

No. 1-14-2324

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
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	
)	
CHARLES LIVINGSTON,)	No. 92 CR 286
)	
Defendant-Appellant.)	The Honorable
)	Nicholas R. Ford,
)	Judge Presiding.
)	

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's consecutive sentence was not void. His untimely *pro se* petition filed under section 2-1401 of the Code of Civil Procedure was properly dismissed.

¶ 2 Defendant Charles Livingston appeals from the trial court's judgment dismissing his petition filed *pro se* under section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2014)). We affirm.

¶ 3 BACKGROUND

¶ 4 Following a bench trial, defendant was found guilty of the 1991 first-degree murder of Clarence Hall and the concealment of Hall's homicide. The evidence showed that defendant and his cohort shot the victim twice, once in the chest, over a drug debt owed. Defendant then transported the victim's body to the trunk of his vehicle and drove away. About a week later and not far from the crime scene, kids in the street reported a terrible odor by the sewer, where police then found the victim's decomposed body. In addition, evidence showed that defendant's vehicle had been impeccably cleaned and cleaning materials were discovered in the trunk. Defendant was sentenced to 45 years and 5 years for the respective offenses, to be served consecutively. Defendant filed a direct appeal, and this court affirmed his conviction denying his claims that the evidence was insufficient to prove him guilty beyond a reasonable doubt and that his trial attorney was constitutionally ineffective. *People v. Livingston*, No. 1-92-4153 (1994) (unpublished order under Supreme Court Rule 23). Defendant then filed several unsuccessful petitions under the Post-Conviction Hearing Act (725 ILCS 5/122-2.1 (West 2008)).

¶ 5 In 2014, about 22 years after his conviction, defendant filed the present *pro se* section 2-1401(f) petition. Where a defendant files a petition seeking relief under section 2-1401, the petition must be filed more than 30 days from entry of the final order but not more than 2 years after that entry. 735 ILCS 5/2-1401 (West 2014); *People v. Thompson*, 2015 IL 118151, ¶ 28. The two-year limitation, however, does not apply to petitions brought on voidness grounds. *Id.* ¶ 29; *People v. Moran*, 2012 IL App (1st) 111165, ¶ 13. Defendant argued his total sentence of 50 years was void because he was subject to a concurrent rather than a consecutive sentence. He argued the trial court erroneously believed consecutive sentences were mandatory, but that *People v. Wagner*, 196 Ill. 2d 269, 283 (2001), clarified the concealment statute did not mandate consecutive sentences. The circuit court dismissed defendant's section 2-1401 petition,

concluding the sentencing court had discretion to impose the consecutive-term sentence under section 5-8-4(b) of the Unified Corrections Code (Code) (Ill. Rev. Stat. 1991, ch. 38, par. 1005-8-4(b)) for the public's protection.¹ Notably, defendant did not acknowledge in his petition that notwithstanding *Wagner's* holding as to the concealment statute, he could still be subject to consecutive sentences under the Code. See *Wagner*, 196 Ill. 2d at 282-83 (noting, section 5-8-4 of the Code of Corrections governs whether sentences are to be served consecutively).

Defendant now challenges the circuit court's judgment.

¶ 6

ANALYSIS

¶ 7 Relevant to defendant's appeal, section 5-8-4(a) generally prohibits consecutive sentences for offenses arising out of a single course of conduct when "there was no substantial change in the nature of the criminal objective." Ill. Rev. Stat. 1991, ch. 38, par. 1005-8-4(a); *People v. Whitney*, 188 Ill. 2d 91, 96 (1999). By contrast, when offenses are committed in separate courses of conduct, section 5-8-4(b) provides the sentencing court with discretion to impose a consecutive term. Ill. Rev. Stat. 1991, ch. 38, par. 1005-8-4(b); *People v. Bole*, 155 Ill. 2d 188, 198 (1993) ("We acknowledge that the statute, as interpreted, creates something of an anomaly, leaving the question of consecutive sentences within the discretion of the trial judge in what must be deemed the more serious situation of multiple offenses committed in separate courses of conduct."); *People v. Sergeant*, 326 Ill. App. 3d 974, 987 (2001). Section 5-8-4(b) states:

"The court shall not impose a consecutive sentence except as provided for in subsection (a) unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that such a term is required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record ***." Ill. Rev. Stat. 1991, ch. 38, par. 1005-8-4(b).

¹ Defendant is entitled to be sentenced under the law as it existed at the time of his 1991 offense. *People v. Mescall*, 403 Ill. App. 3d 956, 964 (2010).

¶ 8 Defendant contends the offenses in this case – murder and concealment of homicidal death – arose out of a single course of conduct and are therefore prohibited under section 5-8-4(a), and this fact also makes section 5-8-4(b) inapplicable.² Defendant alternatively contends the trial court failed to make the record findings under section 5-8-4(b) to impose consecutive sentences. Notwithstanding that defendant did not make these particular arguments in his section 2-1401 petition, they still fail. See *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 229 (1986) ("It is well established that matters not presented to or ruled upon by the trial court may not be raised for the first time on appeal.").

¶ 9 "Conduct" is "an act or a series of acts, and the accompanying mental state." Ill. Rev. Stat. 1991, ch. 38, par. 2-4. A course of conduct thus includes a range of activity. *Bole*, 155 Ill. 2d at 193. Whether offenses were committed during a single course of conduct (and the sentences thus served concurrently) is guided by determining "overarching criminal objective" or whether the acts were independently motivated. *People v. Daniel*, 311 Ill. App. 3d 276, 287 (2000). Determining course of conduct is a question of fact, and as such, we defer to the trial court's conclusion unless it is against the manifest weight of the evidence. *Id.* So long as the trial court's conclusion is supported by the record (*i.e.*, it's not unreasonable or arbitrary), we will not reverse its decision. *Id.* Similarly, when consecutive sentences are imposed pursuant to the law and are supported by the record, they will not be reversed on review. *People v. Lopez*, 228 Ill. App. 3d 1061, 1077 (1992). This is because it is well established that the trial court is the proper forum to decide sentencing issues, and its decision is entitled to great deference. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). Absent an abuse of discretion, a sentence within the statutory limits will not be disturbed on appeal. *Coleman*, 166 Ill. 2d at 258.

² Section 5-8-4(a) identifies two exceptions to this general rule, and if applicable, then the sentences are mandated to be consecutive. The parties agree these exceptions do not apply in this case.

¶ 10 At sentencing in this case, the trial court announced that defendant committed the acts of killing the victim over a drug debt and then transporting the body to his car's trunk, also noting the body was later found in a state of substantial decomposition. Immediately before declaring defendant subject to consecutive sentences, the court tracked the language of section 1005-8-4(b), stating:

"One would have to search far and wide for evidence of provocation, justification, excuse, and certainly from what has been presented, it would be very difficult to conclude that this defendant would not present further problems to society, would not commit other criminal acts if the opportunity were presented in the near future, and all of this cries out for a substantial period of incarceration."

¶ 11 The court thus determined on the record that consecutive sentences were needed to "protect the public from further criminal conduct by" defendant since he would present future danger and deserved a substantial period of time based on the calculated "execution" of another individual. See Ill. Rev. Stat. 1991, ch. 38, par. 1005-8-4(b); *Coleman*, 166 Ill. 2d at 260-61; *People v. Hicks*, 101 Ill. 2d 366, 375 (1984); see also *People v. Pittman*, 93 Ill. 2d 169, 178 (1982) (sentencing court set forth sufficient reasons for imposing consecutive sentences under section 5-8-4(b) by noting defendant's extensive criminal history); cf. *People v. Clark*, 278 Ill. App. 3d 996, 1006 (1996) (erroneous consecutive sentences imposed under section 5-8-4(b) where trial court stated at sentencing that there was no reason to believe defendant was danger to society). Moreover, the record supports the court's implicit determination that the offenses were committed in separate courses of conduct. See *Lopez*, 228 Ill. App. 3d at 1075-76 (affirming trial court's explicit finding that murder of victim in car and concealment of her death in river were not committed as single course of conduct); cf. *People v. Robinson*, 273 Ill. App. 3d 1069, 1073-74 (1995) (direct appeal holding that where acts of killing victim persisted during

concealment of victim's body, there was a single course of conduct);³ *People v. Wilder*, 325 Ill. App. 3d 987, 1002 (2001) (direct appeal remanding case to sentencing court where course of conduct determination was implicit). Regarding the first act, defendant's overarching criminal intent was retribution and harm leading to death. Regarding his second act, his overarching criminal intent was hiding his crime, insofar as he sought to prevent, delay, or hide the discovery of the victim's death. See *Clark*, 278 Ill. App. 3d at 1005. The court's findings were neither against the manifest weight of the evidence nor an abuse of discretion. The trial court thus imposed defendant's consecutive-term sentences of 45 and 5 years' imprisonment in accordance with the statute.

¶ 12 In reaching this conclusion, we reject defendant's assertion that the trial court believed consecutive sentences were mandatory pursuant to the exceptions stated in section 1005-8-4(a). While the State apparently thought that was the case, the trial court made no mention of mandatory sentences. Rather, the trial court's oral pronouncement indicates it imposed the sentence pursuant to section 1005-4-8(b).

¶ 13 Even assuming the trial court committed an error and the void sentence rule could still be applied in the instant case, defendant's sentence was not void. See *People v. Castleberry*, 2015 IL 116916, ¶¶ 1, 19 (abolishing the void sentence rule). A judgment is void, as opposed to voidable, only if the court that entered it lacked jurisdiction. *People v. Mescall*, 379 Ill. App. 3d 670, 673 (2008). Jurisdictional failure can result from a court's lack of personal or subject matter jurisdiction or, under the pre-*Castleberry* law, the court's lack of power to render the particular judgment. *Id.* Jurisdiction or the power to render a particular judgment does not necessarily

³ Defendant cites *People v. Patterson*, 217 Ill. 2d 407, 448 (2005), as support for his assertion that the offenses in this case were part of a single course of conduct. *Patterson* addressed the 2002 version of the consecutive sentencing statute, and the defendant there conceded his convictions for murder and concealment of homicidal death were part of a single course of conduct. It is therefore inapplicable to this case.

mean that the judgment rendered must be one that should have been rendered; indeed, the power to decide carries with it the power to decide wrong, as well as correctly, and a court will not lose jurisdiction merely because it makes a mistake in the law, the facts, or both. *People v. Davis*, 156 Ill. 2d 149, 156 (1993). To the extent the trial court committed any error regarding the imposition of consecutive sentences in this case, based on findings as to the course of conduct or necessity of consecutive sentences for public safety, its errors would have rendered the judgment voidable and not void since they involved, at best, mistakes of fact. See *People v. Brown*, 225 Ill. 2d 188, 205 (2007) (where a court imposes an excessive sentence due to mistake of law or fact, the sentence is merely voidable and the error can be waived); *People v. Welch*, 392 Ill. App. 3d 948, 954 (2009) (because the court had jurisdiction, any error the court made in imposing consecutive sentences renders the judgment voidable); see also *Hicks*, 101 Ill. 2d at 375 (requirement that a court shall set forth on the record the basis for its determination as under section 1005-8-4(b) is subject to waiver). Defendant's sentence of 45 years for murder and 5 years for concealment of a homicide, totaling a consecutive term of 50 years, was well within the statutory limits for the offenses. See Ill. Rev. Stat. 1991, ch. 38, par. 1005-8-1(a)(1), (6). Defendant's sentence is not subject to collateral attack 22 years later even under the pre-*Castleberry* legal scheme. See *Thompson*, 2015 IL 118151, ¶ 29. Defendant's untimely section 2-1401(f) petition filed on voidness grounds therefore cannot be sustained. See *Welch*, 392 Ill. App. 3d at 954.

¶ 14

CONCLUSION

¶ 15 Having determined that defendant's sentence was entered in conformance with the statutes, we need not address the parties additional arguments regarding how the abolishment of

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the void sentence rule in *People v. Castleberry* affects the present case. We affirm the decision of the circuit court of Cook County dismissing defendant's section 2-1401 petition.

¶ 16 Affirmed.