2015 IL App (3d) 140252-U

Order filed December 17, 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,	)	
	)	Appeal No. 3-14-0252
v.	)	Circuit No. 07-CF-767
	)	
TOOLA O. TAYLOR,	)	Honorable Stephen A. Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Wright dissented.

ORDER

¶ 1 *Held*: The trial court did not err when it denied defendant's petition for relief from judgment.

¶ 2 Defendant, Toola O. Taylor, appeals from the trial court's denial of his petition for relief from judgment. 735 ILCS 5/2-1401 (West 2010). On appeal, defendant argues that the court erred when it denied his petition because he was charged with and convicted of an aggravated

criminal sexual assault offense that did not exist at the time of the charged conduct in 2006. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by a three-count indictment with two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(8), (1) (West 2006)), and one count of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)).[1] Count II of the indictment alleged that, on or about July 18, 2006, defendant committed the offense of aggravated criminal sexual assault in that:

> "HE, WHILE COMMITTING A CRIMINAL SEXUAL ASSAULT DISPLAYED OR THREATENED TO USE A DANGEROUS WEAPON OR AN OBJECT FASHIONED OR UTILIZED IN SUCH A MANNER AS TO LEAD THE VICTIM UNDER THE CIRCUMSTANCES TO REASONABLY BELIEVE IT TO BE A DANGEROUS WEAPON IN THAT HE KNOWINGLY PERFORMED AN ACT OF SEXUAL PENETRATION UPON [the victim] BY THE USE OF FORCE OR BY THREAT OF FORCE
>
> in violation of 720 ILCS 5/12-14(a)(1) of the Illinois Compiled Statutes."

¶ 5 The case proceeded to a jury trial. At the conclusion of the trial, the jury found defendant guilty of criminal sexual assault and aggravated criminal sexual assault. On June 20, 2008, the trial court sentenced defendant to 32 years' imprisonment on count II alone.

¶ 6 On direct appeal, we affirmed defendant's convictions and sentence. *People v. Taylor*, 397 Ill. App. 3d 813 (2010).

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[1]Counts I and III are not relevant to the present appeal.

¶ 7 On March 16, 2011, defendant filed a *pro se* section 2-1401 petition for relief from judgment. In the petition, defendant argued that his conviction was void because count II was based on a statute that was not in effect at the time of his offense. After hearing arguments, the trial court denied the petition. Defendant appeals.

¶ 8 ANALYSIS

¶ 9 Defendant asks this court to vacate the order denying his section 2-1401 petition and reverse his aggravated criminal sexual assault conviction because he was charged with and convicted of an offense that did not exist at the time of the charged actions in 2006. See *People v. Tellez-Valencia*, 188 Ill. 2d 523 (1999). Upon review, we find defendant was validly charged under the second clause of the 2006 version of the aggravated criminal sexual assault statute.

¶ 10 Section 2-1401 of the Code of Civil Procedure provides a statutory procedure by which final orders, judgments, and decrees may be vacated after 30 days from their entry. 735 ILCS 5/2-1401 (West 2010). Although usually characterized as a civil remedy, section 2-1401's remedial powers extend to criminal cases. *People v. Haynes*, 192 Ill. 2d 437, 460-61 (2000). A petition for relief from judgment must be filed within two years of the entry of the judgment being challenged. 735 ILCS 5/2-1401(c) (West 2010). However, a person may seek relief beyond the two-year period where the judgment being challenged is void. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001) (cited for the general principle stated in *Harvey*, albeit the challenge was to a sentencing order decided prior to *People v. Castleberry*, 2015 IL 116916[2]). We review *de*

[2]We note that in *Castleberry*, 2015 IL 116916, ¶ 16, our supreme court abolished the void-sentence rule. The supreme court specifically held that a judgment is considered void if lacking in subject matter jurisdiction. *Id*. ¶ 15. The supreme court defined subject matter jurisdiction to include "justiciable matter[s], *i.e.*, 'a controversy appropriate for review by the

novo the denial of a section 2-1401 petition for relief from judgment. *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 53.

¶ 11 We initially note that count II of the indictment alleged that the charged offense occurred on July 18, 2006, and included an accurate citation to section 12-14(a)(1) of the Criminal Code of 1961. 720 ILCS 5/12-14(a)(1) (West 2006). Nevertheless, defendant contends that the *language* in the indictment indicated that he was charged with the 1998 version of aggravated criminal sexual assault, which was not in effect at the time of his alleged acts in 2006. The 1998 version of aggravated criminal sexual assault read:

> "(a) [t]he accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and any of the following aggravating circumstances existed during, or for the purposes of paragraph (7) of this subsection (a) as part of the same course of conduct as, the commission of the offense:
>
> (1) the accused displayed, threatened to use, or used a dangerous weapon or any object fashioned or utilized in such a manner as to lead the

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court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse interests.' " *Id.* (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002)). In this case, defendant argues that he was charged with a crime that did not exist. If defendant's argument was meritorious, the court would lack subject matter jurisdiction because there would be no justiciable matter. See *Tellez-Valencia*, 188 Ill. 2d at 526. Therefore, *Castleberry*, does not present a bar to our resolution of this case.

victim under the circumstances reasonably to believe it to be a dangerous weapon[.]" 720 ILCS 5/12-14(a)(1) (West 1998).

In contrast, the 2006 version of the offense, which was applicable to defendant's acts, stated:

"(a) [t]he accused commits aggravated criminal sexual assault if he or she commits criminal sexual assault and any of the following aggravating circumstances existed during, or for the purposes of paragraph (7) of this subsection (a) as part of the same course of conduct as, the commission of the offense:

(1) the accused displayed, threatened to use, or used a dangerous weapon, *other than a firearm*, or any object fashioned or utilized in such a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon[.]" (Emphasis added.) 720 ILCS 5/12-14(a)(1) (West 2006).

¶ 12 Count II of the indictment did not include the "other than a firearm" element. 720 ILCS 5/12-14(a)(1) (West 2006). However, this omission was not a fatal defect as the "other than a firearm" language was not a necessary element of the charge of aggravated criminal sexual assault. See *Taylor*, 397 Ill. App. 3d at 818. There are two ways that defendant could be charged with aggravated criminal sexual assault under the 2006 statute: (1) if the person displayed, threatened to use, or used a dangerous weapon, other than a firearm, or (2) if the person displayed, threatened to use, or used an object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be a dangerous weapon. See *id*. As evidenced by the date of the offense listed in the indictment, statutory citation, and language of the charge, defendant was validly charged under the second clause.

¶ 13 Defendant argues that our supreme court's decision in *Tellez-Valencia,* 188 Ill. 2d 523, controls the outcome of this case. In *Tellez-Valencia,* two defendants challenged their predatory criminal sexual assault of a child convictions after the underlying statute was held unconstitutional. *Id*. at 526-27; see also *Johnson v. Edgar*, 176 Ill. 2d 499 (1997) (holding Public Act 89-428 (eff. Dec. 13, 1995) which codified the offenses at issue, unconstitutional because it violated the single subject rule). The court noted that "[w]hen Public Act 89-428 was held unconstitutional *** the offense of predatory criminal sexual assault of a child was rendered void *ab initio*[.]" *Tellez-Valencia*, 188 Ill. 2d at 526. The court found that although the General Assembly later reenacted the offense, the reenactment created an entirely new criminal statute. *Id*. As a result, each of the defendants' charging instruments failed to state an offense. *Id*.

¶ 14 We find that the instate case is unlike *Tellez-Valencia*. Specifically, the statute which defendant challenges existed before, during, and after defendant's charged actions. Additionally, unlike *Tellez-Valencia*, the offense of aggravated criminal sexual assault was not declared void *ab initio* between the commission of the offense and defendant's conviction. *Id*. at 526. Rather, in 2000, Public Act 91-404 (eff. Jan. 1, 2000) added the "other than a firearm" language. This addition did not nullify the existing offense or create a new offense, but added an additional theory under which the State could charge aggravated criminal sexual assault. See *Taylor*, 397 Ill. App. 3d at 818. The indictment in this case evinces that defendant was not charged under this new theory, but under the theory that existed both in 1998 and 2006.

¶ 15 CONCLUSION

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

¶ 17 Affirmed.

¶ 18 JUSTICE WRIGHT, dissenting.

¶ 19 Based on the alternative language used in the 2007 indictment, one single count charged defendant with using "a dangerous weapon" *or* an object the victim "reasonably believed to be a dangerous weapon." Thus, this particular 2007 indictment was defective because the State did not clearly inform defendant whether he was facing an enhanced 15-year sentence if convicted on this individual count or whether the State would be seeking an enhanced 10-year sentence for a conviction on the same count. In other words, as charged, this count alleged two separate offenses that carried two separate enhanced punishments in 2006.

¶ 20 In spite of this error in the indictment, the State did not amend the charges before trial and elected to stand on the 2007 indictment charging a violation of section 12-14(a)(1) based on outdated language reflective of the 1998 version of the statute. This is problematic because the 1998 version of section 12-14(a)(1) did not allow a court to impose a sentence in excess of 30 years for aggravated criminal sexual assault. Nonetheless, the trial court imposed a 32-year sentence for a violation of section 12-14(a)(1).

¶ 21 Now, in hindsight, I cannot overlook or cure the State's Attorney's legal error with respect to the language of the indictment. It would be improper to direct the trial court to re-sentence defendant to an unenhanced 6 to 30-year sentence because a 6 to 30-year sentence is an impossibility under the 2006 statutory scheme. Therefore, I would reverse the circuit court's ruling on defendant's section 2-1401 petition, vacate the conviction and enhanced sentence for a violation of section 12-14(a)(1), and remand for sentencing on Class 1 felony of criminal sexual assault based on the jury's verdict on that charge.