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2015 IL App (3d) 120817-U

Order filed February 25, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-12-0817
)	Circuit No. 00-CF-573
WESLEY ZOLLICOFFER,)	Honorable
Defendant-Appellant.)	Timothy M. Lucas, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Because the decision in *People v. White*, 2011 IL 109616, does not apply retroactively, defendant's sentence, which did not include the 25-year mandatory firearm enhancement, is not void.

¶ 2 Defendant, Wesley Zollicoffer, pled guilty to first degree murder (720 ILCS 5/9-1(a)(2) (West 2000)), and was sentenced to a term of 38 years' imprisonment. Following multiple direct appeals, defendant filed a *pro se* petition for postconviction relief, in which he alleged numerous instances of ineffective assistance of counsel. Following the dismissal of that petition, defendant

appeals. On appeal, defendant abandons his arguments for ineffective assistance of counsel, instead contending that his sentence was void under *People v. White*, 2011 IL 109616. We affirm.

¶ 3

FACTS

¶ 4

On June 27, 2000, defendant was indicted on two counts of first degree murder. Count I alleged that defendant, "without lawful justification with the intent to cause great bodily harm to another, discharged a firearm into a motor vehicle occupied [*sic*] by Scott Brown, thereby causing the death of Scott Brown" (720 ILCS 5/9-1(a)(1) (West 2000)). Count II alleged that defendant, "without legal justification knowingly discharged a firearm in the direction of Scott Brown knowing such act created a strong probability of death or great bodily harm to Scott Brown or another, and thereby caused the death of Scott Brown" (720 ILCS 5/9-1(a)(2) (West 2000)). The parties reached a plea agreement under which defendant would plead guilty to count II and the State would dismiss count I. According to the agreement, defendant's sentence would not exceed 45 years' imprisonment.

¶ 5

On May 29, 2002, the parties relayed the plea agreement to the court. After defendant confirmed that he understood the charge against him, the court explained that the minimum sentence for first degree murder is not less than 20 years' imprisonment, and "the usual maximum term in the case could be not more than 60 years [*sic*] Department of Corrections determinate." Defendant indicated that he understood the usual penalties. Following a series of admonishments concerning defendant's trial rights and the waiver of those rights pursuant to a guilty plea, defendant indicated that he understood those rights and the fact that he was waiving them.

¶ 6

The State then delivered an extensive factual basis. The State averred that on June 19,

2000, Scott Brown was driving a car when another car approached. A man in the backseat of the second car, identified by numerous witnesses as defendant, fired a single shot into Brown's car, striking Brown and causing his death. When defendant was apprehended, he admitted to firing the single shot into Brown's car. Defense counsel agreed that the State would be able to produce such evidence. Defendant agreed that he was entering the plea of his own free will. Finding that the plea was knowing and voluntary, the court found defendant guilty, and convicted him of first degree murder as set out in count II of the indictment.

¶ 7 At sentencing, the court reiterated the terms of the plea agreement, including the 45-year sentencing cap. On July 19, 2002, after hearing arguments in aggravation and mitigation, the court sentenced defendant to a term of 38 years' imprisonment.

¶ 8 On August 19, 2002, defendant filed a *pro se* motion to withdraw his plea, alleging that counsel, Assistant Public Defender Frank Picl, coerced him into pleading guilty. The trial court subsequently reappointed the public defender to represent defendant on his claims, and Assistant Public Defender Tim Cusack was assigned to the case. Following a hearing, the court denied defendant's motion to vacate the plea.

¶ 9 On direct appeal, defendant argued that Cusack had labored under a conflict of interest in representing him on his claims of coercion. This court remanded the matter so that the trial court might hold a hearing to determine if such a conflict existed. *People v. Zollicoffer*, No. 3-03-0067 (Sept. 29, 2004). On remand, the trial court held a hearing in which defendant was represented by a third assistant public defender. After hearing testimony regarding the relationship between Cusack and Picl, the court found that there existed no conflict of interest. On direct appeal, this court affirmed that decision. *People v. Zollicoffer*, No. 3-07-0348 (Mar. 28, 2008).

¶ 10 Defendant filed a *pro se* petition for postconviction relief on July 3, 2008. In the petition,

defendant alleged that he had received ineffective assistance of counsel from each of the three assistant public defenders that had represented him to that point. Assistant Public Defender Thomas Sheets was assigned to the case, but subsequently sought leave to withdraw after determining that the petition was without merit. On August 22, 2012, the court granted the State's motion to dismiss.

¶ 11 On appeal from the dismissal of his first postconviction petition, defendant abandons each of the arguments made in that petition. Instead, defendant contends, for the first time, that his sentence is void because the trial court neglected to include the mandatory 25-year firearm enhancement, and his sentence thus fell outside of the statutory range. Consequently, defendant argues that the sentence should be vacated and he should be allowed to withdraw his guilty plea.

¶ 12 ANALYSIS

¶ 13 At the outset of our analysis, we must address the State's contention that defendant's argument has been waived. Under the Post-Conviction Hearing Act, "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012). However, our supreme court has made clear that a void judgment "may be attacked at any time or in any court, either directly or collaterally." *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). Accordingly, defendant's argument that his sentence is void is not subject to waiver, and we will address the argument on its merits.

¶ 14 A conviction for first degree murder carries a standard sentencing range of between 20 and 60 years' imprisonment.¹ 730 ILCS 5/5-8-1(a)(1)(a) (West 2000). Additionally, if a

¹ A term of natural life imprisonment is mandated if any factors found in subsections (b)-(c) are found to be present, but none are applicable to defendant's case. See 730 ILCS 5/5-8-1(a)(1)(b), (c) (West 2000).

defendant, in the commission of the offense "personally discharged a firearm that proximately caused *** death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2000). As a result of this 25-year mandatory firearm enhancement, indisputably triggered by the State's factual basis, defendant's potential sentencing range should have been between 45 and 85 years' imprisonment. Because the actual sentence imposed—38 years' imprisonment—fell outside of this range, defendant contends that his sentence is void. See *People v. Arna*, 168 Ill. 2d 107, 113 (1995) ("A sentence which does not conform to a statutory requirement is void.").

¶ 15 In *White*, 2011 IL 109616, our supreme considered the issue of whether a sentence entered following a plea agreement was void if after accounting for the 15-year mandatory firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2004)) the sentence did not meet the statutory minimum requirement. The court reiterated that "[a] court does not have authority to impose a sentence that does not conform with statutory guidelines [citations] and a court exceeds its authority when it orders a lesser or greater sentence than that which the statute mandates." *White*, 2011 IL 109616, ¶ 20. The court rejected the State's argument that the intent of the parties controlled, stating: " '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.' " *Id.* ¶ 23 (quoting *United States v. Greatwalker*, 285 F.3d 727, 730 (8th cir. 2002)).

¶ 16 The *White* court also rejected an argument based on prosecutorial discretion, emphasizing that the firearm enhancement is mandatory. *White*, 2011 IL 109616. "In enacting section 5-8-1(a)(1)(d)(i)," the court concluded, "the legislature took away any discretion the State and trial court had to fashion a sentence that does not include this mandatory enhancement." *Id.* ¶ 26. The court found that the sentence imposed—28 years' imprisonment when the statutory range

was 35 to 75 years' imprisonment—was void, and remanded with directions to allow the defendant to withdraw his guilty plea and proceed to trial if he so chose.

¶ 17 The decision in *White*, however, does not resolve the issue currently before us. In the present case, defendant's final direct appeal was completed in 2008; *White* was decided in 2011. Defendant maintains that *White* applies retroactively, dictating that his sentence be deemed void. The State concedes that, were *White* to be applicable retroactively, defendant would be entitled to withdraw his guilty plea as a result of the void sentence.

¶ 18 Our supreme court's recent decision in *People v. Smith*, 2015 IL 116572, controls the outcome in the present case. In *Smith*, the court considered the question of whether its "holding in *White* applies retroactively to convictions which were final at the time *White* was decided." *Id.* ¶ 1. The court concluded that *White* does not apply retroactively. *Id.* ¶ 34. In reaching its conclusion, the court pointed out that the *White* decision rested in large part on the principle "that a circuit court may not disregard a fact *** that requires the imposition of a statutory sentencing enhancement if that fact is included in the factual basis accepted by the court." *Id.* ¶ 19. Whether this rule was applicable to the defendant (whose conviction was final at the time *White* was decided), the court reasoned, hinged on whether or not it could be considered a "new rule" under the United States Supreme Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). *Smith*, 2015 IL 116572, ¶ 24.

¶ 19 In *Teague*, the Supreme Court held that a judicial decision that established a new rule is applicable to all criminal cases pending on direct review but, with two exceptions, the rule "will not apply retroactively to convictions which are already final at the time the new rule is announced." *Smith*, 2015 IL 116572, ¶ 24 (citing *Teague*, 489 U.S. 288). A judicial decision establishes a new rule "when it breaks new ground or imposes a new obligation on the states or

federal government." *Smith*, 2015 IL 116572, ¶ 25. The *Smith* court found that *White* announced a new rule:

"We did not, in *White*, hold simply that a sentence which does not conform to statutory requirements is void. Rather, for the first time in *White*, we held that a circuit court may not disregard a fact that requires the imposition of a statutory sentencing enhancement if that fact is included in the factual basis accepted by the court." *Id.* ¶ 27.

The court further found that neither exception found in *Teague*, under which even new rules apply retroactively, was applicable to the rule announced in *White*. *Smith*, 2015 IL 116572.

¶ 20 Pursuant to *Smith*, we find that the *White* decision is inapplicable to defendant's case, as his conviction was final at the time *White* was decided. Because the new rule announced by *White* does not apply retroactively to the defendant's case, the court properly sentenced defendant to a term of imprisonment within the statutory range. Accordingly, defendant's sentence is not void.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Peoria County is affirmed.

¶ 23 Affirmed.