

SIXTH DIVISION
May 6, 2016

No. 1-13-3458

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).

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. 80 C 8956 |
| |) | |
| GERARDO MORENO, |) | Honorable |
| |) | Joseph M. Claps, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

O R D E R

¶ 1 *Held:* Because the posttrial court lacked jurisdiction to address the merits of defendant's motion to reconsider his *in absentia* sentences, we vacated the order granting defendant's motion to reconsider his *in absentia* sentences and vacating those sentences and the order resentencing defendant.

¶ 2 Following a bench trial, the trial court convicted defendant Gerardo Moreno *in absentia* of unlawful delivery of a controlled substance and eavesdropping and sentenced him *in absentia* to 10 years' and 1 year of imprisonment, respectively. Thirty years later, defendant appeared before the posttrial court. The posttrial court granted defendant's motion to reconsider his *in absentia* sentences and vacated those sentences and after a new sentencing hearing, resentenced

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him to 12 years' imprisonment for unlawful delivery of a controlled substance, and 1 year of imprisonment for eavesdropping, to be served concurrently. On appeal, defendant argues that trial counsel was ineffective for requesting a new sentencing hearing based upon her misinterpretation of the law regarding *in absentia* admonishments. We vacate the order granting defendant's motion to reconsider his *in absentia* sentences and vacating those sentences and the order of resentencing in that the posttrial court lacked jurisdiction.

¶ 3 In 1980, the State charged defendant with conspiracy to unlawfully deliver a controlled substance; unlawful delivery of a controlled substance; and eavesdropping. The case proceeded to a bench trial in September 1982. On September 8, 1982, following the testimony of Drug Enforcement Administration agents and at the time of a break in the trial, the following colloquy occurred:

"THE COURT: One further point on the record, if I may: [defendant], do you understand, sir, you are out on bond?

[Defendant]: Yes.

THE COURT: Because you are out on bond, the law now permits me to try you *in absentia*.

[Assistant State's Attorney]: So in the event you choose not to appear on any different date, the trial may continue. Do you understand that?

[Defendant]: Yes.

THE COURT: Of course, you understand how it goes if you are not present for trial.

[Defendant]: Yes."

¶ 4 The following day, before the trial recommenced, the trial court granted defendant's request for a Rule 402 conference. The transcript from the September 9, 1982, proceedings indicates that "the Case was not recalled" on that date. Defendant failed to appear at the next trial date, and a bond forfeiture warrant was issued. Defendant was absent for the remainder of his trial. On September 13, 1982, the trial court found defendant guilty *in absentia* on all three counts and merged the conviction for conspiracy to unlawfully deliver a controlled substance with the conviction for unlawful delivery of a controlled substance.

¶ 5 On September 30, 1982, the trial court denied defense counsel's motion for a new trial. Following arguments in aggravation and mitigation, the court sentenced defendant *in absentia* to 10 years' imprisonment for unlawful delivery of a controlled substance to run concurrently with the 1 year sentence for eavesdropping. Defense counsel did not file a motion to reconsider sentence, nor a notice of appeal.

¶ 6 Thirty years later, on November 15, 2012, defendant next appeared in this case after he was arrested in Texas on the 1982 bond forfeiture warrant.

¶ 7 At the January 23, 2013, court date, the posttrial court stated that it had to "assume" the original trial judge "did what he had to do in terms of statutes" and "the constitution" and found it did not "have any other choice but to create a new [mittimus] and send [defendant] to [the] department of corrections." On that date, the posttrial court entered an order of commitment which reflected the sentences which were imposed by the trial court in 1982.

¶ 8 On February 14, 2013, defendant, represented by counsel, filed motions to vacate the convictions and for reconsideration of his sentences, arguing that the trial court had not adequately admonished him that he could be tried and sentenced *in absentia* as required by

section 113-4(e) of the Code of Criminal Procedure (Code) (725 ILCS 5/113-4(e) (West 2012)).

Defendant did not seek a hearing as to whether his absence from trial and sentencing was his fault and was due to circumstances beyond his control.

¶ 9 The State responded that the trial court complied with the required *in absentia* admonishments. Additionally, the State argued that defendant was not entitled to a new sentencing hearing because he had not presented any facts to demonstrate that his failure to appear at trial and sentencing was not his fault and was due to circumstances beyond his control. The State cited section 115-4.1(e) of the Code (725 ILCS 5/115-4.1(e) (West 2012)), in support of its argument.

¶ 10 At the hearing on the motions, defense counsel argued that the State had "the burden of proving that the defendant was, in fact, properly admonished in accordance with [section 113-4(e) of the Code] of [his] trial rights and sentencing rights *in absentia*" and that the trial court's perfunctory admonishments did not comply with section 113-4(e). In the alternative, defense counsel requested a new sentencing hearing asserting that, even if defendant was properly admonished concerning his trial rights *in absentia*, there was "no mention whatsoever of his sentencing rights *in absentia*."

¶ 11 On September 4, 2013, the posttrial court granted defendant's motion to reconsider his sentences, vacated the sentences and ordered a new sentencing hearing. The posttrial court agreed with defendant that he should have been informed not only that his trial would continue in his absence but, also, that sentencing would proceed without him. The circuit court denied defendant's motion to vacate his convictions.

¶ 12 At the resentencing hearing, during the aggravation stage, the State informed the posttrial court that defendant had been convicted of a federal drug offense in 1991. The posttrial court sentenced defendant to 12 years' imprisonment for unlawful delivery of a controlled substance and a concurrent term of 1 year imprisonment for eavesdropping. This appeal followed.

¶ 13 On appeal, defendant argues that his counsel was ineffective based upon her misinterpretation of the law regarding *in absentia* admonishments, and that her request for a new sentencing hearing resulted in a greater sentence. Defendant does not challenge the posttrial court's denial of his request to vacate his convictions. Before discussing the merits of defendant's arguments, we will address an issue which was not raised by either party: the posttrial court's jurisdiction to vacate or modify defendant's sentences pursuant to his 2013 motion to reconsider the sentences, and our jurisdiction as to this appeal. See *People v. Smith*, 228 Ill. 2d 95, 104 (2008) ("A reviewing court has an independent duty to consider issues of jurisdiction, regardless of whether either party has raised them.").

¶ 14 Pursuant to Illinois Supreme Court Rule 606(b) (Ill. S. Ct. R. 606(b) (eff. Dec. 11, 2014)), to confer jurisdiction upon the appellate court, a defendant must file a notice of appeal "within 30 days after the entry of the final judgment appealed from." See *People v. Ross*, 229 Ill. 2d 255, 263 (2008). "Unless there is a properly filed notice of appeal, a reviewing court has no jurisdiction over the appeal and is obliged to dismiss it." *Smith*, 228 Ill. 2d at 104.

¶ 15 "In a criminal case, the entry of a sentence constitutes the final judgment." *People v. Salem*, 2016 IL 118693, ¶ 12. Before filing a notice of appeal, a defendant who seeks to challenge the correctness of the sentence, or any aspect of the sentencing hearing, must file a written motion in the circuit court asking for reconsideration of the sentence imposed. *People v.*

Moore, 2015 IL App (5th) 130125, ¶ 23; see also Ill. S. Ct. R. 605(a)(3)(B) (eff. Oct. 1, 2001).

The motion must be filed within 30 days of the date on which the sentence was imposed. *Id.*

"Once the trial court has heard and determined a case, its jurisdiction to reconsider and modify the judgment is not indefinite, and the court generally loses jurisdiction to vacate or modify its judgment 30 days after entry of judgment." *Moore*, 2015 IL App (5th) 130125, ¶ 28.

¶ 16 Here, the trial court sentenced defendant *in absentia* on September 30, 1982. Following sentencing, defendant did not file a motion to reconsider sentence, nor a notice of appeal. More than 30 years later, in 2013, defendant filed his first motion to reconsider sentence, well beyond the 30 day time limit under Rule 605(a)(3)(B). Thus, because defendant's motion to reconsider sentence was filed more than 30 days after sentencing, the posttrial court had no jurisdiction to consider the merits of the motion to reconsider. *People v. Bailey*, 2014 IL 115459, ¶ 8. The fact that defendant was sentenced *in absentia* does not alter this determination. *People v. Partee*, 125 Ill. 2d 24, 32 (1988) (a judgment *in absentia* is a final adjudication).

¶ 17 Defendant did not seek to obtain relief from his sentences pursuant to a motion under section 115-4.1(e) of the Code. See 725 ILCS 5/115-4.1(e) (West 2012). A section 115-4.1(e) motion is considered a collateral attack of a defendant's *in absentia* conviction and sentence. *Partee*, 125 Ill. 2d at 35. Section 115-4.1(e) provides:

"When a defendant who in his absence has been either convicted or sentenced or both convicted and sentenced appears before the court, he must be granted a new trial or new sentencing hearing if the defendant can establish that his failure to appear in court was both without his fault and due to circumstances beyond his control. A hearing with notice to the State's Attorney on the defendant's request for a new trial or a new

sentencing hearing must be held before any such request may be granted. At any such hearing both the defendant and the State may present evidence." 725 ILCS 5/115-4.1 (e) (West 2012).

Defendant in seeking to overturn his convictions and sentences did not file a motion pursuant to this section for a hearing on whether his failure to appear at trial and at his sentencing hearing "was both without his fault and due to circumstances beyond his control." *Id.* Defendant pursued his motion to reconsider his sentences on the sole ground that the *in absentia* admonishments were inadequate.

¶ 18 Additionally, the posttrial court was not revested with jurisdiction to consider and grant defendant's motion to reconsider his sentences merely by the State's participation in the arguments over the motion. "Under the revestment doctrine, litigants may revest a trial court with personal and subject matter jurisdiction, after the 30-day period following final judgment." *People v. Bannister*, 236 Ill. 2d 1, 10 (2009). In *Bailey*, our supreme court clarified that, for the 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.) *Bailey*, 2014 IL 115459, ¶ 25. If any of these three requirements are not satisfied, "the doctrine does not revest the court with jurisdiction." *Id.*

¶ 19 Here, the first two elements of the revestment doctrine are satisfied, as both the State and defendant actively participated in the proceedings as to the motion to reconsider defendant's sentences, and the State did not object to the motion's untimeliness. The critical question then becomes whether the third element was satisfied. *Bailey* directs our analysis.

¶ 20 In *Bailey*, more than three years after the defendant had pled guilty and had been sentenced for criminal sexual abuse, he filed a motion to vacate his plea and sentence as void because the circuit court failed to require him to register as a sex offender. *Id.* ¶ 3. The State responded to the motion, arguing the plea and sentence were not void. The circuit court denied the motion on the merits. *Id.* Our supreme court addressed, in part, whether the circuit court was revested with jurisdiction to consider the merits of the defendant's motion to vacate. *Id.* ¶¶ 6, 17. Because the parties agreed that the first two elements of the revestment doctrine had been met (*id.* ¶ 17), the court focused on whether the State asserted a position inconsistent with the merits of the prior judgment. *Id.* ¶ 27. In responding to the defendant's motion to vacate, the State "actively opposed the setting aside or modification of [the] defendant's conviction and sentence." *Id.* Because the State attempted to defend the merits of the prior judgment, its actions could not be considered inconsistent with the prior judgment. *Id.* Therefore, our supreme court found the circuit court was not revested with jurisdiction to hear the merits of the defendant's motion, as all three elements of the doctrine had not been satisfied. *Id.* Instead, the circuit court should have dismissed the motion for lack of jurisdiction. *Id.*

¶ 21 Here, as in *Bailey*, the State did not assert a position inconsistent with defendant's convictions and sentences. As relevant here, citing to section 115-4.1(e) of the Code (725 ILCS 5/115-4.1(e) (West 2012)), in its written response to the motion and during the hearing on the motion to reconsider sentence, the State maintained that defendant's requested relief—a new sentencing hearing—was inappropriate because defendant could not establish that his absence was not his fault and due to circumstances beyond his control. The State's attempt to defend the merits of the original sentence and prevent a new sentencing hearing cannot be considered

inconsistent with the prior judgment. Therefore, the third element of the revestment doctrine had not been met because both parties did not assert positions inconsistent with the prior judgment. *Bailey*, 2014 IL 115459, ¶ 27. Consequently, the posttrial court was not revested with jurisdiction to consider the merits of defendant's motion to reconsider his sentences. *Id.*

¶ 22 Where defendant's motion to reconsider his sentences was untimely and the posttrial court was not revested with jurisdiction to consider the merits of the motion, we have no jurisdiction to consider the substantive merits of the court's decision. *Id.* ¶ 29. This, however, does not mean that we have no jurisdiction at all. *Id.* "If that were the case, [we] would have no means of exercising the authority conferred on [this court] by law to review, recognize, and correct any action that exceeded the trial court's jurisdiction." *Id.*

¶ 23 When this court lacks jurisdiction to hear an appeal, the proper remedy, generally, is to dismiss the appeal. *People v. Maclin*, 2014 IL App (1st) 110342, ¶ 20. However, if we were to dismiss this appeal, the posttrial court's order which granted the motion for resentencing and vacated the original sentences and its order resentencing defendant, would be left "undisturbed and intact," even though these orders were void for lack of jurisdiction. *Bailey*, 2014 IL 115459, ¶ 28. Therefore, as our supreme court explained in *Bailey*, under such circumstances the circuit court's orders should be vacated. *Id.* Accordingly, the posttrial court's lack of jurisdiction is not a complete bar to the exercise of our jurisdiction, although we are limited to considering the issue of the jurisdiction below. *Id.* ¶ 29.

¶ 24 Having concluded that the posttrial court lacked jurisdiction to address the merits of defendant's motion to reconsider his sentences, we vacate the order which granted defendant's

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motion to reconsider sentence and vacated the original sentences and the order which resentenced defendant. Defendant's original sentences, therefore, stand.

¶ 25 Orders vacated.