FIRST DIVISION
August 1, 2011

2011 IL App (1st) 091733-U
No. 1-09-1733

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. 08 CR 6895
	)	
CHRISTOPHER HUDSON,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hall and Justice Hoffman concur with the judgement.

O R D E R

HELD: Where trial court accepted defendant's guilty plea and imposed a sentence without benefit of a presentence investigation report and without an on-the-record finding as to defendant's criminal history, sentencing judgment was contrary to law and was vacated and the cause remanded for resentencing.

¶ 1 Defendant, Christopher Hudson, entered a plea of guilty to aggravated criminal sexual assault and was sentenced to eight years in prison. Defendant subsequently filed a *pro se* motion to withdraw that plea and vacate his sentence. New counsel was appointed and she filed a Supreme Court Rule 604(d) (eff. July 1, 2006) certificate, and an amended Rule 604(d) certificate stating she had not made amendments to defendant's *pro se* motion because it adequately presented defendant's contentions. Following a hearing, the trial court denied the motion. Defendant's ensuing motion to reconsider the denial also was denied. Defendant appeals, alleging, for the first time, that he is entitled to a new sentencing hearing because the trial court sentenced him without benefit of a written presentence investigation report or any on-the-record finding of his criminal history. We

vacate the sentence and remand for a new sentence hearing.

¶ 2 Background

¶ 3 On April 9, 2008, defendant was charged, by indictment, with two counts of aggravated criminal sexual assault and one count each of aggravated kidnaping, criminal sexual assault, and kidnaping of Ryan R. on March 14, 2008. (The record does not set out all of the indictment counts, but these counts are listed in several of defendant's motions in the record on appeal without contradiction by the State.)

¶ 4 On one of the ensuing court dates, the prosecution tendered to defendant a copy of his juvenile background. On December 1, 2008, defendant's trial counsel stated the prosecution had made a plea offer, which she would convey to defendant. On December 11, 2008, defendant informed the court that he wished to have a pre-trial conference pursuant to Supreme Court Rule 402 (eff. July 1, 1997). The conference was held and the matter was continued to December 15, 2008.

¶ 5 On that date defense counsel told the court defendant was "rejecting the nine years." However, when the case was recalled that same day, the court gave defendant his guilty plea admonishments and defendant signed a jury waiver. The prosecution was permitted by the court to dismiss the remaining counts against defendant, leaving one count of aggravated criminal sexual assault, based upon bodily harm, to the victim. In response to the court's questioning, defendant acknowledged he could be sentenced from 6 to 30 years on this count, and that he would have to serve 85% of this time, with an additional three years of mandatory supervised release. He also stated that, other than the agreement conveyed to him by his attorney, no other promises or agreements had been made to him to induce his guilty plea.

¶ 6 The court found that the factual basis set forth at the Rule 402 conference was sufficient to support a plea of guilty on the count of aggravated criminal sexual assault, accepted defendant's plea, and entered judgment on it. The court then informed defendant he had a right to a presentence investigation report which would include "any criminal background you may or may not have."

Defendant signed a waiver of this report, and it was also waived orally by defense counsel and the prosecution. Defendant declined his right of allocution and the court sentenced him to eight years in prison with the understanding that he would have to serve 85% of this time. The court further informed defendant that, if he wished to appeal his guilty plea, he would first have to file, within 30 days, a written motion to vacate his plea, and any complaints of violations of his constitutional and statutory rights not contained in that document would be "waived or given up." Defendant acknowledged his understanding of this requirement.

¶ 7 Within 30 days of this plea, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence. Among the grounds defendant asserted were: (1) his plea was involuntary because he was only 17 years old when he entered it; (2) this was his first time in the adult criminal system; and (3) his attorney informed defendant there was nothing he could do. Defendant asserted he was frightened and he did what he was told: take the eight years at 85%. Defendant also claimed, generally, that he was denied the effective assistance of counsel.

¶ 8 The court appointed new counsel to represent defendant on his motion. In a Rule 604(d) certificate and an amended certificate, new counsel stated she had consulted with defendant, had examined the court file and the report of proceedings and had made no amendments to defendant's *pro se* motion, as it adequately set forth his contentions.

¶ 9 At the hearing on defendant's motion, defendant rested without testifying. Defendant's original trial counsel was then called by the prosecution and proceeded to deny the allegations contained in defendant's motion pertaining to her. The court found no merit to defendant's allegations and denied his motion. Defendant filed a subsequent motion to reconsider that denial, informing the court he had not understood completely that his sentence of eight years at 85% would mean he would serve six years and nine months. The court also denied this motion. This appeal followed.

¶ 10 Defendant contends he is entitled to a new sentencing hearing because the trial court

sentenced him without benefit of a written presentence investigation report or any on-the-record finding of his criminal history in violation of section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2006)) which provides:

> "A defendant shall not be sentenced for a felony before a written presentence report of investigation is presented to and considered by the court.
>
> However *** the court need not order a presentence report of investigation where both parties agree to the imposition of a specific sentence, provided there is a finding made for the record as to the defendant's history of delinquency or criminality, including any previous sentence to a term of probation, periodic imprisonment, conditional discharge, or imprisonment." 730 ILCS 5/5-3-1 (West 2006).

¶ 11 Analysis

¶ 12 The presentence investigation and report requirement of section 5-3-1 is mandatory. *People v. Youngbey*, 82 Ill. 2d 556, 561 (1980). In *Youngbey*, our supreme court made clear:

> "The presentence report *** is for the enlightenment of the court, as well as for the benefit of the defendant. As such, it is not a personal right of the defendant. Thus, the presentence investigation report is intended to serve as a useful tool for the sentencing judge. We therefore cannot say that a trial judge will be sufficiently apprised of the defendant's criminal record in the absence of the mandatory presentence investigation and report. We conclude that section 5-3-1 sets forth a mandatory, reasonable legislative requirement which, not being a personal right of the defendant, cannot be waived." *Id*. at 565.

Accordingly, the presentence investigation report can be waived only where the parties have agreed to a specific sentence and there has been a finding on the record of the defendant's criminal history as set forth in section 5-3-1. *Id.*

¶ 13 There was no on-the-record finding of defendant's complete criminal history in this case. The prosecution notes that, early in the proceedings, defendant was tendered a copy of his juvenile

background, however, this juvenile history is not included in the record on appeal, nor were its contents ever made of record in open court at the time of defendant's plea. See *People v. Evans*, 273 Ill. App. 3d 252, 257 (1994) (Section 5-3-1 requires strict compliance with its provisions "at the time the plea is taken without reference to other parts of the record."). Additionally, it is not clear there was ever an agreement as to a specific sentence between the defense and the prosecution. The State can only point to defendant's mention, in his motions to withdraw his guilty plea and vacate his sentence, of a sentence of eight years, which would be reduced by 85% to six years and nine months. This does not establish that such a sentence was agreed upon by defendant and the prosecution, nor was any such agreed sentence stated in open court, as is required by Supreme Court Rule 402(b) (eff. July 1, 1997).

¶ 14 The State argues that defendant forfeited his section 5-3-1 challenge by failing to raise this objection in his motion to withdraw his plea. As stated, the presentence investigation report requirement is mandatory and cannot be waived except in accordance with the exception provision set forth in section 5-3-1. *Youngbey*, 82 Ill. 2d at 565. See also, *People v. Walton*, 357 Ill. App. 3d 819, 821-22 (2005); *Evans*, 273 Ill. App. 3d at 255-56. Because a defendant cannot waive the presentence investigation report requirement, he also cannot forfeit the issue by failing to raise it in a postsentencing motion. *People v. Childress*, 306 Ill. App. 3d 755, 757 (1999).

¶ 15 We are not persuaded by the State's citation to *People v. Sims,* 378 Ill. App. 3d 643 (2007). In *Sims*, the defendant pleaded guilty and was sentenced, even though a presentence investigation report was not filed and a finding of the defendant's criminal history was not made on the record. He did not file a motion to withdraw his guilty plea and vacate the judgment, nor did he file a direct appeal. *Id*. at 644. Instead the defendant filed a petition to vacate his sentence pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2004)). The petition, however, was filed well after the two-year limitations period for such an action had passed. On appeal from the denial of that petition, this court noted that, where a judgment is void, a defendant may seek

relief beyond the two-year limitations period for a section 2-1401 petition. *Id*. at 646. This court examined *People v. Davis*, 156 Ill. 2d 149, 155 (1993), where our supreme court set forth the distinctions between a void and voidable order *(Id*. at 646-47), and held that the defendant's sentence, which was imposed without the benefit of a presentence investigation report, was not void but only voidable and, thus, was not subject to collateral attack by a tardy section 2-1401 petition. *Id*. at 648.

¶ 16 The *Sims* decision is easily distinguishable from the circumstances of this case. The *Sims* decision itself distinguished the procedural posture it faced from the situations addressed in cases such as *Walton*, 357 Ill. App. 3d 819 and *Evans*, 273 Ill. App. 3d 252 (and, indeed, this appeal), finding:

> "These cases are readily distinguishable from the present case. Most importantly, all of these cases involved claims that were brought in a timely direct appeal, and therefore, they do not involve the procedural posture of this case nor do they address the specific issue before this court. At most, these cases stand for the proposition that the trial court is required to strictly comply with the requirements of section 5-3-1 and that the failure to do so constitutes error. The dispute in the present case is not whether the trial court erred by accepting defendant's waiver of the PSI and imposing a sentence without making a finding for the record as to defendant's criminal history. Rather, the question is whether that error deprived the trial court of jurisdiction and therefore rendered the judgment and sentence against defendant void. This question is not addressed or answered by any of these cases." *Sims*, 378 Ill. App. 3d at 649.

¶ 17 We read the *Sims* opinion as not having altered those cases which followed *Youngbey* in holding that a defendant cannot waive the presentence investigation report except by strict compliance with section 5-3-1. Here, defendant challenges the propriety of his sentence in a direct appeal and not, as in *Sims*, in an untimely collateral attack asserting that his sentence is void. The question here is whether the sentence was in error for failure to comply with the requirements of

section 5-3-1 and not whether, as in *Sims*, the error deprived the trial court of jurisdiction so that defendant's tardiness in bringing a section 2-1401 petition was excused. We choose to follow *Youngbey* and its progeny and decline to extend *Sims* beyond its particular procedural history and situation.

¶ 18 We find that the sentence was improper under section 5-3-1, and that this error was not forfeited on direct appeal, despite the failure of defendant to properly preserve his objection in a posttrial motion. *Youngbey*, 82 Ill. 2d at 564; *Childress*, 306 Ill. App. 3d at 757.

¶ 19 Conclusion

¶ 20 Accordingly, we vacate the sentence imposed upon defendant and remand for a new sentencing hearing in full compliance with section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2006)).

¶ 21 Sentence only is vacated;

¶ 22 cause remanded for further proceedings in accord with this order.