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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 07 CR 11290
)	
JONATHAN MIRANDA,)	
)	The Honorable
Defendant-Appellant.)	Stanley Sacks,
)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition affirmed over defendant's contention that he set forth an arguable claim of ineffective assistance of trial counsel and his contention that the trial court lacked subject matter jurisdiction to allow him to withdraw his negotiated guilty plea more than 30 days after its entry, which was raised for the first time on appeal.

¶ 2 Defendant Jonathan Miranda appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that the circuit court erred in summarily

dismissing his petition as frivolous and patently without merit because he presented an arguable claim that trial counsel was ineffective for failing to call certain witnesses at trial. He also contends that the trial court lacked jurisdiction to allow him to withdraw his negotiated guilty plea more than 30 days after its entry.

¶ 3

BACKGROUND

¶ 4

In 2007, defendant and his cousins, Jason and Wellington Jaramillo¹, were charged by indictment with multiple counts of aggravated discharge of a firearm, home invasion, aggravated battery with a firearm, armed violence, aggravated battery, aggravated unlawful restraint, and aggravated unlawful use of a weapon.

¶ 5

On March 10, 2009, defendant and his cousins entered negotiated pleas of guilty to aggravated discharge of a firearm in exchange for the dismissal of the other charges and agreed prison terms of 10 years for defendant and 15 years for his cousins with the express understanding they would be eligible to receive day-for-day good-conduct credit. Before entering judgments of conviction and imposing sentence, the trial court admonished defendant and his cousins of their appeal rights in accordance with Supreme Court Rule 605(c) (eff. Oct. 1, 2001). The trial court addressed defendant, commenting that he was "pretty lucky" because when his cousins "went into the house *** and shot that guy, they didn't kill him [;]" otherwise, he would be facing a minimum sentence of 35 years' imprisonment. The trial court then informed defendant and his cousins, *inter alia*, that before taking an appeal, and "within 30 days of today's date," they must each file a written motion asking that the judgment be vacated and for leave to withdraw the guilty plea stating the reasons for doing so. Defendant and his cousins acknowledged that they understood the trial court's admonishments.

¹ Jason and Wellington Jaramillo are not parties to this appeal.

¶ 6 Sometime thereafter, the trial court received a letter from defendant's mother saying that her son "was doing 85 percent" of his 10-year sentence to which he had agreed with the understanding that he would be eligible to receive day-for-day good-conduct credit. On June 4, 2009, 86 days after defendant and his cousins entered negotiated guilty pleas to aggravated discharge of a firearm, attorneys for defendant and his cousins appeared before the trial court and reformed the plea agreement so the parties, including the State, received the originally bargained-for benefits.

¶ 7 In doing so, the court acknowledged that during the plea hearing, no one "realized aggravated discharge of a firearm after a certain date that charge carried truth and sentencing, 85 percent. We all thought it was 50 percent, and that included myself. *** We have to correct this mistake we all made, including myself." The State tendered a breakdown of what it perceived was an appropriate disposition, which at 85% meant defendant would serve 59 months, just shy of the 60 months initially anticipated. The State also cautioned that "[y]ou have to do good time to get good time," and plea counsel agreed "that's what we discussed because discretionary awarding good time is beyond our control." Pursuant to this agreement, the trial court reduced defendant's prison sentence from "10 years contemplating he would do that 10 at 50 percent" to "70 months" at 85 percent.² The trial court issued a corrected mittimus *nunc pro tunc* to March 10, 2009, the date of the negotiated guilty plea and the initial mittimus.

¶ 8 Twenty-eight days later, on July 2, 2009, defendant, represented by new attorneys, filed a motion to withdraw his plea of guilty and vacate judgment alleging, in pertinent part, as follows:

"In sum and substance [defendant] asserts that his plea on March 10, 2009 was not knowingly and intelligently made in that he was not presented with a choice by his

² The trial court also reduced Jason and Wellington Jaramillo's prison sentences from the "anticipated sentence of 180 months at 50 percent" to 105 months at 85 percent.

counsel. He was informed that he had to accept the deal. He stated he had to accept the deal as a package deal with his codefendants or else they (also being relatives) could not be offered the deal. He contacted his counsel to vacate the guilty plea and that he was initially led to believe that the sentence was a 50% sentencing scheme. Although he was told later that the new sentence is a reduced sentence but still an 85% sentencing scheme, he was led to believe by his counsel that he could still qualify for additional sentence credits of drug counseling and education classes, thus serving less then [sic] the 85% sentence."

¶ 9 On December 14, 2009, a hearing was held on defendant's motion to withdraw his plea of guilty to aggravated discharge of a firearm and to vacate judgment. One of defendant's new attorneys and the State were present, but neither defendant nor his cousins were present. After defense counsel argued the motion, the trial court verified that the State could locate the victim, Froyland Lopez, and asked the State to summarize the factual basis for defendant's plea as it was presented on March 10, 2009. The trial court granted the motion, reinstated the charges previously dismissed, and remanded defendant to the custody of the Cook County jail without bond.

¶ 10 Following a jury trial that commenced on September 1, 2010, defendant was found guilty of home invasion and aggravated *battery* with a firearm under a theory of accountability. The trial court then sentenced defendant to consecutive, respective terms of 21 and 6 years' imprisonment.

¶ 11 On direct appeal, we affirmed the judgment entered on defendant's convictions over his challenge to the sufficiency of the evidence and to the propriety of the State's rebuttal argument. *People v. Miranda*, 2012 IL App (1st) 103360-U. As to the sufficiency of the evidence, we

found there was sufficient evidence allowing a reasonable trier of fact to conclude that defendant had knowledge of his cousins' criminal purpose and acted with intention to aid his cousins in the commission of their offenses against Froylan Lopez, a known narcotics dealer. *Miranda*, 2012 IL App (1st) 103360-U, ¶ 51. Specifically, we found sufficient evidence to support defendant's convictions under accountability principles despite defendant's trial testimony that he remained at home with his girlfriend, mother, and sister the *night before* the shooting, and his brother's testimony that he, and not defendant, drove the Oldsmobile that narcotics surveillance officers observed circle Lopez's house. *Miranda*, 2012 IL App (1st) 103360, ¶¶ 51-53. Defendant's undisputed presence as a get-away driver outside Lopez's house the *following day*, his flight therefrom with his cousins after they shot Lopez, and circumstantial evidence of defendant's *prior* knowledge of his cousins' criminal design established defendant's accountability for the home invasion and aggravated battery of Lopez with a firearm. *Miranda*, 2012 IL App (1st) 103360-U, ¶¶ 51-53. As to the propriety of the State's rebuttal argument, we noted that the prosecutor was entitled to comment on defendant's failure to call his girlfriend, mother, and sister to support an alibi defense because defendant injected their existence into the case, and we ultimately found the prosecutor's comments were reasonable inferences based on the evidence presented at trial and did not impermissibly shift the burden of proof onto defendant or deprive him of a fair trial and warrant reversal of his convictions. *Miranda*, 2012 IL App (1st) 103360-U, ¶ 60.

¶ 12 Defendant then filed the instant *pro se* postconviction petition seeking to vacate his jury convictions and sentences for home invasion and aggravated *battery* with a firearm, or alternatively to reinstate his 10-year sentence for aggravated *discharge* of a firearm under the original plea agreement. As relevant to this appeal, defendant alleged in his petition that he

received ineffective assistance of plea counsel, who misinformed him that if he pled guilty to aggravated discharge of a firearm, he would be sentenced to 10 years' imprisonment, to be served at 50% and that "after all of [his] good time was accumulated, [he] would only serve 2½ to 3 years in jail." Defendant reasoned that plea counsel's actions "started a chain of events that ended when [he] was eventually sentenced to 27 years in prison," and that "one of the events³ in the chain occurred on December 14, 2009 when [he] withdrew [his] previously entered plea of guilty to *** Aggravated Discharge [of a firearm]." Defendant also alleged that trial counsel⁴ was ineffective for failing to call "all of the witnesses who were available to testify" on his behalf, and "[t]his failure allowed the prosecution to argue to the jury in rebuttal that [he] had not presented witnesses to support [his] theory of the case."

¶ 13 The circuit court summarily dismissed the petition as frivolous and patently without merit in a written order. In rejecting defendant's assertion that plea counsel's actions started a "chain of events" that ended with a 27-year prison sentence, the circuit court found that the actual chain of events that led to defendant's 27-year imprisonment started with the home invasion and shooting of Froylan Lopez, and that he voluntarily chose to withdraw his plea of guilty and go to trial. In rejecting defendant's claim that trial counsel was ineffective for failing to call all of the witnesses available to testify on his behalf, the circuit court found that defendant failed to attach any affidavits from those witnesses or indicate what the substance of their testimony would be. The circuit court further found that the issue was barred by the doctrine of *res judicata* because it was previously decided against defendant on direct appeal.

³ Defendant was represented by new attorneys at the time he filed his motion to withdraw his guilty plea on July 2, 2009, and the trial court granted his motion on December 14, 2009.

⁴ Defendant was represented by attorney Joseph DiNatale during the plea proceedings and attorneys Mark Kusatzky and Gus Santana thereafter and during trial.

¶ 14 Defendant now appeals from the summary dismissal of his postconviction petition, and our review is *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 15 ANALYSIS

¶ 16 Defendant first contends that the trial court lacked jurisdiction to allow him to withdraw his negotiated guilty plea more than 30 days after its entry. However, before proceeding to the merits of this claim, we acknowledge the State's observation that it was defendant who persisted in withdrawing his guilty plea and then failed to raise the claim on direct appeal or in his postconviction petition, but we disagree with the State's argument that the doctrines of invited error and forfeiture apply to these circumstances.

¶ 17 A trial court's ruling made without subject matter jurisdiction is void and the only continuing power the trial court possesses over the case is confined to "enforcement of the judgment or correction of clerical errors or matters of form so that the record conformed to the judgment actually rendered." *People v. Flowers*, 208 Ill. 2d 291, 306-07 (2003). A void order may be directly or collaterally attacked at any time, regardless of the length of time that has elapsed since its entry. *People v. Bailey*, 2014 IL 115459, ¶ 12. Moreover, "it is axiomatic that the lack of subject matter jurisdiction is not subject to waiver and may not be cured through consent of the parties." *People v. Evans*, 2015 IL App (3d) 140753, ¶ 15. Accordingly, the doctrines of invited error and forfeiture do not preclude our review of defendant's first contention.

¶ 18 Turning to the merits, defendant argues that the trial court lacked jurisdiction to entertain his motion to withdraw his guilty plea more than 30 days after it was entered. He requests that we vacate the trial court's order allowing him to withdraw his guilty plea as void, reverse the convictions and sentences based on the jury verdicts, and remand with instruction to enforce the

terms of the plea agreement. Whether the circuit court has subject matter jurisdiction presents a question of law subject to *de novo* review. *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 31.

¶ 19 Anticipating the State's argument that the parties' conduct revested the trial court with jurisdiction to consider the untimely motion to withdraw his guilty plea, defendant acknowledges that the revestment doctrine is an exception, albeit a narrow one, to the general rule that a trial court loses jurisdiction to entertain a cause 30 days after the entry of a final judgment. However, defendant argues that revestment did not occur because the State's presence at the hearing on his motion to withdraw his guilty plea does not constitute "active participation" as contemplated by *People v. Bailey*, 2014 IL 115459, ¶ 25, where the supreme court held that for the revestment doctrine to apply, both parties must: "(1) actively participate in the proceedings; (2) fail to object to the untimeliness of the late filing; *and* (3) assert positions that make the proceedings inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment." (Emphasis in original.) As grounds, defendant cites the parties' unawareness of the jurisdictional bar arising from defendant's untimely motion to withdraw his guilty plea and the State's passive role at the plea withdrawal. Defendant also complains that the State did not "seek to modify the prior judgment," referring this court to *People v. Kaeding*, 98 Ill. 2d 237, 241 (1983), where the supreme court found that jurisdiction was revested in the circuit court when both parties filed untimely postjudgment motions seeking alteration of the prior judgment for different reasons.

¶ 20 The State responds that "[a]lthough the *resentencing* proceedings occurred 86 days after defendant's guilty plea, the parties revested the trial court with personal and subject matter jurisdiction when both defense counsel and the prosecutor agreed that defendant's original 10-

year sentence did not comport with the anticipated bargain." We agree with the State that jurisdiction was revested in the trial court. However, we disagree with the State that June 4, 2009, the date the parties reformed the plea agreement to approximate their expectations, was the triggering event for the application of the revestment doctrine.

¶ 21 Thirty days after the entry of a final judgment, relief may be granted by applying the revestment doctrine, by a finding that the order is void, by agreement of the parties, or by a *nunc pro tunc* order. *Virzint v. Beranek*, 202 Ill. App. 3d 511, 514 (1990). The entry of a sentence constitutes the final judgment in a criminal case. *People v. Salem*, 2016 IL 118693, ¶ 12. "A court has inherent power to make an entry *nunc pro tunc* at any time to have the record reflect the actual order or judgment rendered." *Virzint*, 202 Ill. App. 3d at 514-15.

¶ 22 The State's assertion that June 4, 2009, was the triggering event for the application of the revestment doctrine is premised upon the faulty assumption that the trial court did not have jurisdiction to "resentence" defendant on that date. Rather, the letter from defendant's mother to the trial court pointing out a discrepancy between the details of the negotiated plea and the mittimus was the equivalent of a motion to correct the mittimus. *People v. Thomas*, 402 Ill. App. 3d 1129, 1132 (2010). The trial court's correction of a mittimus is a ministerial act that does not alter the underlying sentence. *People v. Wright*, 337 Ill. App. 3d 759, 762 (2003). "Because the mittimus is not a part of the common law record and because the trial court may amend the mittimus at any time, the trial court's act of correcting the mittimus is not the same as if it issued a new sentence." *Thomas*, 402 Ill. App. 3d at 1132 (citing *Wright*, 337 Ill. App. 3d at 762). Accordingly, we disagree with the State's characterization of June 4, 2009, as a resentencing proceeding because the trial court possesses limited continuing jurisdiction to correct the mittimus (*People v. Corredor*, 399 Ill. App. 3d 804, 808 (2010)), even after the trial court has

otherwise lost jurisdiction (*Baker v. Department of Corrections*, 106 Ill. 2d 100, 106 (1985); see also, *e.g.*, *State v. Bailey*, 2012 IL App (2d) 110209, ¶ 45 (McLaren, J., dissenting) (by definition, revestment does not apply to circumstances where jurisdiction in the trial court was never lost)), and the corrected mittimus issued by the trial court, among other things, supports defendant's position that the trial court was exercising its limited continuing jurisdiction at that time.

¶ 23 Further, defendant correctly notes that the trial court lost jurisdiction to entertain his motion to withdraw his guilty plea even though it was filed 28 days after the mittimus correction. While Supreme Court Rule 604(d) (eff. Mar. 8, 2016) provides that an appeal from a negotiated guilty plea must be filed within 30 days of the date on which sentence is imposed, that means the date the judgment and sentence were *originally* filed and not the date the trial court amended the mittimus. (Emphasis added.) *Thomas*, 402 Ill. App. 3d at 1132. Because the final judgment's sentence does not have to be correct in order to trigger the 30-day limitations period for filing a motion to withdraw (*Wright*, 337 Ill. App. 3d at 763), defendant was required to file his motion to withdraw his guilty plea within 30 days of March 10, 2009, when the trial court entered a judgment of conviction against defendant and imposed a sentence of 10 years' imprisonment. This did not happen.

¶ 24 Instead, defendant filed his motion to withdraw his guilty plea and vacate judgment on July 2, 2009, more than 30 days after final judgment was entered upon his negotiated guilty plea. Although the trial court technically had no jurisdiction to entertain defendant's motion to withdraw his guilty plea, we find that the parties' conduct at the hearing on defendant's motion revested the trial court with jurisdiction to consider the matter.

¶ 25 Despite the finality of defendant's sentence, both parties: actively participated in the proceedings as to the motion to withdraw defendant's negotiated guilty plea; did not object to the motion's untimeliness; and endeavored to have the trial court vacate defendant's conviction, reinstate the previously dismissed charges, and proceed with trial. See *People v. Buffkin*, 2016 IL App (2d) 140792, ¶ 13 (applying the revestment doctrine to the parties' conduct on appeal). After defense counsel argued the merits of the motion, the trial court confirmed that the State could locate the victim, Froyland Lopez, presumably for trial, and then asked the State to summarize the factual basis for defendant's plea as it was presented on March 10, 2009. *People v. Hughes*, 2011 IL App (2d) 090992, ¶ 9. Even so, the State did not defend the merits of the original plea agreement or argue against defendant's motion to withdraw it. *Bailey*, 2012 IL App (2d) 110209, ¶ 33. Under these circumstances, the trial court was revested with jurisdiction to hear the merits of defendant's motion to withdraw his guilty plea, notwithstanding defendant's arguments to the contrary. That the question of jurisdiction was not even considered at the hearing on defendant's motion to withdraw his guilty plea does not necessitate defendant's conclusion that "the parties here were unaware of the jurisdictional bar," and defendant's parenthetical citation to *Bailey*, 2014 IL 115459, ¶¶ 21-25, " 'that this court has applied the revestment doctrine when *both parties have sought to* modify or overturn the prior judgment,' " is a factually distinguishable reference to *Kaeding*, 98 Ill. 2d at 241, where, as we previously noted, the supreme court found that jurisdiction revested in the circuit court because *both parties* filed untimely postjudgment motions seeking alteration of the prior judgment for *different* reasons.

¶ 26 Defendant next contends that the circuit court erred in summarily dismissing his postconviction petition as frivolous and patently without merit because he presented an arguable

claim that trial counsel was ineffective for failing to call his mother and sister as a witness to corroborate "his defense that he did not case the house the night before the shooting and did not know about his cousins' plan and could not have been accountable for it." Defendant concedes that he did not support this claim with affidavits from his mother and sister, but argues the record plainly shows what their testimony would have been if called to testify, referring to the statements his aunt made to the court at sentencing: "His little sister, who is now 12, you know, was there the night before with him. His mom, you know, she was here at trial. She was not allowed in because she could have been a witness." Defendant also complains that the circuit court applied the wrong legal standard in evaluating this claim.

¶ 27 The State responds that the summary dismissal of defendant's postconviction petition should be affirmed because defendant failed to support his claim with affidavits from his mother and sister and failed to offer an explanation for their absence. We agree.

¶ 28 Section 122-2 of the Act requires, in relevant part, that defendant either attach "affidavits, records, or other evidence" to support his allegations or explain the absence thereof. 725 ILCS 5/122-2 (West 2012). The purpose of this requirement is to establish that the allegations are capable of objective or independent corroboration. *Hodges*, 234 Ill. 2d at 10. In the absence of such affidavits, "a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010) (citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000)).

¶ 29 Defendant argues that affidavits from his mother and sister were unnecessary, citing *People v. Hanks*, 335 Ill. App. 3d 894, 899 (2002), where the reviewing court found that an affidavit from the defendant's brother, who recognized a juror that had worked with the

defendant in the past, was unnecessary because the record, the contents of the court file, and the exhibits allowed for independent corroboration of the defendant's claim. Here, however, the record is devoid of a statement made under oath that would provide the objective or independent corroboration required under the Act. Put another way, objective or independent corroboration of what defendant's mother and sister would testify about requires an affidavit from defendant's mother and sister, not from unsworn representations made by defendant's aunt at sentencing. Given the absence of such affidavits, further review of defendant's claim of ineffective assistance of trial counsel is unnecessary⁵. *Jones*, 399 Ill. App. 3d at 371.

¶ 30 Lastly, because our review of the dismissal order entered by the circuit court is *de novo*, we may affirm the summary dismissal of defendant's postconviction petition on any proper ground, notwithstanding defendant's suggestion that the circuit court failed to apply the "more lenient formulation" of the *Strickland* test as articulated in *People v. Tate*, 2012 IL 112214, ¶ 19.

¶ 31 CONCLUSION

¶ 32 For the reasons stated, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's postconviction petition.

¶ 33 Affirmed.

⁵ We note that the circuit court also considered this claim barred by the doctrine of *res judicata* because it was previously decided against defendant on direct appeal. See *People v. Blair*, 215 Ill. 2d 427, 442 (2005) (the doctrines of *res judicata* and waiver are appropriate considerations at the summary dismissal stage); *People v. Jones*, 362 Ill. App. 3d 31, 34 (2005).