FIFTH DIVISION
December 11, 2015

No. 1-13-3291

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 8635
	)	
ROBERT LAMAR,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 *Held*: We affirm the circuit court's summary dismissal of defendant's post-conviction petition where the circuit court's reliance on defendant's prior conviction for aggravated unlawful use of a weapon did not render his sentence void; we correct the mittimus to reflect that defendant's conviction for attempted armed robbery is a Class 1 felony.

¶ 2 Defendant Robert Lamar appeals from the judgment of the circuit court summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS

5/122-1 *et seq*. (West 2012). On appeal, defendant contends, for the first time, that his sentence is void where the trial court considered as an aggravating factor a prior conviction, *i.e.*, aggravated unlawful use of a weapon (AUUW), which was declared unconstitutional in *People v. Aguilar*, 2013 IL 112116. As relief, defendant requests that this court vacate his sentence and remand the cause for a new sentencing hearing. In the alternative, defendant contends that this court should order his mittimus corrected to reflect that his conviction for attempted armed robbery is a Class 1 felony. We affirm as modified.

¶ 3 Following a jury trial, defendant was convicted of aggravated battery with a firearm, attempted armed robbery, and aggravated battery of a peace officer. Defendant's convictions arose from an incident where he approached Artemia Torres on the street, grabbed her, and demanded money on April 25, 2008. When Torres struggled to escape, defendant shot her in the leg. Defendant and codefendant Eric Porter,[1] who was standing nearby, fled in a white sedan. Officer Marek Drozd heard about the incident via police radio and pulled over the white sedan, which codefendant was driving with defendant as a passenger. Defendant had a gun on the seat between his legs, which Drozd seized. Drozd handcuffed defendant and ordered him out of the car. Defendant attempted to run away, but Drozd kept hold of the handcuffs and was pulled to the ground. Defendant dragged Drozd for five to eight feet before another officer subdued defendant. Drozd had bruises on his forearms and abrasions on his knees as a result of the struggle, and defendant's wrist was lacerated because he "used full force to get away."

¶ 4 At sentencing, the State advised the trial court that on August 20, 2007, defendant was sentenced to two years' probation for AUUW, and was still on probation when he committed the instant offense eight months later. In mitigation, defense counsel argued that defendant was 18

[1] Codefendant is not a party to this appeal.

years old at the time of the offense, spent much of his life without a male role model, and had a potential for rehabilitation justifying a minimum sentence. Following arguments in aggravation and mitigation, the trial court sentenced defendant on his convictions of aggravated battery with a firearm, attempted armed robbery, and aggravated battery of a peace officer to concurrent prison terms of 16, 8, and 5 years, respectively. In doing so, the court stated that defendant:

> "does have a history of prior criminality based on the fact that *** eight months before he caught this case, I sentenced him to probation. I had compassion on him, and I'm certain I did it over the State's objection.
>
> I can't say whether or not his criminal conduct was the result of circumstances unlikely to recur. I can't say that it's unlikely that he will commit another crime. Because he committed a serious crime by possessing a gun, and then committed an even more serious crime when he involved himself with Artemia Torres."

The mittimus reflects the above prison terms, but incorrectly states that attempted armed robbery is a Class X offense.

¶ 5 On direct appeal, defendant contended that there was insufficient evidence to convict him of aggravated battery of a peace officer, and that his 16-year sentence was excessive. We affirmed defendant's convictions and sentence. *People v. Lamar*, 2012 IL App (1st) 110816-U.

¶ 6 In June 2013, defendant filed the instant post-conviction petition, apparently arguing that his arrest was illegal and the seizure of the weapon recovered at the time of his arrest violated his fourth amendment rights. He also claims that trial and appellate counsel were ineffective for failing to raise this fourth amendment issue. The trial court summarily dismissed defendant's petition as frivolous and patently without merit on August 28, 2013. This appeal follows.

¶ 7 On appeal, defendant has abandoned the claims in his petition and instead contends that this court should vacate his sentence as void, and remand the matter for a new sentencing hearing. In particular, defendant asserts that the trial court considered as an aggravating factor at sentencing a prior conviction for AUUW that violated the second amendment's right to bear arms. See *Aguilar*, 2013 IL 112116, ¶¶ 21-22 (declaring unconstitutional the Class 4 form of AUUW). Defendant maintains that because the AUUW conviction relied on by the trial court is void, the sentence at issue is, in turn, void.

¶ 8 It is well established that a defendant cannot raise a new issue or advance a new post-conviction allegation for the first time on appeal. *People v. Andrews*, 365 Ill. App. 3d 696, 698 (2006), citing *People v. Jones*, 211 Ill. 2d 140, 148 (2004). Here, defendant's sentencing claim is not properly before this court because it was not included in his post-conviction petition, which necessarily controls and confines the subject of this appeal. Therefore, defendant's attempt to insert this new claim on appeal is inappropriate.

¶ 9 Nevertheless, defendant attempts to circumvent waiver by arguing that his sentence is void. See *People v. Thompson*, 209 Ill. 2d 19, 25 (2004) (an attack on a void judgment may be made at any time). Whether a sentence, or portion thereof, is void is a question of law subject to *de novo* review. *People v. Donelson*, 2011 IL App (1st) 092594, ¶ 7.

¶ 10 Turning to the merits, this court rejected a similar argument in *People v. Ware*, 2014 IL App (1st) 120485, ¶¶ 33-36, in which we held that we did not have jurisdiction to review whether the prior AUUW convictions were now void, and that resentencing was unnecessary where the prior convictions were not elements of the charged offenses and had not served as the basis for any statutory enhancement. See also *People v. Scott*, 2015 IL App (1st) 131503, ¶¶ 49-50 (following *Ware*).

¶ 11 Here, as in *Ware*, this court does not have jurisdiction to review defendant's prior felony conviction for AUUW where the notice of appeal is limited to the summary dismissal of his post-conviction petition challenging the constitutionality of his convictions for aggravated battery with a firearm, attempted armed robbery, and aggravated battery of a peace officer. Therefore, if defendant wishes to challenge his prior conviction for AUUW, he must file appropriate pleadings. *Ware*, 2014 IL App (1st) 120485, ¶ 34. Moreover, we need not remand the case for resentencing where defendant's prior AUUW conviction was not an element of the charged offense and did not serve as a basis for any statutory enhancement or extended-term sentence. *Id*., ¶ 35.

¶ 12 Defendant attempts to distinguish *Ware* in his reply brief by arguing that, unlike in the case at bar, there was a question as to whether the defendant's prior AUUW convictions were void. *Id*., ¶ 34. We find this to be a distinction without a difference. *Ware* clearly held that it did not have jurisdiction to review the defendant's "other" convictions for AUUW where the notice of appeal was limited to his convictions for armed robbery (*Id*., ¶ 34), and thus defendant's assertion here that he has a stronger case that his AUUW conviction is void is irrelevant where the notice of appeal does not concern that conviction.

¶ 13 Furthermore, defendant points out that the *Ware* court concluded that, even assuming that his prior convictions were void, the trial court's consideration of them was harmless and had not affected his current sentence because "the trial court placed little emphasis on the prior AUUW convictions." *Id*., ¶ 36. In contrast, defendant states that the trial court here emphasized his prior AUUW conviction at sentencing. The court specifically stated that defendant:

> "does have a history of prior criminality based on the fact that *** eight months before he caught this case, I sentenced him to probation. I had compassion on him, and

I'm certain I did it over the State's objection."

Even assuming the trial court here considered defendant's prior AUUW conviction to be a more significant aggravating factor than it did in *Ware*, this interpretation does not change the outcome in this case. The *Ware* court held that there was no reason to remand the matter for resentencing based on a claim that two of defendant's prior convictions may now be void under *Aguilar* because neither of the prior convictions for AUUW was an element of the charged offenses, or served as a basis for any statutory enhancement or extended-term sentence. *Id.*, ¶ 35. Like *Ware*, defendant's conviction here was only used as an aggravating factor and the same result is warranted here. For this reason, *People v. Hall*, 2014 IL App (1st) 122868 and *People v. Claxton*, 2014 IL App (1st) 132681, relied on by defendant, are distinguishable. See *Hall*, 2014 IL App (1st) 122868, ¶ 13 (holding that the defendant's sentence was void because the use of the same conviction as an element of the offense and as a basis for imposing a Class X sentence amounted to an impermissible double enhancement); *Claxton*, 2014 IL App (1st) 132681, ¶ 20 (reversing the defendant's unlawful use of a weapon by a felon (UUWF) conviction where his prior Class 4 AUUW conviction was void and could not serve as an essential element of his UUWF conviction).

¶ 14 Defendant alternatively argues, and the State correctly agrees, that his mittimus should be corrected to reflect that his conviction for attempted armed robbery is a Class 1 felony, rather than a Class X felony.

¶ 15 Where the mittimus does not reflect the conviction and sentence, the proper remedy is to amend the mittimus to conform to the judgment. *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007). A corrected mittimus can be issued at any time. *People v. Latona*, 184 Ill. 2d 260, 278 (1998). Pursuant to Supreme Rule 615(b)(1) (eff. Aug. 27, 1999), a reviewing court can correct a

mittimus itself without remanding the cause. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 16 Here, Count 2 of the indictment charged defendant with attempted armed robbery. Armed robbery is a Class X felony. 720 ILCS 5/18-2(b) (West 2008). Attempt to commit a Class X felony is a Class 1 felony. 720 ILCS 5/8-4(c)(2) (West 2008). Therefore, attempted armed robbery is a Class 1 felony. See, *e.g.*, *People v. Maxwell*, 264 Ill. App. 3d 323, 330 (1994). Nevertheless, the mittimus lists defendant's conviction for attempted armed robbery under Count 2 as a Class X felony.

¶ 17 Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), and our authority to correct a mittimus without remand (*McCray*, 273 Ill. App. 3d at 403), we direct the clerk of the circuit court to correct the mittimus to reflect that defendant's conviction for attempted armed robbery is a Class 1 felony. We otherwise affirm the judgment of the circuit court summarily dismissing defendant's post-conviction petition.

¶ 18 Affirmed; mittimus corrected.