

NOTICE
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2014 IL App (5th) 130321-U

NO. 5-13-0321

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Edwards County.
)	
v.)	No. 05-CF-17
)	
TONY MORRISON,)	Honorable
)	David K. Frankland,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Welch and Justice Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* The order dismissing the defendant's section 2-1401 petition for relief from judgment is affirmed, but this cause is remanded to the circuit court for issuance of an amended judgment of sentence reflecting the imposition of two statutorily required fines.

¶ 2 The defendant, Tony Morrison, appeals from the circuit court's order dismissing his *pro se* petition for relief from judgment in a criminal case. In his petition, the defendant claimed that the plea agreement and the sentence in his criminal case were void because they did not include two fines that were statutorily required. Although the defendant is correct in stating that the two fines were statutorily required, he is wrong in concluding that their absence rendered the plea agreement and the sentence void in their

entireties. The plea agreement and the sentence are void only to the extent that they do not include the required fines. This problem can be solved, without disturbing any of the essential terms of the plea agreement, by simply modifying the defendant's sentence so as to include the required fines. This cause is remanded to the circuit court for that purpose.

¶ 3

BACKGROUND

¶ 4 In May 2005, the defendant, Tony Morrison, was charged with four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)), and four counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2004)). Each of the four counts of predatory criminal sexual assault of a child appears to have involved a different child-complainant, *viz.*: T.R.M. in count I, S.R.M. in count II, S.M.M. in count III, and T.M. in count IV. The four counts of aggravated criminal sexual abuse, counts V through VIII, may have involved some of these same children, though the record is not entirely clear on this point. Count VIII appears to have involved a unique victim, J.M. All eight counts alleged a continuous course of action during a period of years.

¶ 5 On June 24, 2005, the State's Attorney, the defendant, and the defendant's appointed attorney appeared before the circuit court. Pursuant to an agreement between the parties, the defendant pleaded guilty to an amended count I, which charged that on or about December 31, 2000, he committed predatory criminal sexual assault of a child, T.R.M. The court sentenced the defendant to imprisonment for 30 years, with credit for 47 days of presentencing incarceration, plus 3 years of mandatory supervised release (MSR). The seven other counts against the defendant were dismissed. The record on

appeal does not include a transcript of the plea hearing, but the terms of the agreement are evident from the docket sheets and the written judgment. The prison sentence and the MSR term were the only punishments imposed; there was no mention of any fine. The defendant did not file any postplea motions, and he did not appeal from the judgment of conviction.

¶ 6 In May 2007, the defendant filed *pro se* a petition for postconviction relief, wherein he claimed that plea counsel provided constitutionally ineffective assistance in that counsel (1) lacked sufficient time to examine the evidence in the defendant's case, and (2) told the defendant that he would rather defend someone charged with murder than someone charged with the defendant's crimes, which caused the defendant to believe that he could not win his case, which led the defendant to accept a plea offer even though he would have insisted on a trial under any other circumstances. In September 2007, the defendant filed by appointed counsel an amended postconviction petition. The amended petition presented several claims of ineffective assistance of plea counsel, a claim that the defendant's guilty plea was involuntary due to stress and depression, and a claim that the defendant was not given an opportunity to waive or request a presentence investigation report prior to being sentenced. In November 2007, the State filed an answer to the amended petition. In January 2008, the circuit court denied the postconviction petition. The defendant did not appeal from the order denying his postconviction petition.

¶ 7 On May 20, 2013, the defendant filed *pro se* a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). He claimed that the judgment of conviction in his case, entered eight years earlier, was

void. His reasoning was as follows: in his case, Illinois statutes required imposition of a sexual assault fine (730 ILCS 5/5-9-1.7 (West 2000)) and a Violent Crime Victims Assistance Fund fine (725 ILCS 240/10 (West 2000)); the circuit court neither admonished him about nor imposed either of these two required fines; therefore, the plea agreement and the sentence were void.

¶ 8 On May 30, 2013, the State filed a motion to dismiss the section 2-1401 petition on the grounds that (1) the defendant did not set forth specific factual allegations supporting the existence of a meritorious defense or claim, (2) the defendant was seeking the correction of alleged errors of law, while the only proper subject of a section 2-1401 petition in a criminal case is errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented the judgment's entry, and (3) the petition was filed beyond the two-year limitation period.

¶ 9 On June 21, 2013, the State and the defendant *pro se* appeared before the circuit court and argued for or against the motion to dismiss the section 2-1401 petition. The defendant, during his argument, stated that he decided to accept the State's plea offer only after his attorney assured him that the sentence would not include any fine; he seemed to intimate that he would have rejected the plea offer if it had included a fine. The court granted the State's motion to dismiss the section 2-1401 petition. The defendant filed a timely notice of appeal from the dismissal order, thereby perfecting the instant appeal.

¶ 11 The defendant is appealing from the circuit court's order dismissing his section 2-1401 petition for relief from judgment. On appeal, the dismissal of a section 2-1401 petition is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 12 Section 2-1401 of the Code of Civil Procedure allows a litigant, upon filing a petition, to seek the vacation or modification of a final order or judgment even though more than 30 days have passed since the entry thereof. 735 ILCS 5/2-1401 (West 2012). The remedy allowed by section 2-1401 is generally characterized as a civil remedy, but it extends to criminal cases. *Vincent*, 226 Ill. 2d at 8. Ordinarily, a section 2-1401 petition must be filed within two years after the entry of the order or judgment. 735 ILCS 5/2-1401(c) (West 2012). Ordinarily, to obtain relief under section 2-1401, a litigant "must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986).

¶ 13 However, when the section 2-1401 petition alleges that the order or judgment is void, different rules apply. Section 2-1401(f) explicitly allows for a petition attacking an order or judgment as void. 735 ILCS 5/2-1401(f) (West 2012); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104-05 (2002) (a petition under section 2-1401(f) is the proper method of collaterally attacking a void judgment.). "Petitions brought on voidness grounds need not be brought within the two-year time limitation. Further, the

allegation that the judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." *Sarkissian*, 201 Ill. 2d at 104.

¶ 14 Here, the defendant's section 2-1401 petition was brought on voidness grounds. The petition was filed for the purpose of seeking to vacate an allegedly void judgment, and the petition must be categorized as a section 2-1401(f) motion. Therefore, the defendant did not need to allege a meritorious defense to the charges against him, or due diligence, and the two-year limitation did not apply.

¶ 15 The defendant averred that under Illinois statutes, his sentence was required to include a sexual assault fine and a Violent Crime Victims Assistance Fund fine. On this point, he is correct. The defendant pleaded guilty to one count of predatory criminal sexual assault of a child. Under section 5-9-1.7(b)(1) of the Unified Code of Corrections, whenever a person is convicted of any "sexual assault," a fine of \$100 must be imposed upon that person, in addition to any other penalty imposed. 730 ILCS 5/5-9-1.7(b)(1) (West 2000). Sexual assault, in this context, includes the commission of predatory criminal sexual assault of a child. 730 ILCS 5/5-9-1.7(a)(1) (West 2000). Therefore, a sentence for predatory criminal sexual assault of a child that does not include a \$100 sexual assault fine is contrary to statute. Here, the circuit court failed to impose the \$100 sexual assault fine upon the defendant. Furthermore, under section 10(b) of the Violent Crime Victims Assistance Act, which is section 10(b) of the Code of Criminal Procedure of 1963, "each defendant upon conviction of any felony" must pay "an additional penalty of \$4 for each \$40, or fraction thereof, of fine imposed," with the money to be deposited into the Violent Crime Victims Assistance Fund. 725 ILCS 240/10(b) (West 2000).

Therefore, a sentence for any felony that does not include an "additional penalty" (or, a Violent Crime Victims Assistance Fund fine) of \$4 for each \$40, or fraction thereof, of fine imposed is contrary to statute. In the defendant's case, as explained above, a \$100 sexual assault fine should have been imposed. Therefore, an additional penalty of \$12 also should have been imposed. The circuit court failed to impose the additional penalty.

¶ 16 It is undeniable that "[a] sentence which does not conform to a statutory requirement is void." *People v. Arna*, 168 Ill. 2d 107, 113 (1995). Here, though, the defendant goes astray in concluding that the absence of the two statutorily required fines from his sentence renders his plea agreement and his sentence void in their entirety.

¶ 17 Plea agreements oftentimes are compared to enforceable contracts, and Illinois courts have applied contract law principles in appropriate circumstances. *People v. Donelson*, 2013 IL 113603, ¶ 18. Section 184 of the Restatement (Second) of Contracts states that when some portion of an agreement is unenforceable as against public policy, "a court may nevertheless enforce the rest of the agreement in favor of a party who did not engage in serious misconduct if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange." Restatement (Second) of Contracts § 184(1), at 30 (1981). The court may take this approach even when some degree of inequality results. Restatement (Second) of Contracts § 184(1), cmt *a* (1981). However, "[i]f the performance as to which the agreement is unenforceable is an essential part of the agreed exchange, the inequality will be so great as to make the entire agreement unenforceable." Restatement (Second) of Contracts § 184(1), cmt *a*, at 30 (1981). "Whether the performance is an essential part of the agreed exchange depends on

its relative importance in the light of the entire agreement between the parties." Restatement (Second) of Contracts § 184(1), cmt *a*, at 30 (1981). "The rationale for this rule is obvious; complex, multipart agreements on which there may have been significant reliance should not be void as a whole solely because some small part is against public policy." *People v. McNett*, 361 Ill. App. 3d 444, 448 (2005). "Similarly, in a criminal law context, the need to make a minor correction in a sentence should not be the undoing of what was otherwise a sound plea agreement." *Id.*

¶ 18 With these contract law principles in mind, the question here becomes whether the absence of the two statutorily required fines amounts to an essential part of the parties' plea agreement. In the light of the entire agreement, this question must be answered in the negative.

¶ 19 The defendant pleaded guilty to a single count of predatory criminal sexual assault of a child, in exchange for the State's recommendation of a 30-year prison sentence and the dismissal of three other counts of predatory criminal sexual assault of a child and four counts of aggravated criminal sexual abuse. Predatory criminal sexual assault of a child was a Class X felony (720 ILCS 5/12-14.1(b)(1) (West 2000)) punishable by imprisonment for a nonextended term of 6 to 30 years (730 ILCS 5/5-8-1(a)(3) (West 2000)). Aggravated criminal sexual abuse was a Class 2 felony (720 ILCS 5/12-16(g) (West 2000)) punishable by imprisonment for a nonextended term of three to seven years (730 ILCS 5/5-8-1(a)(5) (West 2000)). In addition, each of these eight felony counts was punishable by a fine of up to \$25,000. See 730 ILCS 5/5-9-1(a)(1) (West 2000). Multiple sentences of imprisonment that included a sentence for predatory criminal

sexual assault of a child required consecutive sentencing. 730 ILCS 5/5-8-4(a)(ii) (West 2000). Furthermore, each of the four counts of predatory criminal sexual assault of a child appears to have involved a different child-complainant, viz.: T.R.M., S.R.M., S.M.M., and T.M., in counts I, II, III, and IV, respectively. A term of natural life imprisonment was mandated for any person convicted of predatory criminal sexual assault of a child committed against two or more persons. 720 ILCS 5/12-14.1(b)(1.2) (West 2004). By pleading guilty to a single count of predatory criminal sexual assault of a child, and being sentenced to 30 years of imprisonment, in exchange for the dismissal of all seven of the other counts, the defendant dramatically reduced the possible punishments he faced. The essential terms of the parties' plea agreement were the plea of guilty to the one count, the prison sentence, and the dismissal of the seven other felony counts. Compared to those terms, the two statutorily required fines are of very little moment, from any practical perspective.

¶ 20 The pertinent facts in the instant case are reminiscent of those in *People v. Montiel*, 365 Ill. App. 3d 601 (2006), and the approach taken by the appellate court in *Montiel* should be taken here. Defendant Montiel, pursuant to a fully negotiated plea agreement with the State, pleaded guilty to unlawful delivery of 1 to 15 grams of cocaine (720 ILCS 570/401(c)(2) (West 2002)), a Class 1 felony, and was sentenced to imprisonment for four years, while a Class X felony was dismissed. *Id.* at 603-04, 607. Neither the plea agreement nor the sentence included a \$2,000 fine mandated by section 411.2(a)(2) of the Illinois Controlled Substances Act (720 ILCS 570/411.2(a)(2) (West 2002)). *Id.* at 603, 605-06. On direct appeal, defendant Montiel did not raise this matter,

but the appellate court noted that the \$2,000 fine was statutorily required but not imposed. *Id.* The appellate court cited *Arna* for the principle that a sentence which does not conform to a statutory requirement is void, and cited *People v. Thompson*, 209 Ill. 2d 19, 27 (2004), for the principle that courts have an independent duty to vacate void orders and may *sua sponte* declare an order void. The appellate court then held that defendant Montiel's sentence was "void to the extent it [did] not include required fines and fees." *Montiel*, 365 Ill. App. 3d at 606. The court remanded the case to the circuit court "to impose the \$2,000 fine and all other statutorily required fines and fees." *Id.*

¶ 21 Using the language of contract law, the appellate court explained why this change in defendant Montiel's sentence did not render the whole plea agreement void. A plea agreement as a whole is void only if an "essential" term, *i.e.*, a term that is relatively important in light of the entire agreement between the parties, cannot be performed. *Id.* If a defendant's agreed-upon sentence does not fully comply with the sentencing statutes, but the sentence can be brought into compliance through a comparatively small change, the agreement as a whole will not be void. *Id.* at 606-07. According to the appellate court, "[a]s a matter of common sense, the fines and fees [were] a minor issue and an inessential term of the agreement," considering that the agreement involved dismissal of a Class X felony and imposition of the minimum term of imprisonment for the Class 1 felony to which defendant Montiel pleaded guilty. The sentence could be modified so as to impose the required \$2,000 fine without disturbing the plea agreement's essential terms. *Id.* at 607.

¶ 22 If the fines and fees were "a minor issue and an inessential term of the agreement" in *Montiel*, the same certainly can be said of the fines in the instant case. The fines and fees in *Montiel* totaled \$2,000, while the two fines in the instant case total \$112. Considering that three Class X felonies and four Class 2 felonies, involving multiple child victims, were dismissed in exchange for the defendant's pleading guilty to one Class X count, the fines in this case were the epitome of a minor issue and an inessential term. None of the essential terms of the plea agreement in this case will be disturbed by modifying the sentence so as to impose the required fines. The change needed to bring the agreement into compliance with Illinois statutes is very small.

¶ 23 Lastly, this court notes that the sexual assault fine will be reduced to \$0 after application of the \$5-per-day credit (see 725 ILCS 5/110-14 (West 2000)) for the defendant's 47 days of presentencing incarceration. The \$5-per-day credit does not apply to the \$12 additional penalty. See 725 ILCS 240/10(b) (West 2000) ("Such additional penalty shall not be considered a part of the fine for purposes of any reduction made in the fine for time served either before or after sentencing.").

¶ 24 This cause is remanded to the circuit court for issuance of an amended judgment of sentence reflecting the \$100 sexual assault fine under section 5-9-1.7(b)(1) of the Unified Code of Corrections and a \$12 additional penalty under section 10(b) of the Code of Criminal Procedure. Otherwise, the judgment dismissing the section 2-1401 petition is affirmed.

¶ 25 Affirmed and remanded with directions.