

THIRD DIVISION
February 1, 2012

No. 1-09-2712

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
Plaintiff-Appellee,)	CIRCUIT COURT OF
)	COOK COUNTY
)	
v.)	No. 93 CR 28565 (01)
)	
)	HONORABLE
)	COLLEEN
EDGAR CRUZ,)	McSWEENEY-MOORE,
Defendant-Appellant.)	JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was convicted *in absentia* of delivery of a controlled substance and sentenced *in absentia* to 18 years' imprisonment. The appellate court lacked jurisdiction where defendant did not file a timely notice of appeal within 30 days of the pronouncement of sentence and did not file a motion seeking to vacate his conviction and sentencing *in absentia*. Appeal dismissed.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Edgar Cruz was convicted *in absentia* of delivery of a controlled substance and sentenced *in absentia* to 18 years'

imprisonment. On appeal, Cruz argues: (1) this court has jurisdiction to hear an appeal of his motion to vacate his conviction and sentence; and (2) the trial court erred in failing to instruct the jury on the lesser included offense of possession of a controlled substance. For the following reasons, we conclude this court lacks jurisdiction and dismiss the appeal.

¶ 3

BACKGROUND

¶ 4 The record on appeal discloses the following facts. In 1993, Cruz and his wife, Miriam Martinez, were indicted for delivery of a controlled substance and possession of a controlled substance. At their arraignment, the trial court advised Cruz and Martinez that they must appear for each and every court date and if they did not appear, they could be tried *in absentia*. Both said they understood the court's admonishment.

¶ 5 Prior to trial, the State moved to *nolle prosequi* the possession of a controlled substance charge against Cruz. Cruz's counsel responded that the State was on notice to include possession as a lesser included offense when preparing the jury instructions.

¶ 6 Cruz's trial commenced on April 17, 1996. In the opening statement, defense counsel conceded that Cruz had engaged in a small drug transaction with Drug Enforcement Agency special agent Patrick Humes (Agent Humes) on September 2, 1993, and was prepared to sell over 200 grams of cocaine to Agent Humes a week later. However, defense counsel asserted Cruz was arrested after he decided not to complete the sale.

¶ 7 Agent Humes testified that on September 9, 1993, he agreed to purchase 10 ounces of cocaine from Cruz. Agent Humes drove to Cruz's apartment at approximately 5:30 p.m., with agents and undercover vehicles positioned nearby.

¶ 8 Agent Humes also testified that upon arriving at Cruz's apartment, he asked whether Cruz had the cocaine; Cruz said he did, but he wanted to see the money first. Agent Humes returned to his car and returned with the money, but he did not immediately give it to Cruz. According to Agent Humes, Cruz turned to Martinez and said something in Spanish (although he conceded he did not mention this in his report on the incident). Martinez handed Cruz a clear bag containing a white powder substance, which Cruz then handed to Agent Humes. At Cruz's request, Agent Humes handed the money to Martinez to count.

¶ 9 Agent Humes further testified he transmitted the arrest signal to the surveillance agents, indicating he received delivery of the cocaine. According to Agent Humes, other agents knocked on Cruz's door and pressed his door buzzer. After Cruz said he was expecting friends, Martinez opened the door, whereupon the agents entered and arrested Cruz and Martinez. Agent Humes acknowledged he did not wear any device to record the events that transpired in Cruz's apartment.

¶ 10 Moreover, Agent Humes testified he gave the bag of white powder to Countryside police detective Timothy Swanson. Detective Swanson testified he inventoried the bag and took it to the crime lab approximately a week after the arrest. Fella Johnson, a forensic scientist with the Illinois State Police, testified she tested the white powder and opined the substance weighed 275.2 grams¹ and contained cocaine.

¹ Testimony from Cruz's motion to suppress evidence (the denial of which is not a subject of this appeal) indicated the weight was 257 grams.

¶ 11 Martinez testified on Cruz's behalf. Martinez stated she was cooking dinner at home on September 9, 1993, when Agent Humes arrived. According to Martinez, Cruz and Agent Humes discussed something loudly in the living room, as though they were fighting, but she did not know what they discussed. Martinez denied ever seeing or touching any cocaine or being called into the living room to collect or count any money. Martinez remembered hearing knocking on the door and stated police broke down the door when she tried to open it.

¶ 12 After the defense rested, Cruz's counsel requested the jury be instructed on the lesser included offense of possession of a controlled substance based on Martinez's testimony. The State objected. The trial court agreed with the State, reasoning the jury could choose to believe or disbelieve Agent Humes on the issue of delivery. During closing argument, defense counsel conceded that Cruz possessed cocaine on September 9, 1993, but argued the sale was never consummated.

¶ 13 When the jury indicated it had reached a verdict, defense counsel reported Cruz and Martinez had disappeared. According to counsel, they had all agreed to meet for lunch, but Cruz and Martinez never appeared. The trial court noted Cruz and Martinez were admonished about trial *in absentia* and found they voluntarily absented themselves from the proceedings. The State argued the statutory two-day waiting period for proceeding where a defendant absents himself after trial commences (725 ILCS 5/115-4.1(a) (West 1992)) was permissive and not mandatory. The trial court agreed and proceeded to have the verdicts read. The jury found Cruz guilty of delivery of a controlled substance, but found Martinez not guilty.

¶ 14 On May 28, 1996, during the sentencing hearing, the trial court asked whether defense counsel filed a motion for new trial. Defense counsel replied he had not because the trial court had provided "such a fair trial," he could not think of grounds for a motion. The trial court, after considering evidence in aggravation and mitigation, entered an order sentencing Cruz to serve 18 years in prison.

¶ 15 On July 23, 2007, the State informed the circuit court that Cruz had been located in another state. On August 7, 2008, Cruz appeared in the circuit court for further proceedings in this case and another pending case (93 CR 28566). The court granted Cruz time to retain counsel and stayed the mittimus in this case.

¶ 16 On September 15, 2008, Cruz's counsel informed the court he was attempting to obtain the case file and requested time to file any pleadings he might need to file.

¶ 17 On November 20, 2008, Cruz's counsel told the court, "[O]n today's date I'm filing a motion to set aside the verdict and sentence in this case. I'm tendering a copy to counsel." Counsel stated he did not yet have a transcript of proceedings and the allegations were made upon information and belief. The trial judge responded, "Well, I don't want to set this for hearing on your motion until I know both sides are in possession of the original transcript."

¶ 18 The circuit court continued the matter while transcripts of the original proceedings were prepared. On July 14, 2009, Cruz's counsel informed the court he had the final transcript and requested another continuance "to file motions." The court continued the matter for "the filing of Defendant's motions."

¶ 19 On August 17, 2009, Cruz's counsel told the court, "I did draft motions in the case and I have another jury trial down the hall, which I forgot to bring the file; but I will mail it to Counsel if you want me to set it for a date for argument." The trial court responded it would not set a case for argument on unfiled motions. Cruz's counsel said he would file the motions that week. The trial court held the case over to the next day.

¶ 20 On August 18, 2009, Cruz pleaded guilty to delivery of a controlled substance in case number 93 CR 28566. The trial court hearing in that case stated that the sentences in both cases would run concurrently and the mittimus would issue in this case. The transcript in case number 93 CR 28566 contains no reference to any motion to vacate the verdict and sentence in this case.

¶ 21 On September 19, 2009, Cruz mailed a notice of appeal to this court indicating the date of the judgment appealed from was "9/11/93 [Motion for ReTrial Denied 8/18/09]."

¶ 22 On March 11, 2011, Cruz's trial counsel appeared in the circuit court, claiming this court would not proceed with an appeal absent a ruling on a motion to vacate the verdict and sentence. The trial judge noted that the motion tendered was not file-stamped. Cruz's trial counsel responded that he did not have the case file, but noted the transcript of proceedings for November 20, 2008, in which he stated, "[O]n today's date I'm filing a motion to set aside the verdict and sentence in this case." The trial judge stated that her file and the half-sheet did not reflect that any motion was filed on November 20, 2008.

¶ 23 Cruz's trial counsel then stated appellate counsel asked him to request a ruling on the motion. The trial judge asked whether he had an order from this court. Cruz's trial counsel responded that he did not, but that appellate counsel stated he was continuously reporting to this

court on the status of the motion and that "apparently" this court could not proceed until the trial court disposed of the motion. The trial judge stated she did not know why appellate counsel would be informing this court he was waiting for a ruling on a motion that had not been presented to her in almost three years. The trial judge added that she did not know whether she had jurisdiction to rule on such a motion after Cruz filed his notice of appeal. The trial judge concluded she had nothing to rule upon in the absence of a file-stamped motion showing the motion was filed prior to the date the mittimus issued. The trial judge also concluded she did not have jurisdiction.

¶ 24

DISCUSSION

¶ 25 The dispositive issue here is whether this court possesses jurisdiction over Cruz's appeal. Illinois Supreme Court Rule 606(b) (eff. March 20, 2009) provides a notice of appeal must be filed within 30 days after the entry of the final judgment being appealed from or within 30 days after the entry of an order disposing of a timely filed motion directed against the judgment. The timely filing of a notice of appeal is the only jurisdictional step for initiating appellate review. *People v. Patrick*, 2011 IL 111666, ¶ 20. If there is no properly filed notice of appeal, the reviewing court lacks jurisdiction and must dismiss the appeal. *Id.*

¶ 26 In a criminal case, the sentence is the final judgment. *People v. Partee*, 125 Ill. 2d 24, 32 (1988) (citing *People v. Allen*, 71 Ill. 2d 378, 381 (1978)). The pronouncement of sentence is the judicial act comprising the court's judgment; the entry of the judgment order is a ministerial act merely evidencing the sentence. *Allen*, 71 Ill. 2d at 381. The mittimus is a document directed to a sheriff, warden, the Department of Corrections, or other executive officer detailing a prisoner's

sentence, which is often simply a copy of the judge's signed judgment or order. *People v. Wright*, 337 Ill. App. 3d 759, 762 (2003); 735 ILCS 5/2–1801(a) (West 2008). The mittimus is not part of the judgment, but the method by which the final judgment is executed. See *People v. Harland*, 295 Ill. App. 3d 325, 326 (1998) (construing similar Iowa law).

¶ 27 In his brief's jurisdictional statement, Cruz notes he was sentenced *in absentia* in 1996. On August 7, 2008, the trial court stayed the mittimus in this case. On August 18, 2009, after Cruz pleaded guilty to delivery of a controlled substance in case number 93 CR 28566, the trial court there stated that the sentences in both cases would run concurrently and mittimus would issue in this case. On September 19, 2009, Cruz mailed a notice of appeal indicating the date of the judgment appealed from was "9/11/93 [Motion for ReTrial Denied 8/18/09]."

¶ 28 However, under Illinois case law, the date of the final judgment in this case was on May 28, 1996, when the trial court imposed sentence on Cruz. The September 19, 2009, notice of appeal was not filed within 30 days of that date as required by Illinois Supreme Court Rule 606(b) (eff. March 20, 2009).

¶ 29 Thus, Cruz argues on appeal that this court has jurisdiction under sections 115-4.1(e) and (g) of the Code of Criminal Procedure (725 ILCS 5/115-4.1(e), (g) (West 2008)), governing the absence of a defendant, which provide in relevant part:

"(e) When a defendant who in his absence has been either convicted or sentenced or both convicted and sentenced appears before the court, he must be granted a new trial or new sentencing hearing if the defendant can establish that his failure to appear in court was both without his fault and due to circumstances beyond his control. A hearing with notice

to the State's Attorney on the defendant's request for a new trial or a new sentencing hearing must be held before any such request may be granted. At any such hearing both the defendant and the State may present evidence.

(g) A defendant whose motion under paragraph (e) for a new trial or new sentencing hearing has been denied may file a notice of appeal therefrom. Such notice may also include a request for review of the judgment and sentence not vacated by the trial court."

Cruz contends the circuit court "implicitly denied" his motion to vacate the verdict and sentence by declining to rule on the motion on March 11, 2011. The State responds the trial court did not deny Cruz's motion, because defense counsel never filed the motion.

¶ 30 We note "the jurisdiction of the appellate court over the direct appeal does not affect the circuit court's jurisdiction over a defendant's section 115-4.1(e) motion, and the jurisdiction of the circuit court over the section 115-4.1(e) motion does not deprive the appellate court of jurisdiction over the defendant's initial appeal." *Partee*, 125 Ill. 2d at 36. However, we first address the issue of whether Cruz in fact filed a section 115-4.1(e) motion.

¶ 31 The common law record, including the docket sheets, "imports verity and is presumed correct." *People v. Brooks*, 158 Ill. 2d 260, 274 (1994); *People v. Lilly*, 291 Ill. App. 3d 662, 665, 687 (1997). The trial court record can only be impeached, contradicted or amended by reason of other matters appearing of record. *People v. Gayles*, 24 Ill. 2d 242, 244 (1962); *People v. Sinisi*, 57 Ill. App. 3d 716, 719 (1978). A reviewing court is bound by the certified record of proceedings in the trial court, and the record is presumed to be correct unless it can be shown to

be otherwise. *People v. Allen*, 109 Ill. 2d 177, 184 (1985); *People v. Bland*, 228 Ill. App. 3d 1080, 1086 (1992). When a conflict exists between the common law record and the report of proceedings, the court should resolve the conflict by looking at the record as a whole. *Allen*, 109 Ill. 2d at 184.

¶ 32 In this case, the trial judge reviewed the court's records, including the half-sheet, and determined the motion to vacate the verdict and sentence was not filed. Defense counsel was unable to produce a file-stamped copy of the motion verifying it was filed. The trial judge concluded that defense counsel's November 20, 2008, comment that "on today's date I'm filing a motion to set aside the verdict and sentence in this case" failed to rebut the presumption that the court's common law record was correct. Based on the facts and circumstances presented in this case, we conclude the trial court did not err in its ruling.

¶ 33 CONCLUSION

¶ 34 In sum, Cruz failed to file a timely notice of appeal from the final judgment in this case. In addition, the trial judge did not err in concluding no section 115-4.1(e) motion to vacate the verdict and sentence had been filed. Accordingly, we conclude this court lacks jurisdiction to hear Cruz's appeal.

¶ 35 Appeal dismissed.