

2017 IL App (1st) 142929-U
No. 1-14-2929
September 29, 2017

SECOND DIVISION

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Respondent-Appellee,)	
)	No. 00 CR 16875
v.)	
)	
WILLIE HAMPTON,)	The Honorable
)	Michael B. McHale,
Petitioner-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Postconviction petitioner who alleged that, after a remand for resentencing, his trial and appellate counsel failed to object to an increase in his sentences on four charges, adequately stated the gist of a claim for ineffective assistance of counsel. Postconviction petitioner who alleged that his appellate attorney failed to object on appeal to a sentence for armed robbery when the State first sought the sentence ten years after the trial court found the petitioner guilty of armed robbery and entered no sentence on the charge, adequately stated the gist of a claim for ineffective assistance of counsel.

¶ 2 This case, now in postconviction proceedings, comes before us for a fourth time. In 2002, the trial court found Willie Hampton guilty of aggravated criminal sexual assault

(ACSA) and home invasion and sentenced him to 84 years in prison. Following a series of appeals and remands, the trial court resentenced Hampton in 2012 to 84 years in prison for ACSA, and added a new 25 year sentence for armed robbery, with the armed robbery sentence to run consecutively to the ACSA sentence. This court affirmed the new sentences on the direct appeal. *People v. Hampton*, 2013 IL App (1st) 121783-U. Hampton then filed a postconviction petition, arguing that he received ineffective assistance of counsel at the resentencing hearing and on the subsequent appeal. The trial court dismissed the petition as frivolous. We find that Hampton has stated the gist of claims that he received ineffective assistance of trial counsel at the resentencing hearing, and that he received ineffective assistance of appellate counsel on the subsequent appeal. We reverse the trial court's judgment and remand for further proceedings on the postconviction petition.

¶ 3

BACKGROUND

¶ 4

In July 2000, a grand jury indicted Hampton and Cory Durr for ACSA, home invasion, and armed robbery. Durr pled guilty to some of the charges, while Hampton chose to go to trial. At the trial, Durr refused to testify about the alleged offense, but he admitted that he signed a statement about the offense. The court accepted the signed statement into evidence. In the statement, Durr said that he, Hampton, and a third man invaded the home shared by Y.N. and E.H., and the men brandished a gun and forced Y.N. to perform sexual acts with Hampton and the third man.

¶ 5

The trial court found Hampton guilty and imposed sentences on ten counts of the indictment. Counts numbered 1, 4, 7, and 10 charged Hampton with ACSA, with the home invasion counting as the aggravating factor. The four counts differed only in the kind of act

and the identity of the perpetrator of the act. The court sentenced Hampton to 6 years in prison on each of the four counts, with the sentences to run concurrently. In counts 22, 23, 24, and 25, the State charged the same four acts as ACSA, with the use of a firearm providing the aggravating factor. The court sentenced Hampton to 6 years in prison on each of the four counts, and the court added a 15 year firearm enhancement to each count, making a sentence of 21 years on each of the four counts. The court set the sentences to run consecutively. Counts 29 and 36 stated charges of home invasion, with one count charging invasion of Y.N.'s home, and a second count charging invasion of E.H.'s home. The court imposed concurrent sentences of 21 years on the two counts. The court found that Hampton committed armed robbery as charged in count 37 of the indictment, but the court imposed no sentence on that charge.

¶ 6 Thus, the sentences on all the charges together amounted to 84 years, based on the four consecutive sentences imposed for ACSA with a firearm. All other sentences ran concurrently with those four sentences.

¶ 7 On the direct appeal, the appellate court vacated the convictions and sentences and remanded for a hearing concerning the admissibility of Durr's out-of-court statement. *People v. Hampton*, 363 Ill. App. 3d 293 (2006). The court also addressed some sentencing issues Hampton raised. The State raised no issue concerning the lack of a sentence on count 37. The Illinois Supreme Court vacated the appellate court opinion insofar as the appellate court addressed sentencing issues, but left undisturbed the remand for a hearing on the admissibility of Durr's statement. *People v. Hampton*, 225 Ill. 2d 238, 246 (2007). Again, the State made no mention of the lack of a sentence on count 37.

¶ 8 The trial court on remand found that Hampton forfeited his challenge to the admissibility of Durr's statement. In December 2008, the trial court reinstated all of Hampton's original convictions and sentences, totaling 84 years in prison. Again, the State made no argument about the lack of a sentence on the armed robbery count.

¶ 9 Hampton again appealed. The appellate court affirmed the ruling regarding the admissibility of Durr's statement, but held unconstitutional the 15-year firearm enhancements to the sentences on counts 22, 23, 24, and 25, all for ACSA. The appellate court also noted that the one-act, one-crime doctrine required the trial court to vacate one of the two home invasion counts and four of the eight ACSA counts. *People v. Hampton*, 406 Ill. App. 3d 925 (2010). The appellate court reversed the sentences on the four counts of ACSA with a firearm, and remanded with directions that the trial court must vacate four of the eight ACSA convictions and one of the home invasion convictions, and resentence Hampton on the home invasion count and the four counts of ACSA that the trial court chose not to vacate. The appellate court did not itself vacate any of the convictions. The State again raised no issue concerning the lack of a sentence on count 37.

¶ 10 In November 2011, Hampton mailed to the court a document he labeled a postconviction petition. The trial court dismissed the petition.

¶ 11 On remand, with the consent of the State and Hampton, the trial court vacated the four convictions for ACSA with a firearm, counts 22, 23, 24, and 25. The court imposed sentences of 21 years on each the four convictions for ACSA based on home invasion, counts 1, 4, 7, and 10, and made the sentences run consecutively. The trial court chose to vacate the conviction on count 36 for home invasion, and resented Hampton to 21 years on count 29,

which the court set to run consecutively to the sentences for ACSA based on home invasion. The prosecution and the court made no mention of Hampton's postconviction conduct as justification for the new sentences.

¶ 12 The State pointed out that the trial court had found Hampton guilty of armed robbery, but had never imposed a sentence on that count. The court decided to sentence Hampton to 25 years on count 37, for armed robbery, with the sentence to run consecutively to the four ACSA sentences but concurrently with the sentence for home invasion. The new sentences, entered on June 1, 2012, totaled 109 years: 84 years for ACSA, plus 25 years for armed robbery.

¶ 13 Hampton again appealed. His attorney argued that (1) the appellate court had vacated the convictions on counts 1, 4, 7, and 10, and therefore the trial court erred when it sentenced Hampton on those counts instead of counts 22, 23, 24, and 25; (2) "the court erred in sentencing Hampton to 21 years for each count of aggravated criminal sexual assault where he was previously sentenced to 21 years for the same offenses but under a sentencing range that included an additional [unconstitutional] 15-year enhancement;" and (3) the 25-year sentence for armed robbery included an unconstitutional firearm enhancement. The appellate court rejected all of defense counsel's arguments and affirmed the convictions and sentences. *People v. Hampton*, 2013 IL App (1st) 121783-U.

¶ 14 In May 2014, Hampton, pro se, filed a postconviction petition, arguing that he received ineffective assistance of trial and appellate counsel. Hampton said that "just like in *People v. Moore*, 686 N.E.2d 587[, 177 Ill. 2d 421 (1997),] the issue regarding Petitioner's sentence being unconstitutionally increased *** was not correctly raised on direct appeal due to the

ineffective assistance of Appellate Counsel." Hampton said that, contrary to the arguments his counsel raised, in *Hampton*, 406 Ill. App. 3d 925, the appellate court "chose to give the Lower Court the d[iscre]tion to cho[o]se which 4 ACSA out of the 8 count[s] to retain on remand," and "[b]ecause the trial court on remand chose to retain count[s] 1, 4, 7, and 10, the trial court, according to the Appellate Court's mandate in *Hampton II*, 406 Ill. App. 3d 925, had no authority to impose a more severe[] and greater sentence *** than originally imposed on count[s] 1, 4, 7, and 10 ***. And there can be no other explanation other than vindictiveness, especially in light that the trial court 'res[ur]rected' count 37 Armed Robbery and leveled a 25 year sentence on" that count. Hampton added:

"[T]he Appellate Court's mandate in *Hampton II*, supra, was clear, p[re]cise and to the point in it[s] instructions to the trial court giving the lower court a limited jurisdiction *** to reflect 4 count[s] of ACSA[] and 1 count of home invasion.

Due to the deficiency of both trial counsel and Appellate Counsel, this precept was lost upon both the trial court and the Appellate Court causing prejudice to Petitioner."

¶ 15 The trial court dismissed the petition as frivolous and patently without merit. Hampton now appeals.

¶ 16 ANALYSIS

¶ 17 Although Hampton filed a document labeled a postconviction petition before he filed the petition at issue in this appeal, the petition he filed in May 2014 is the only postconviction petition he has filed since the resentencing in June 2012. Therefore, the 2014 petition

qualifies as Hampton's first postconviction petition, which he has a statutory right to file. See *People v. Jenkins*, 2016 IL App (1st) 133286 ¶ 22; 725 ILCS 5/122-1(a), (f) (West 2012).

¶ 18 We apply familiar standards to assess the judgment dismissing the postconviction petition at the first stage of postconviction proceedings.

"To prevail on a claim of ineffective assistance *** a defendant must show both that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense. [Citation.] At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 19 The State argues that res judicata bars all of Hampton's arguments, because Hampton could have raised them in a timely petition for rehearing of the direct appeal following the 2012 resentencing. The State points out that Hampton's appellate counsel attempted to raise these issues in a petition for rehearing, but this court did not address any of the arguments because counsel filed the petition after this court had lost jurisdiction due to the passage of time. See Ill. S. Ct. R. 367(a) (eff. July 1, 2017); *People v. Ross*, 229 Ill. 2d 255, 265 (2008). Res judicata does not bar the claim that ineffective assistance of appellate counsel led to the failure to raise these issues in a timely manner. See *People v. Harris*, 206 Ill. 2d 1, 13 (2002). By raising the issues in the untimely petition for rehearing, appellate counsel

persuasively showed that no strategy led counsel to decide not to raise the issues Hampton later presented in his postconviction petition.

¶ 20 The State argues that the court properly rejected the argument based on *Moore* as futile. A trial court found Moore guilty on two counts of ACSA and sentenced him to consecutive terms of 12 years and 18 years. Following a successful appeal and resentencing after the remand, the trial court sentenced Moore to 30 years on each count, with the sentences to run concurrently. *Moore*, 177 Ill. 2d at 424. Moore appealed and his appellate counsel raised only one issue: whether the sentencing order correctly reflected all of the time Moore served. Moore later filed a postconviction petition, arguing that appellate counsel provided ineffective assistance by failing to argue that the increase in the sentence on one count from 12 years to 30 years, and on the other count from 18 years to 30 years, violated section 5-5-4 of the Unified Code of Corrections. 730 ILCS 5/5-5-4 (West 1994).

¶ 21 The *Moore* court held:

"[A] harsher sentence imposed after a successful appeal or motion to reconsider is only proper if it is based on additional bad conduct performed by the defendant after the original sentencing. This was not the scenario in *** the case at bar, because there was no additional conduct which a trial judge could use to justify an increased sentence. ***

* * *

*** [A]lthough the total number of years for all the sentences may remain the same for a defendant, increasing the number of years which a defendant must

serve for a specific offense is considered an improper increase in violation of ***
[section] 5-5-4.

Since we find defendant's contention that his sentences were improperly increased on remand to be meritorious, we must conclude that his appellate counsel's failure to raise this issue on direct appeal resulted in prejudice to defendant. Clearly, the second prong of *Strickland* was satisfied by defendant in this case. We further find that defendant met the first prong of *Strickland*, by proving that appellate counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). *** It was unreasonable for appellate counsel to fail to raise this meritorious issue on direct appeal. We find that defendant's claim of improper resentencing was not raised on direct appeal due to ineffective assistance of appellate counsel." *Moore*, 177 Ill. 2d at 433-37.

¶ 22 The State contends that *Moore* does not require reversal, because the sentences imposed on Hampton were void, and the proscription in section 5-5-4 "does not apply to void sentences." In support, the State relies on the following passage from *People v. Hauschild*, 226 Ill. 2d 63 (2007):

"A sentence is void if it fails to conform to statutory requirements. *People v. Arna*, 168 Ill. 2d 107, 113 (1995). Here, although at the time of defendant's sentencing [two Illinois Supreme Court decisions] had rendered the 15-year enhanced penalties for his armed robbery and attempted murder convictions

unconstitutional, we find that the overruling of those cases during the pendency of defendant's appeal has made the nonenhanced sentences imposed by the trial court statutorily nonconforming and thus void. See *** *People v. Garcia*, 179 Ill. 2d 55, 73 (1997) (trial court's imposition of concurrent sentences in certain instances where consecutive sentences were mandated rendered defendants' sentences void). Thus, contrary to defendant's contention in this court, but in accord with his argument adopted by the appellate court, we believe the proper remedy in this instance is to remand the cause to the trial court for a new sentencing hearing. [Citation], citing *Arna*, 168 Ill. 2d at 112-13 (it was within appellate court's authority to remand cause to trial court for determination of appropriate sentences to be imposed consecutively where imposition of concurrent sentences did not conform to statutory requirement and was void). This procedure will provide the trial court an opportunity to determine, within the statutory sentencing range, the length of the sentence for each offense while considering defendant's sentence in its totality. *People ex rel. Waller v. McKoski*, 195 Ill. 2d 393, 401-02 (2001) (where trial court's judgment vacated as void and remanded for resentencing with sentences to run consecutively, '[i]t remains within the discretion of the circuit court to determine, within the permissible statutory sentencing range [citations], the length of each sentence to be imposed') *** Accordingly, we hold that defendant's 18-year sentence for attempted murder while armed with a firearm must be vacated and the cause remanded to the trial court." *People v. Hauschild*, 226 Ill. 2d 63, 80-81 (2007).

¶ 23 The *Hauschild* court's reasoning relies heavily on *Arna* and its holding that a sentence that does not fully comply with the sentencing statute is void. Our supreme court overruled *Arna* and the void sentencing rule in *People v. Castleberry*, 2015 IL 116916 ¶¶ 17-20. *Hauschild* may no longer state valid law concerning the trial court's authority with respect to void sentences and resentencing. The *Castleberry* court clarified that sentences imposed in violation of statutory or constitutional restrictions remain valid and not void. *Castleberry*, 2015 IL 116916, ¶¶ 17-26. We must reject the central premise of the State's argument. After the trial court imposed the 6 year sentences on counts 1, 4, 7, and 10 in 2008, no court vacated those sentences until the trial court increased all those sentences to 21 years on each of the four counts, at the resentencing in 2012. The postconviction petition states the gist of a claim that counsel unreasonably failed to raise the issue that the increased sentences on counts 1, 4, 7, and 10 violated section 5-5-4 of the Unified Code of Corrections (730 ILCS 5/5-5-4 (West 2012)). We also find a reasonable likelihood that Hampton would have achieved a better result if appellate counsel had compared the new sentences on counts 1, 4, 7, and 10 to the original sentences on those counts, instead of comparing the new sentences on those counts to the original sentences on counts 22, 23, 24, and 25, and referring to the new sentences as imposed "for the same offenses" as the original 21-year sentences. See *Moore*, 177 Ill. 2d 437.

¶ 24 We recognize that our supreme court may reconcile *Hauschild* with *Castleberry*, in a manner that gives the trial court authority to increase a sentence following remand, even if the defendant's conduct after the conviction does not justify the increase. In case the supreme court disagrees with our resolution of Hampton's first issue, we address Hampton's second

claim: trial and appellate counsel provided ineffective assistance by failing to object to the State's far belated request for a sentence on count 37, for armed robbery.

¶ 25 The State asserts first that Hampton failed to raise this issue in his pro se postconviction petition. Hampton said, "there can be no other explanation other than vindictiveness, especially in light that the trial court 'res[ur]rected' count 37 Armed Robbery and leveled a 25 year sentence on" that count. He added, "[T]he Appellate Court's mandate in *Hampton II*, supra, was clear, p[re]cise and to the point in it[s] instructions to the trial court giving the lower court a limited jurisdiction *** to reflect 4 count[s] of ACSA[] and 1 count of home invasion," and "[d]ue to the deficiency of both trial counsel and Appellate Counsel, this precept was lost."

¶ 26 Applying the directive that we must construe the petition liberally (see *People v. Hommerson*, 2014 IL 115638 ¶ 7), we find that the petition's allegations, reformulated into lawyer's language, sufficiently states the gist of a claim that Hampton's attorneys in the trial court and the appellate court provided ineffective assistance when they failed to argue that the appellate court's mandate limited the trial court's jurisdiction, and did not permit sentencing on count 37. We also find the reference to resurrection of count 37 sufficient to state a claim that his trial and appellate counsel provided ineffective assistance by failing to argue that the State had waived the issue of whether the trial court should have sentenced Hampton on count 37. And the petition sufficiently includes a claim that appellate counsel provided ineffective assistance by failing to argue trial counsel's failings as grounds for finding that trial counsel provided ineffective assistance. We find that counsel arguably provided objectively unreasonable assistance by failing to object to the State's argument, first

raised ten years after the court found Hampton guilty of armed robbery and chose not to impose sentence on that count, that the trial court should impose a sentence for armed robbery.

¶ 27 Hampton must also show that, arguably, he would have achieved a better result on appeal if trial and appellate counsel had not erred. *People v. Baker*, 85 Ill. App. 3d 661, 663 (1980), supports Hampton's argument that the trial court had no authority to sentence him for armed robbery, because the appellate court mandate limited the court's power.

¶ 28 The persuasive reasoning of *People ex rel. Harty v. Fay*, 179 N.E.2d 483 (N.Y. 1961), supports the assertion that the State waited too long to raise the issue of sentencing Hampton for armed robbery. In *Fay*, Harty pled guilty to a charge of robbery in 1953, but before the sentencing on that charge could take place, a court in a different county sentenced him to an indefinite term for a different robbery. Harty served his time and got out of prison. Police arrested Harty again in 1958 and discovered the 1953 guilty plea with no sentence imposed. In 1959, the trial court sentenced Harty based on the 1953 guilty plea. Harty appealed. The *Fay* court said:

"This State has a strong policy against unreasonable delays in criminal causes and it has been enforced to the full (citation). No reason appears why it should not be enforced here. Sentencing is the entry of judgment in a criminal cause. It is a part of the judicial process and, as explained in the above-cited cases from other jurisdictions, it is in the absence of compelling reasons inconsistent and disorderly to defer that part of the process. We need not stop to inquire what factors justify long delays in sentencing because we find here nothing that the law would accept

as a reason. Not only orderly administration of the courts and the public interest therein demand prompt disposition of these matters but a convicted defendant also has an enforceable interest in having judgment pronounced. Until such pronouncement he cannot be eligible for pardon or commutation of sentence, and deferment of imprisonment puts off the time when he can serve his term and return to society or can be eligible for parole. *** Lack of a judgment prevents an appeal. For all these reasons we think the better rule is that a long and unnecessary failure to sentence is not only an error but results in lack of jurisdiction. If sentencing can be delayed 6 years without failure of jurisdiction, it can be delayed forever." *Fay*, 179 N.E.2d at 485.

¶ 29 Our supreme court said, more succinctly, "It is also well established by the decisions of this court tha[t] an undue delay between the entry of judgment and the execution of the sentence deprives the sentencing court of jurisdiction." *People ex rel. Rudin v. Ruddell*, 46 Ill. 2d 248, 249 (1970); see *People v. Williams*, 309 Ill. App. 3d 1022, 1024-26 (2000).

¶ 30 Here, the court found Hampton guilty of armed robbery in 2002. From 2002 until 2012, the State never mentioned the absence of a sentence on the armed robbery count. We find a reasonable probability that this court would have reached a different result on appeal from the 2012 sentencing if appellate counsel had argued that the State waived sentencing on the armed robbery count, or that the trial court lost jurisdiction to impose sentence on that count, and that trial counsel provided ineffective assistance by failing to object to the decision to sentence Hampton for armed robbery.

¶ 31 Finally, Hampton asks us to vacate the sentence for home invasion, because his convictions for ACSA based on home invasion, the convictions on counts 1, 4, 7, and 10, include home invasion as a lesser included offense. We encourage appointed counsel to raise the issue on remand.

¶ 32 CONCLUSION

¶ 33 Hampton asserted facts that state the gist of a claim that he received ineffective assistance of trial and appellate counsel, both when counsels failed to object to the increase in the sentences on counts 1, 4, 7, and 10, and when counsels failed to object to the extremely belated imposition of sentence on count 37, without any authorization in the appellate court mandate for such action. We reverse the trial court's judgment and remand to advance the postconviction petition to the second stage of postconviction proceedings.

¶ 34 Reversed and remanded.