

No. 1-12-0908

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 4982
	)	
TYRONE GABB,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where defendant raises, for the first time on appeal, the issue of whether his consecutive sentences are void and argues that this court incorrectly decided the issue when presented with the identical argument in a prior appeal, the doctrines of forfeiture and *res judicata* preclude reconsideration of the issue, when defendant merely identifies a factual finding with which he disagrees rather than a claim of lack of jurisdiction or statutory authority.

¶ 2 Defendant Tyrone Gabb appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (735 ILCS 5/122-1 *et seq.* (West 2010)). On

appeal, defendant has abandoned the claims raised in his petition and contends solely that his consecutive sentences are void. We affirm.

¶ 3 Following a bench trial, defendant was found guilty of the attempted armed robbery and first degree murder of his drug supplier, Reginald Flowers. He was also found guilty of the armed robberies of Marlon Alfred and Serena Turner. Defendant was sentenced to consecutive terms of 4 years for attempted armed robbery, 24 years for murder, and 6 years for each armed robbery, resulting in a total of 40 years' imprisonment. Defendant appealed, and this court affirmed. See *People v. Gabb*, No. 1-05-0716 (2007) (unpublished order under Supreme Court Rule 23). However, pursuant to a supervisory order from our supreme court, the matter was remanded for a new sentencing hearing "including articulation on the record of the basis for imposing any consecutive sentences, if so ordered upon the conclusion of the new hearing." *People v. Gabb*, No. 104510 (Sept. 26, 2007).

¶ 4 On remand, the trial court again sentenced defendant to consecutive sentences totaling 40 years. The trial court reasoned that (1) defendant was a danger to the community and (2) there was a change in the nature of the criminal objective. This court affirmed the imposition of the consecutive sentences. *People v. Gabb*, No. 1-09-1139 (2011) (unpublished order under Supreme Court Rule 23).

¶ 5 Defendant subsequently filed a postconviction petition, which the trial court summarily dismissed. The petition raised three claims, none of which are raised in this appeal. Instead, counsel asserts that the imposition of consecutive sentences for the armed robbery convictions was improper. Counsel acknowledges that the issue raised was not contained in defendant's *pro se* petition and that ordinarily our previous Rule 23 order affirming the sentences would be *res judicata*. However, counsel argues that no procedural bars prevent us from addressing the issue

because the consecutive sentences are void. The State responds that the issue was forfeited because defendant failed to include it in his postconviction petition and further argues that is barred by the doctrine of *res judicata*. We agree with the State that the issue has been forfeited and is barred by the doctrine of *res judicata*, and we reject defendant's contention that his sentences are void.

¶ 6 The facts of this case are extensively set out in our prior order. See *Gabb*, No. 1-09-1139. Briefly stated, defendant and his co-assailant robbed three people in an apartment, Reginald Flowers, Marlon Alfred, and Serena Turner. A struggle ensued during the robbery and Flowers was killed.

¶ 7 On remand from the supreme court supervisory order, the trial court held a new sentencing hearing and again imposed consecutive sentences. This court affirmed, reasoning:

"Here, the court found the motivation to commit the attempted armed robbery and eventual murder of Flowers was independent of the motivation to commit the armed robberies of Alfred and Turner. The trial court specifically noted that there was 'a change in the course of direction of the offense from the initial target of Reginald Flowers, who was going to be the original victim of armed robbery \*\*\* to [the] armed robbery of Alford and Turner who just happened to be there.' The record supports this finding. It shows that both defendant, who sold drugs for Flowers, and co-assailant armed themselves before entering Flowers' apartment with the intent to rob Flowers. Defendant immediately proceeded to the living room, where Flowers was located, and asked him for drugs. Only after Flowers denied having any did defendant and co-assailant brandish their guns and order the victims to the floor. Defendant

clarified that Flowers was the intended target of the armed robbery even as he searched and took money from Alfred and Turner. Defendant then continued to search the kitchen. Clearly, the overarching criminal objective was to rob Flowers of his drugs, and upon discovering there were none, the criminal objective changed to robbing all three victims of their money. See *People v. Radford*, 359 Ill. App. 3d 411, 421 (2005); *People v. Hummel*, 352 Ill. App. 3d 269, 273 (2004); *People v. Tigner*, 194 Ill. App. 3d 600, 610 (1990). We therefore find the court's determination that Alfred and Turner were simply 'in the wrong place at the wrong time' reasonable.

The attempted armed robbery and murder of Flowers was not committed within the same course of conduct as the armed robberies of Alfred and Turner. Concurrent sentences were not required. Under section 5-8-4(b), the court then had the discretion to impose consecutive sentences upon finding them necessary 'to protect the public from further criminal conduct by the defendant.' See 730 ILCS 5/5-8-4(b) (West 1998). Its decision is entitled to great deference. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995)." *Gabb*, No. 1-09-1139, order at 8-9.

¶ 8 On appeal, defendant has abandoned the allegations of error contained in his postconviction petition and has elected instead to argue, once again, that the trial court erred when it imposed consecutive sentences for defendant's armed robbery convictions. The State raises two procedural bars to a reconsideration of the merits of defendant's claim of a sentencing error, forfeiture and *res judicata*. Defendant, in anticipation of the State's response, argues that neither forfeiture nor *res judicata* bars his claim because both the trial court and this court decided the issue incorrectly and the consecutive sentences are in fact void.

¶ 9 The State first argues that defendant forfeited his argument by failing to include it in his postconviction petition. Our supreme court has clearly held that any issue to be reviewed must be included in a defendant's postconviction petition, that a defendant may not raise an issue for the first time on appeal, and that a defendant's only remedy if he fails to raise an issue is to file a successive postconviction petition. *People v. Jones*, 211 Ill. 2d 140, 148 (2004). Defendant concedes that he failed to raise the issue of consecutive sentences in his postconviction petition but argues that "there is no forfeiture problem" because his sentences are void.

¶ 10 Our supreme court has held "The preclusion doctrines of *res judicata*, collateral estoppel, and law of the case prevent a defendant from 'taking two bites out of the same appellate apple.'" *People v. Tenner*, 206 Ill. 2d 381, 395 (2002), quoting *People v. Partee*, 125 Ill. 2d 24, 37 (1988). Defendant concedes that he raised the identical issue in his prior appeal, but argues that *res judicata* does not bar his claim because his consecutive sentences are void and it would be fundamentally unfair to allow them to go uncorrected.

¶ 11 Defendant is correct that "[b]ecause a party may attack a void sentence literally 'at any time, either directly or collaterally' [citation], *res judicata* or the doctrine of waiver would not prevent a party from doing so [citation]." *People v. Harper*, 345 Ill. App. 3d 276, 285 (2003), quoting *People v. Wade*, 116 Ill. 2d 1, 5-6 (1987). However, defendant's arguments reflect a fundamental misunderstanding of what constitutes a void sentence.

¶ 12 Whether a judgment is void is a legal question that we review *de novo*. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 41. "A judgment is void, as opposed to voidable, only where the trial court lacked jurisdiction or exceeded its statutory authority to act." *Id.*, citing *People v. Smith*, 406 Ill. App. 3d 879, 887 (2010). Here, there is no question raised regarding the trial court's jurisdiction; rather, defendant argues that because the crimes were not part of a

separate course of conduct the trial court lacked the statutory authority to impose consecutive sentences.

¶ 13 Defendant was sentenced under the version of section 5-8-4 of the Unified Code of Corrections that was in effect at the time of his 1999 offense, which provided:

"(a) \*\*\*. The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, \*\*\* in which event the court shall enter sentences to run consecutively. Sentences shall run concurrently unless otherwise specified by the court.

(b) 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; except that no such finding or opinion is required when multiple sentences of imprisonment are imposed on a defendant for offenses that were not committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, and one of the offenses for which the defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury \*\*\*, in which event the Court shall enter sentences to run consecutively." 730 ILCS 5/5-8-4 (West 1998).

¶ 14 In our prior order, we held that this section of the Code authorized the trial court to impose consecutive sentences when two conditions were met: (1) the trial court made a factual finding that the acts were "independently motivated"; and (2) the trial court, in the exercise of its discretion determined that consecutive sentences were necessary to protect the public. *Gabb*, No. 1-09-1139, order at 8-9. Defendant argues that the first requirement was not met because the criminal acts were part of a single course of conduct and that accordingly the trial court's imposition of consecutive sentences is void.

¶ 15 Defendant's argument incorrectly equates that lack of statutory authority with an allegedly erroneous factual finding. The *authority* to impose consecutive sentences has never been seriously challenged in this case, either now or during the prior appeal. The trial court quite clearly had the authority to impose consecutive sentences *if* it made the required factual finding that the crimes alleged were not part of a continuous course of conduct. "[J]urisdiction or power to render a particular judgment does not mean that the judgment rendered must be the one that should have been rendered, for the power to decide carries with it the power to decide wrong as well as to decide right." *People v. Davis*, 156 Ill. 2d 149, 156 (1993), citing *People v. Kidd* 398 Ill. 405, 409 (1947). We find that, without regard to the propriety of its factual finding, once the trial court found that the crimes were not part of the same course of conduct, it had the discretion to impose consecutive sentences. Therefore, the judgment of the circuit court is not void, and there is no basis for relaxing the procedural bars of forfeiture and *res judicata*.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 17 Affirmed.