

2015 IL App (2d) 130561-U  
No. 2-13-0561  
Order filed March 12, 2015

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Winnebago County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 03-CF-3298
	)	
JESSE BUTLER,	)	Honorable
	)	Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Justices McLaren and Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court was not permitted to dismiss sua sponte defendant's postconviction petition at the second stage; thus, we vacated the dismissal and remanded the cause; (2) defendant's extended-term sentence for possession with intent to deliver cocaine was void, as the offense was less serious than his offense of possession with intent to deliver heroin; thus, we reduced the sentence to the maximum nonextended term.

¶ 2 Following a bench trial in the circuit court of Winnebago County, defendant, Jesse Butler, was found guilty of possession with intent to deliver 15 grams or more but less than 100 grams of a substance containing heroin (720 ILCS 570/401(a)(1)(A) (West 2002)), which is a Class X felony, and possession with intent to deliver 1 gram or more but less than 15 grams of a

substance containing cocaine (720 ILCS 570/401(c)(2) (West 2002)), which is a Class 1 felony. Defendant was sentenced to an 18-year prison term on the former offense, to run concurrently with an 18-year extended-term sentence for the latter offense. We affirmed defendant's convictions on direct appeal. *People v. Butler*, Nos. 2-07-0357 & 2-07-0549 cons. (2010) (unpublished order under Supreme Court Rule 23). This appeal arises from the second-stage dismissal of defendant's petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant argues that it was error to dismiss the petition before the State answered it or moved for its dismissal. Defendant also argues that his extended-term sentence for possession with intent to deliver cocaine is void. We vacate the dismissal of defendant's postconviction petition and remand for further proceedings. We also modify defendant's sentence.

¶ 3 Less than a week before we issued our decision in defendant's direct appeal, defendant filed, *pro se*, a petition for *mandamus* seeking entry of an order "compelling Judge J. Edward Prochaska to follow the correct drug sentencing statutes or law in Illinois for trace amount of heroin." On March 3, 2010, the trial court entered an order pursuant to *People v. Shellstrom*, 216 Ill. 2d 45 (2005), advising defendant that the court intended to recharacterize the *mandamus* petition as a petition for relief under the Act. The trial court granted defendant leave "to either move to withdraw the [*mandamus* petition], or submit an amended filing that contains all claims appropriate to a post-conviction petition that the Defendant believes he has."

¶ 4 On June 3, 2010, defendant filed, *pro se*, an "amended" postconviction petition. Finding that the petition stated the gist of a constitutional claim, the trial court appointed counsel to represent defendant. On March 11, 2013, defendant's attorney, Assistant Public Defender Shelton O. Green, moved to withdraw. Green asserted that he found no arguably meritorious

issues to raise on defendant's behalf and that defendant had notified Green that he no longer wanted him to be his attorney. The trial court granted Green's motion on March 22, 2013. Defendant appeared before the court, without counsel, and requested that a new attorney be appointed to represent him. The trial court indicated that it would reappoint Green, if defendant wished. Defendant declined, and the trial court dismissed defendant's petition.

¶ 5 Defendant first argues that it was error for the trial court to dismiss his postconviction petition in the absence of a motion to dismiss filed by the State. This court has recently observed as follows:

“The Act provides a three-stage process for adjudicating postconviction petitions. [Citation.] At the first stage, a trial court considers whether the postconviction petition is frivolous or patently without merit. [Citation.] If the postconviction petition survives the first-stage review, it proceeds to the second stage and is docketed ‘for further consideration in accordance with Sections 122-4 through 122-6.’ [Citation.] At the second stage, counsel is appointed and the *pro se* petition may be amended. [Citation.] In addition, the State may answer the petition or seek its dismissal. [Citation.] The proceedings advance to the third stage if the State answers the petition or the court denies the State's motion to dismiss.” *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 46.

Once the initial 90-day period for first-stage review of the petition elapses, the Act makes no provision for disposing of a postconviction petition until the State has either answered the petition or moved to dismiss it. 725 ILCS 5/122-5, 122-6 (West 2010). Any *sua sponte* disposition after the initial 90-day period is improper. *People v. Greer*, 341 Ill. App. 3d 906, 910 (2003), *aff'd*, 212 Ill. 2d 192 (2004). Here the dismissal occurred well beyond the 90-day

period. The State concedes that the dismissal was error and that the case must be remanded so that the State may answer the petition or move for its dismissal.

¶ 6 Defendant next argues that his 18-year extended-term sentence for possession with intent to deliver cocaine is void. Although defendant did not raise this issue in the proceedings below, a void order may be attacked at any time, either directly or collaterally, in any court with jurisdiction. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). The State contends, however, that this court lacks jurisdiction. According to the State, the trial court's order dismissing defendant's postconviction petition was itself void and could confer jurisdiction on this court to do nothing more than vacate the dismissal. The State relies on *People v. Flowers*, 208 Ill. 2d 291 (2003). As explained below, the State's reliance on *Flowers* is misplaced.

¶ 7 In *Thompson*, our supreme court summarized *Flowers* as follows:

“In *Flowers*, the defendant entered a guilty plea to seven counts of forgery. She was sentenced to prison terms and ordered to pay restitution. The circuit court authorized the Illinois Department of Corrections (DOC) to withhold 50% of the defendant's prison income to pay the restitution and costs. The defendant did not file any postplea motions. She subsequently filed a *pro se* postconviction petition in which she alleged ineffective assistance of trial counsel for failing to comply with [Illinois Supreme Court] Rule 604(d). More than 16 months after the defendant had been sentenced, postconviction counsel filed a motion to reconsider the sentences. The circuit court denied the motion. The defendant then filed *pro se* notices of appeal from this decision. Thereafter, her postconviction counsel withdrew her postconviction petition and the defendant filed another set of *pro se* notices of appeal. Because the defendant's postconviction petition had been withdrawn, the appellate court treated her appeal as from the denial of her

motion to reconsider her sentences. On appeal, the defendant argued that she should not have been ordered to pay restitution because the circuit court had failed to admonish her of the possibility of restitution. She also argued that the provision in her sentence allowing DOC to withhold a portion of her prison income to pay restitution and costs was void because the circuit court lacked the statutory authority to make such an order. The appellate court found that the failure to admonish the defendant of the possibility of restitution precluded the circuit court from imposing a restitution requirement. It also found that the withholding requirement was void. [Citation.]

On further appeal, this court concluded that the circuit court lacked subject matter jurisdiction to consider the defendant's motion to reconsider sentence *because the motion was not filed within the time required by Rule 604(d). Thus, the circuit court's order denying the defendant's motion was void and the appellate court lacked jurisdiction to consider the merits of the defendant's appeal from that order.* As to the allegedly void withholding order, this court acknowledged the well-established principle of law that a void order may be attacked at any time or in any court, either directly or collaterally. However, we held that the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts. A court that lacks jurisdiction cannot confer any relief, even from void orders or judgments. We noted that, absent jurisdiction, an order directed at a void judgment would itself be void. Accordingly, the appellate court lacked the authority to grant the defendant relief from the allegedly void withholding order. [Citation.]" (Emphasis added.) *Thompson*, 209 Ill. 2d 27-28.

¶ 8 Jurisdiction was lacking in *Flowers* because there was no proceeding properly pending in the trial court; it was for that reason that trial court's order could not confer appellate

jurisdiction. That is not the case here, however. There is no question that defendant's postconviction petition conferred jurisdiction upon the trial court. Violations of statutory procedural requirements generally do not divest the trial court of subject-matter jurisdiction. *In re Luis R.*, 239 Ill. 2d 295, 301 (2010). Because the proceeding below was properly before the trial court, our jurisdiction is proper. Unlike in *Flowers*, there was no failure in this case to comply with a rule that is a condition precedent to appellate review. See *Flowers*, 208 Ill. 2d at 308 (appellate court's reviewing power attaches only upon compliance with rules governing appeals, including Rule 604(d)). We therefore have jurisdiction to consider whether defendant's extended-term sentence for possession of cocaine with intent to deliver is void. Although a trial court's subject-matter jurisdiction does not depend on compliance with procedural statutes, it is firmly established that a sentence that does not conform to a statutory requirement is void. *Thompson*, 209 Ill. 2d at 24. Subject to exceptions not applicable here, our supreme court has held that the plain language of the statute governing extended-term sentencing provides that, when a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may be imposed only for the conviction within the most serious class. *People v. Jordan*, 103 Ill. 2d 192, 206 (1984). Defendant was sentenced to an extended term for a Class 1 felony, even though he was also convicted of a Class X felony. The portion of the sentence exceeding the 15-year maximum nonextended term for a Class 1 felony (730 ILCS 5/5-8-1(a)(4) (West 2002)) is void and must be vacated.

¶ 9 For the foregoing reasons, we vacate the order dismissing defendant's postconviction petition and remand for further proceedings. We also reduce defendant's sentence for unlawful possession of cocaine with intent to deliver to 15 years' imprisonment

¶ 10 Judgment modified; order vacated; cause remanded.