

No. 1-13-3021

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. 05 CR 10248 |
| |) | |
| RAYMOND NESBITT, |) | Honorable |
| |) | Mary Margaret Brosnahan, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Palmer concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Summary dismissal of defendant's postconviction petition reversed where defendant stated the gist of a constitutional claim that his sentence is void because the circuit court lacked jurisdiction when it resentenced him.
- ¶ 2 Defendant Raymond Nesbitt appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that he stated the gist of a constitutional claim that his sentence is void and a new

sentencing hearing is required because the trial court was without jurisdiction when it resentenced him. He thus requests that the summary dismissal of his petition be reversed and his cause remanded for second-stage proceedings and a new sentencing hearing.

¶ 3 The record shows that on December 8, 2008, defendant was sentenced to an aggregate term of 40 years in prison on his bench convictions of five counts of predatory criminal sexual assault, in proceedings where he appeared *pro se*. This court affirmed those convictions on direct appeal, but remanded the case for resentencing after finding that the trial court deprived defendant of his sixth amendment right to counsel by failing to re-admonish him at the sentencing stage of proceedings. *People v. Nesbitt*, No. 1-09-0026 (Dec. 23, 2010) (unpublished order under Supreme Court Rule 23).

¶ 4 Our mandate issued on April 8, 2011, and the memorandum of orders shows that it was filed in the circuit court on April 19, 2011, and that the case was assigned for resentencing on May 4, 2011.¹ A new presentence report was ordered, and the trial court granted defense counsel's request for several continuances to contact witnesses.

¶ 5 On September 28, 2011, the trial court noted that defendant had filed a *pro se* motion for scope of representation, in which he requested a stay of the sentencing hearing, and indicated that he had filed a notice of intent to file a petition for leave to appeal (PLA) to the supreme court on January 13, 2011. Counsel informed the court that defendant told her he had sent a copy of the PLA to her, and also mailed a copy of same to the trial court. She then requested a stay of

¹ The letter from the clerk's office transferring the mandate to the circuit court is stamped "filed" by the circuit court clerk's office on April 8, 2011, and April 19, 2011.

resentencing proceedings pending the outcome of the supreme court's decision in the matter, and defendant told the court that he had "just mailed off" the PLA. The trial court stated that it would allow counsel a short continuance to "look into what it is [defendant has] actually filed, what are the timing requirements, whether he missed it, didn't miss it, et cetera, and if in fact there is anything coming down from a higher court." The court, however, refused to "stay these [sentencing] proceedings indefinitely for a year or two years until something may or may not happen."

¶ 6 On October 14, 2011, defense counsel informed the court that she had contacted the offices of the appellate and supreme court clerks, and learned that each had received a notice of defendant's intent to file a PLA in January of 2011, but neither had received an actual *pro se* PLA filed by defendant. Defense counsel, nevertheless, stood on her written motion requesting a stay of proceedings. The court denied the motion, noting that "at this juncture, [the clerks' offices] don't even have any record that there was a PLA filed." The court further stated that it would not stay the proceedings because "The Appellate Court has sent it back to me for resentencing, so I have to follow their orders and go through on it." The trial court continued defendant's resentencing hearing to November 30, 2011, and then again to December 19, 2011.

¶ 7 The common law and Appellate Court Information System (ACIS) records in this case show that a PLA was filed with the supreme court on November 30, 2011. The ACIS record further shows that this court recalled its mandate from the circuit court on December 7, 2011, and on December 7, 2011, the clerk of this court mailed a letter to the clerk of the circuit court,

requesting the circuit court to return the mandate in defendant's case. The letter was stamped "filed" by the circuit court on January 11, 2012.

¶ 8 Meanwhile, on December 19, 2011, the trial court conducted the resentencing hearing where defendant was represented by counsel and heard factors in aggravation and mitigation. In that proceeding, the victim and her mother testified about the harm caused by defendant's crimes, character letters were presented on defendant's behalf in mitigation, arguments were presented by opposing counsel, and defendant exercised his right to allocution. Following an analysis of all the appropriate sentencing factors, and the nature of defendant's crimes, the court resentedenced defendant to an aggregate term of 37 years in prison, followed by three years of mandatory supervised release. The trial court denied defendant's motion to reconsider sentence, and defendant filed a timely notice of appeal on December 20, 2011.

¶ 9 The memorandum of orders shows that on January 20, 2012, our recall of the mandate in this case was transferred to the circuit court, and a notation was entered by a judge, other than the sentencing judge, that the mandate had been recalled. On January 25, 2012, the supreme court denied defendant's PLA, and issued its mandate on February 29, 2012. We then reissued our original mandate to the circuit court on March 9, 2012, which was filed in the circuit court on April 23, 2012. On May 17, 2012, the sentencing judge noted in the memorandum of orders that: "Original mandate re-issued—no new mandate. Order of 12-19-11 to stand (Resentencing and hearing)."

¶ 10 The record further shows that on December 30, 2011, the State Appellate Defender was appointed to represent defendant in his appeal from the resentencing decision, and on March 15,

2012, a letter was sent from that office to defendant, informing him that "[t]here may be a problem with this current appeal *** when you were resentenced on December 19, the circuit court may not have had jurisdiction." However, on August 9, 2012, the State Appellate Defender filed a motion for leave to withdraw as appellate counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967). The motion was based on counsel's conclusion that there were no meritorious issues to be raised, and no mention was made of the jurisdictional issue raised here in the accompanying brief. On January 18, 2013, this court granted counsel's motion and affirmed the resentencing judgment entered by the trial court. *People v. Nesbitt*, 2013 IL App (1st) 120160-U, ¶ 3. The mandate in that case was transmitted to the circuit court and filed on April 4, 2013.

¶ 11 On April 19, 2013, defendant filed the *pro se* form postconviction petition at bar, alleging, *inter alia*, speedy trial violations, violations of his constitutional rights throughout the trial, and ineffective assistance of counsel. Defendant also asserted that the circuit court "did not have jurisdiction when [he] was resentenced on Dec. 19, 2011, because mandate recalled," and attached the letter he received from the office of his appellate counsel referencing that possibility.

¶ 12 On July 11, 2013, the circuit court timely examined defendant's petition and summarily dismissed it as frivolous and patently without merit. In its written order, the court examined each of defendant's claims, noted that this court had affirmed the new sentence on appeal, and found no issues of arguable merit. This court subsequently allowed defendant leave to file late notice of appeal from that order, and counsel was appointed to represent him.

¶ 13 In this court, defendant solely contends that the summary dismissal of his petition should be reversed and his cause remanded for second-stage proceedings because he stated the gist of a constitutional claim that his sentence is void since the trial court lacked jurisdiction when it resentenced him. He maintains that he raised the claim in his petition, but that the circuit court failed to address it in its written order.

¶ 14 The Act provides a method by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage of proceedings, the circuit court is required to review the petition within 90 days, and dismiss it in a written order if it finds it frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2012)), *i.e.*, it has no arguable basis in law or in fact (*Hodges*, 234 Ill. 2d at 10, 16). If defendant sets forth the gist of a constitutional claim, his petition is advanced to the second stage where counsel is appointed; if necessary, the State is allowed to file responsive pleadings; and the circuit court determines whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). We review the circuit court's summary dismissal of defendant's postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 15 Defendant's void sentence claim is based on his contention that the trial court did not have jurisdiction of his case on December 19, 2011, when the sentence was entered, because this court had recalled its mandate on December 7, 2011. The State responds that defendant's claim is contradicted by the record, which shows that the recall of the mandate was "filed," and therefore

took effect, on January 11, 2012, almost a month after defendant had been resentenced.

Defendant replies that this court issued its mandate on April 8, 2011, recalled it on December 7, 2011, and did not reissue it until April 23, 2012. He thus maintains that the court acted without jurisdiction when it resentenced him on December 19, 2011, and, consequently, his sentence is void.

¶ 16 Where a reviewing court remands a case for a new hearing, the clerk of the circuit court is required to file a mandate promptly upon receiving it. Ill. S. Ct. R. 369(a) (eff. July 1, 1982). Once the mandate is filed in the circuit court, that court is revested with jurisdiction until a higher court issues a stay or recalls the mandate. *In re Estate of Grabow*, 74 Ill. App. 3d 336, 340 (1979). When a defendant files a PLA, the reviewing court may recall its mandate until review by the supreme court is granted or denied. Ill. S. Ct. R. 368(c) (eff. July 1, 2006). The mandate is stayed automatically only if the petition is filed before the mandate issues (Ill. S. Ct. R. 368(b) (eff. July 1, 2006)), thereby affecting the jurisdiction of the lower courts (*Grabow*, 74 Ill. App. 3d at 340).

¶ 17 In this case, we issued our original mandate on April 8, 2011, and it was filed in the circuit court, at the very latest, on April 19, 2011, thus vesting the court with jurisdiction to resentence defendant. Defendant filed his PLA to the supreme court on November 30, 2011, and since it was after our mandate issued, the mandate was not automatically stayed. Ill. S. Ct. R. 368(b) (eff. July 1, 2006). We recalled our mandate on December 7, 2011, and did not reissue it until March 9, 2012. The record shows, however, that our recall was not filed in the circuit court until January 11, 2012, almost one month after the trial court concluded the resentencing hearing.

¶ 18 Given this chronology, defendant maintains that when the original mandate was recalled on December 7, 2011, the case stood as if no mandate had been issued, and the trial court had no authority to proceed with the resentencing hearing on December 19, 2011. In doing so, he analogizes his situation to that in *People v. Palmer*, 148 Ill. 2d 70, 78 (1992), where the supreme court determined that when a mandate is recalled, jurisdiction does not revest in the circuit court unless and until further action is taken by the reviewing court, and that jurisdiction remains in the reviewing court.

¶ 19 The State responds that the recall of the mandate was not effective until January 11, 2012, when the mandate was "filed" in the circuit court. In support of its position, the State cites *Seith v. Chicago Sun-Times, Inc.*, 371 Ill. App. 3d 124, 132 (2007), and *Pecora v. Szabo*, 109 Ill. App. 3d 824, 827 (1982), where the reviewing courts noted that after the case is decided and a mandate is *filed* in the circuit court, the appellate court no longer has jurisdiction, and jurisdiction revests in the circuit court. Under this authority, the State maintains that the recall was not effective until it was filed in the circuit court on January 11, 2012, and that the court therefore had jurisdiction to resentence defendant on December 19, 2011.

¶ 20 Defendant disputes that interpretation, asserting that the reviewing courts' use of "filing," or "issuance," of a mandate is a distinction without a difference. Defendant points out that neither *Seith*, nor *Pecora* differentiated between the two, and that *Seith*, in fact, used these words interchangeably.

¶ 21 We observe that neither the language in the supreme court rules, nor the cases deciding various aspects of mandate recalls set forth a meaningful distinction between the "issuance" of a

mandate recall by a higher court, and the "filing" of the same in the circuit court. As noted above, Rule 368 refers to the "issuance, stay and recall" of a mandate, and Rule 369 refers to the "filing" of a mandate, and the effect on enforcement of the judgment and the reinstatement of the case in the circuit court.

¶ 22 We further observe that Illinois courts have implicitly recognized the effective date of a mandate recall to be the date that it is entered by the reviewing court. See, *e.g.*, *Palmer*, 148 Ill. 2d at 81-82 (1992) (where the supreme court recalled the mandate of the appellate court in response to the State's motion for a stay, jurisdiction did not revert in the trial court, but remained in the reviewing court); *People v. Adams*, 36 Ill. 2d 492, 496 (1967) (when the supreme court recalled the original mandate filed in the circuit court, the case stood as if no mandate had been issued, and the trial court had no authority to proceed until the mandate had reissued); *Pros Corporate Management Services, Inc. v. Ashley S. Rose, Ltd.*, 228 Ill. App. 3d 573, 579-80 (1992) (the trial court had authority to conduct a bench trial on July 12, 1990, where the appellate court's mandate was filed in the circuit court on June 12, 1990, and the appellate court did not enter the order recalling the mandate and staying the trial court proceedings until July 17, 1990). Notably, none of the cases directly address the issue of whether the effective date of a mandate recall is the date it is "issued" by a higher court, or the date it is "filed" in the lower court.

¶ 23 At the first stage of postconviction proceedings, a *pro se* defendant is only required to allege sufficient facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *Hodges*, 234 Ill. 2d at 9. On appeal from the summary dismissal of such a petition, the

question before the reviewing court is whether defendant's petition had no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 17. Given the ambiguity reflected in the authorities set forth above, we find it at least arguable that defendant's claim that his sentence was void based on the circuit court's lack of jurisdiction at the time he was resentenced was not indisputably meritless (*Hodges*, 234 Ill. 2d at 22), and, accordingly, that his petition should be advanced to second-stage proceedings (*People v. Brown*, 236 Ill. 2d 175, 194 (2010)), where the record can be further developed.

¶ 24 This result is not altered by the fact that appellate counsel may have been aware of the jurisdictional issue as indicated in the letter of March 15, 2011 to defendant, but did not raise it in the subsequent *Anders* motion. Notwithstanding any omissions by counsel, or our subsequent affirmance of defendant's sentence on remand, a void order may be attacked either directly or collaterally at any time or in any court (*People v. Thompson*, 209 Ill. 2d 19, 25 (2004)), and defendant is thus not barred from presenting his claim here.

¶ 25 We therefore reverse the summary dismissal entered by the circuit court, and remand defendant's cause to the circuit court for second-stage proceedings, where counsel may be appointed to represent defendant and submit an amended petition, the State may file responsive pleadings, and the circuit court can determine whether the petition and accompanying documentation make a "substantial showing of a constitutional violation." *Edwards*, 197 Ill. 2d 245-46.

¶ 26 Reversed and remanded.