2012 IL App (1st) 102515-U

FOURTH DIVISION
December 20, 2012

No. 1-10-2515

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. 96CR15097
	)	
DENNIS EDWARDS,	)	The Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concur in the judgment.

ORDER

¶ 1 *Held:* Where negotiated guilty plea was based in part on crime which was not in existence at the time of the assault, the enacting statute having been found void *ab initio*, defendant could properly bring collateral challenge to plea. Plea found void. Cause remanded to circuit court for defendant to withdraw his guilty plea and proceed to trial, if he so chooses.

¶ 2 Defendant Dennis Edwards appeals from the dismissal of his petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122 *et seq*. (West 2010)). On appeal, defendant abandons the contentions he made in his postconviction petition and, for the first time,

asserts that we should remand this cause to the circuit court with directions to allow defendant to withdraw his guilty plea and then elect to plead anew or proceed to trial because his convictions and sentence are void.

¶ 3 I. BACKGROUND

¶ 4 Defendant was arrested in May 1996 and charged by indictment with 60 felony counts stemming from an incident that spanned May 15 and 16, 1996. The indictment charged defendant with 2 counts of predatory criminal sexual assault of a child; 30 counts of aggravated criminal sexual assault; 8 counts of aggravated criminal sexual abuse; 6 counts of criminal sexual assault; 6 counts of criminal sexual abuse; 1 count of aggravated battery of a child; 1 count of aggravated battery; 4 counts of aggravated kidnaping; 1 count of kidnaping; and 1 count of unlawful restraint.

¶ 5 In February 1997, the trial court found defendant unfit to stand trial. Defendant was remanded at that time to the custody of the Department of Mental Health. Eventually, following the final restoration hearing held in June 2000, the trial court entered a finding that defendant was fit to stand trial with medication.

¶ 6 In June 2000, defendant entered into a negotiated guilty plea in which he agreed to plead guilty to two counts of predatory criminal sexual assault of a child and one count each of aggravated battery of a child and aggravated kidnaping, in exchange for an aggregate sentence of 45 years' incarceration. The factual bases presented at the hearing for the guilty plea are as follows: on May 15, 1996, defendant, who was 39 years old at the time, took the victim, 8 year old E.R., with her mother's permission, to purchase a bicycle. Instead of doing so, however,

defendant took her to an abandoned building at 3845 South Halsted Street in Chicago. There he forced her to remove her clothing, digitally penetrated her both vaginally and anally, and repeatedly struck her in the face and about her body. He bound her wrists and ankles and left her in the building, threatening her not to escape. The victim escaped after approximately 10 hours. When arrested, defendant admitted taking the victim to the abandoned building, tying her up, and leaving her there for approximately 10 hours.

¶ 7 The trial court determined defendant's guilty plea was knowing and voluntary, and sentenced him to 15 years for each of the 2 counts of predatory criminal sexual assault, and 15 years for aggravated battery of a child, with the sentences to be served consecutively, and a concurrent term of 15 years for the aggravated kidnaping conviction, for an aggregate sentence of 45 years to be served.

¶ 8 Defendant was then incarcerated.

¶ 9 In June 2003, defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2002)) arguing, *inter alia*: (1) ineffective assistance of trial counsel where counsel failed to request a fitness hearing immediately prior to the guilty plea proceedings; and (2) that his guilty plea was not knowing and voluntary. The circuit court dismissed this petition in August 2003. Defendant appealed. Thereafter, defendant's appellate counsel discovered a signed order in the clerk's file indicating that on the same day the trial court ordered the petition dismissed, it also docketed the cause and appointed counsel. This court dismissed the appeal in October 2004.

¶ 10 The matter then proceeded in postconviction proceedings. At a status hearing in April

2005, counsel for defendant informed the court that "one of the statutes [defendant] was pled to was declared unconstitutional as a result of the single subject rule." Thereafter, in December 2007, a different attorney from the Public Defender's office filed his appearance on defendant's behalf. This counsel filed a 651(c) certificate stating that it was "unnecessary to file additional pleadings amending or supplementing the *pro se* petition." The State filed a motion to dismiss the postconviction petition.

¶ 11 After hearing arguments from the parties, the court granted the State's motion to dismiss the petition in August 2010.

¶ 12 Defendant appeals.[1]

¶ 13 II. ANALYSIS

---

[1] During the pendency of this appeal, in January 2012, defendant filed a motion for summary disposition, arguing that his negotiated guilty plea and convictions for two counts of predatory criminal sexual assault of a child, one count of aggravated battery of a child, and one count of aggravated kidnaping are void because the offense of predatory criminal sexual assault of a child did not exist at the time the incident occurred. In his motion, defendant requested this Court to remand the matter to the circuit court with directions to allow him to withdraw his guilty plea and proceed to trial, if he so chose. We allowed the State to file a response.

We initially issued an order denying defendant's motion for summary disposition, but remanding the cause to the circuit court. One week later, however, we withdrew the previous order and issued another order, again denying defendant's motion for summary disposition, but not remanding the cause to the circuit court.

¶ 14 On appeal, rather than arguing that his postconviction petition was dismissed in error, defendant contends that his guilty plea is void. Specifically, defendant argues that his two convictions for predatory criminal sexual assault of a child are void because they were predicated on a statute that was declared unconstitutional. Because these underlying convictions were an essential part of the negotiated plea agreement and sentences, defendant argues, the plea itself is void. Defendant urges this court to remand this matter to the circuit court with directions to allow defendant to withdraw his guilty plea and plead anew or proceed to trial, if he so chooses.

¶ 15 The Post-Conviction Hearing Act provides a remedy for defendants whose constitutional rights were substantially violated in their original trial or sentencing hearing when such a claim was not, and could not have been, previously adjudicated. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). An action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). The current petition was dismissed after the second stage of review. At the second stage of the process, the State is required to either answer the pleading or move to dismiss. 725 ILCS 5/122-5 (West 2010).

¶ 16 A. Whether Defendant has Forfeited this Claim

¶ 17 Initially, the State urges us to consider this issue forfeited, as defendant failed to include it in his postconviction petition. The State contends that our review is limited to those issues actually raised in defendant's postconviction petition. The State relies on various cases to support its argument, including *People v. Petrenko*, 237 Ill. 2d 490, 502 (2010) (" ' "[T]he question raised in an appeal from an order dismissing a post-conviction petition is whether the

allegations *in the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act." ' (Emphasis in original.) Thus, any issues to be reviewed must be presented in the petition filed in the circuit court, and a defendant may not raise an issue for the first time while the matter is on review.") (*Petrenko*, 237 Ill. 2d 490, 502 (quoting *People v. Jones*, 211 Ill. 2d 140 (2004))).

¶ 18 Within this forfeiture argument, however, the State correctly acknowledges that, where the underlying trial court judgment is void, this court may properly consider the issue. See, *e.g.*, *People v. Thompson*, 209 Ill. 2d 19, 27 (2004) (An attack on a void judgment may be made at any time or in any court, either directly or collaterally. Moreover, courts have an independent duty to vacate void orders.). In *Thompson*, the defendant, who had entered negotiated guilty pleas, filed a postconviction petition alleging various claims, but not challenging his sentences. *Thompson*, 209 Ill. 2d at 21-22. The circuit court dismissed the petition as frivolous and patently without merit. *Thompson*, 209 Ill. 2d at 22. On appeal, the defendant added various new constitutional challenges to his sentences. *Thompson*, 209 Ill. 2d at 22. The appellate court rejected his constitutional contentions, but acknowledged that, while one of the contentions had merit, it was not cognizable in postconviction proceedings because it was not a matter of substantial deprivation of constitutional rights and because defendant had waived the issue by not raising it prior to his postconviction appeal. *Thompson*, 209 Ill. 2d at 22. On review by our supreme court, the court noted: "The principle has often been stated that a sentence, or portion thereof, that is not authorized by statute is void." *Thompson*, 209 Ill. 2d at 22. It then found the extended-term sentence at issue was unauthorized by statute and, accordingly, void. *Thompson*,

209 Ill. 2d at 22. The court found the defendant could challenge the void order through his appeal, notwithstanding the fact that he had not included it in his postconviction petition. *Thompson*, 209 Ill. 2d at 25. Specifically, the court noted, "It is a well-settled principle of law that a void order may be attacked at any time or in any court, either directly or collaterally." *Thompson*, 209 Ill. 2d at 25. The court went on to hold:

> "We conclude that defendant may raise the voidness issue in this appeal. This conclusion necessarily follows from the analysis contained in the decisions cited above from this court and from the appellate court. The extended-term sentence on defendant's conviction for violation of an order of protection is void. A void order may be attacked at any time or in any court, either directly or collaterally. An argument that an order or judgment is void is not subject to waiver. Defendant's argument that the extended-term portion of his sentence is void does not depend for its viability on his postconviction petition. In fact, courts have an independent duty to vacate void orders and may *sua sponte* declare an order void. See *Schak v. Blom*, 334 Ill. App. 3d 129, 134, 267 Dec. 832, 777 N.E.2d 635 (2002). Accordingly, defendant may contest the void order in this appeal." *Thompson*, 209 Ill. 2d at 27.

Since the defendant here solely alleges that his conviction and sentence are void, we will address

the merits of that claim. Whether a judgment is void presents a legal question, which we address *de novo*. *People v. Rodriguez*, 355 Ill. App. 3d 290, 293-94 (2005).

¶ 19 The State's reliance on *People v. Myrieckes*, 315 Ill. App. 3d 478 (2000), for the proposition that "it is not unlawful for the State and a defendant to bargain for a plea of guilty to even a nonexistent crime if the defendant receives a benefit" is unpersuasive. *Myrieckes* is factually distinguishable from the case at bar. In *Myrieckes*, the defendant pleaded guilty to three counts of predatory criminal sexual assault of a child and three counts of aggravated criminal sexual abuse, and was sentenced to an aggregate of 80 years in prison. *Myrieckes*, 315 Ill. App. 3d at 480. On appeal, the defendant argued, in relevant part, that his sentence was void because it was based on a void indictment where the victim was not under the age of 13 as required by the statute. *Myrieckes*, 315 Ill. App. 3d at 480. The Third District of this court determined that defendant's claim was actually not based on a defective indictment, but rather was a challenge to the sufficiency of the evidence to show that the victim was under age 13. *Myrieckes*, 315 Ill. App. 3d at 486. The court found the defendant had waived his right to challenge the sufficiency of the evidence by pleading guilty, noting, as the State quotes, "it is not unlawful for the State and a defendant to bargain for a plea of guilty to even a nonexistent crime if the defendant receives a benefit." *Myrieckes*, 315 Ill. App. 3d at 486. This is clearly distinguishable from the case at bar, where the *Myrieckes* "nonexistent crime" to which the defendant pleaded guilty was one that was not capable of proof. Here, however, the crime to which defendant pleaded guilty was actually an offense that was not in existence at the time the acts were committed. Moreover, we note that the *Myrieckes* decision predates *Thompson*, and, as such, its continued viability is in

question. As such, the State's reliance on *Myrieckes* is unpersuasive.

¶ 20 B. Whether Defendant's Sentence and Plea are Void

¶ 21 Defendant contends that his two convictions for predatory criminal sexual assault of a child are void because they were predicated on a statute that was declared unconstitutional and void *ab initio* in *Johnson v. Edgar*, 176 Ill. 2d 499 (1997). He argues that his entire guilty plea is void because the illegal convictions were an essential part of the negotiated plea agreement and sentences. The State disagrees, arguing, *inter alia*, that the claimed error is merely voidable–rather than void–and not subject to a collateral attack such as the instant appeal. In so arguing, the State points out that, because the trial court had both personal and subject matter jurisdiction in this cause, any resulting error must be considered voidable rather than void.

¶ 22 Our supreme court has "consistently held that a judgment is void if and only if the court that entered it lacked jurisdiction." *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 16 (citing *People v. Davis*, 156 Ill. 2d 149 (1993)). In *Davis*, our supreme court explained that the term "void" should be reserved only for those judgments rendered by a court lacking jurisdiction. *Davis*, 156 Ill. 2d at 155. The court explained:

> "Whether a judgment is void or voidable presents a question of jurisdiction. [Citation.] Jurisdiction is a fundamental prerequisite to a valid prosecution and conviction. Where jurisdiction is lacking, any resulting judgment rendered is void and may be attacked either directly or indirectly at any time. [Citation.] By contrast, a voidable judgment is one entered erroneously by a

court having jurisdiction and is not subject to collateral attack."

Davis, 156 Ill. 2d at 155-56.

¶ 23 The *Davis* court then recognized three "elements of jurisdiction": (1) personal jurisdiction; (2) subject matter jurisdiction, and (3) "the power to render the particular judgment or sentence." *Davis*, 156 Ill. 2d at 156. Of the third element, the court warned that "jurisdiction or power to render a particular judgment does not mean that the judgment rendered must be 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." *Davis*, 156 Ill. 2d at 156.

¶ 24 Since *Davis*, our supreme court "continues to adhere to this formulation of the voidness doctrine." *Hubbard*, 2012 IL App (2d) 101158, ¶ 16 (citing *In re M.W.*, 232 Ill. 2d at 414); see also *People v. Coady*, 156 Ill. 2d 531, 537 (1993); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002) ("[a] judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally" (internal quotation marks omitted)); see also *People v. Permanian*, 381 Ill. App. 3d 869, 873-76 (2008); see also *People v. Holmes*, 405 Ill. App. 3d 179, 183-84 (2010) (A judgment is void, as opposed to voidable, only if the court that entered it lacked jurisdiction. *People v. Rodriguez*, 355 Ill. App. 3d 290 (2005). 'For instance, where a court lacks jurisdiction [over] the parties or the subject matter, or exceeded its statutory power to act, any resulting judgment is void and may be attacked either directly or indirectly at any time.' *People v. Raczkowski*, 359 Ill. App. 3d 494, 497, 296 Ill. Dec. 39, 834 N.E.2d 596, 599 (2005), citing

Davis, 156 Ill. 2d at 156. 'The jurisdictional failure can be the court's lack of (1) personal jurisdiction or (2) subject matter jurisdiction, but it can also be (3) that the court lacked the power to render the particular judgment or sentence.' *Rodriguez*, 355 Ill. App. 3d at 296. The jurisdictional failure here was of the third kind, as the trial court lacked the inherent power to accept a guilty plea based on a nonexistent statute.

¶ 25 On May 22, 1997, our supreme court held Public Act 89-428, the act which created the offense of predatory criminal sexual assault of a child, unconstitutional as a violation of the single subject rule (Ill. Const. 1970, art. IV, section 8); *Johnson*, 176 Ill. 2d 499. "When Public Act 89-428 was held unconstitutional by [the Illinois Supreme Court's] ruling in *Johnson v. Edgar*, 176 Ill. 2d 499, 224 Ill. Dec. 1, 680 N.E.2d 1372 (1997), the offense of predatory criminal sexual assault of a child was rendered void *ab initio*; that is, it was as if the law never existed." *People v. Tellez-Valencia*, 188 Ill. 2d 523, 526 (2000).[2] Shortly thereafter, on May 29, 1996, the

[2]In reversing convictions obtained under Public Act 89-428, our supreme court observed:

> "[T]he offense of predatory criminal sexual assault of a child was rendered void *ab initio*; that is, it was as if the law never existed. [Citation.] * * * Each defendant's charging instrument thus failed to state an offense because the statute under which each was charged and prosecuted was not in effect when the alleged offenses occurred. Accordingly, * * * [the] convictions for predatory criminal sexual assault of a child cannot stand." *Tellez-Valencia*, 188 Ill. 2d at 526.

General Assembly reenacted the offense of predatory criminal sexual assault of a child by passing Public Act 89-462. *Tellez-Valencia*, 188 Ill. 2d at 525. "Public Act 89-462 did not become effective, however, until May 29, 1996, and by its language, does not apply to offenses occurring before that date." *Tellez-Valencia*, 188 Ill. 2d at 525.

¶ 26 In *Tellez-Valencia*, a consolidated case, the indictments alleged the offense of predatory criminal sexual assault of a child, a crime which was not in effect at any time during the period when the alleged conduct occurred. *Tellez-Valencia*, 188 Ill. 2d at 525. The defendants were charged, prosecuted, and convicted of a nonexistent offense because, while their respective direct appeals were pending, our supreme court invalidated the act that created the offense. *Id*., at 525. Shortly thereafter, the General Assembly passed Public Act 89-463, reenacting the offense. *Id*., at 525. However, by its language, the statute did not apply to acts occurring before that date. *Id*., at 525. The defendants argued on appeal that their convictions were invalid because they were based upon charging instruments that failed to state an offense. *Id*., at 525. The State argued that the proper remedy was to amend the defendants' charging instruments on appeal to change the name of the offense charged to aggravated criminal sexual assault. *Id*., at 526. It argued that this change would be a mere "formality because the elements of the two crimes, as well as the statutory language and penalties as applied to defendants, are identical." *Id*., at 526. Therefore, continued the State, "defendants are not prejudiced in any way by such an amendment because each was apprised of the nature and elements from which to prepare a defense, regardless of the specific name given to the alleged criminal act." *Id*., at 526. Our supreme court disagreed and held that, when a defendant is convicted under a statute later held unconstitutional, the State may

not amend the charging instrument on appeal. *Id*., at 528. It noted:

> "While we acknowledge that formal defects in a charging instrument may be amended by the State at any time (see 725 ILCS 5/111-5 (West 1998)), we disagree with the State's characterization of the proposed amendment in the cases at bar as a mere formality. The committee comments to section 111-5 of the Code of Criminal Procedure of 1963 specifically exclude failure to charge a crime from those defects in a charge considered merely formal and which may be cured by amendment at any time, instead labeling this a substantive defect. See 725 ILCS 5/111-5, Committee Comments–1963 (Smith-Hurd 1992). Further, the defect caused by charging an offense based upon a statute not in effect when the alleged offense occurred is fatal, rendering the entire instrument invalid, and warranting reversal of defendants' convictions. See *People v. Wasson*, 175 Ill. App. 3d 851, 854 (1988)." *Id*., at 526-27.

Accordingly, the court determined that the charging instrument in each case was invalid and the defendants' convictions were reversed. *Id*., at 527-28.

¶ 27 The Second District of this court has also found in the context of a guilty plea that a defendant's conviction for predatory criminal sexual assault where the crime, as here, was committed before the reenactment of the offense, was void under *Johnson*, 176 Ill. 2d 499. See

People v. Jaramillo, 307 Ill. App. 3d 914, 915 (1999). In *Jaramillo*, the defendant pleaded guilty to one count of predatory criminal sexual assault for a crime that was committed before the reenactment of the statute, and was sentenced to 20 years' imprisonment. *Id*., at 915. The defendant appealed, arguing, in pertinent part, that his conviction was unconstitutional because the crime of predatory criminal sexual assault did not exist when the defendant committed the offense. *Id*., at 915. Relying on *People v. Tellez-Valencia*, 295 Ill. App. 3d 122 (1998), aff'd 188 Ill. 2d 523 (1999), the court agreed, finding:

> "Here, as in *Tellez-Valencia*, the offense of predatory criminal sexual assault did not exist when the defendant committed the offenses. Specifically, here, the acts that led to the defendant's conviction occurred between December 26, 1995, and January 10, 1996. Since the crime of predatory criminal sexual assault did not exist until May 29, 1996, which was after the defendant committed the offenses, the defendant in the instant action cannot be charged with predatory criminal sexual assault." *Id*., at 915.[3]

---

[3] Citing the appellate *Tellez-Valencia* case which was later affirmed on appeal to our supreme court, the *Jaramillo* court acknowledged, however, that, when the cause is remanded to the circuit court, "[e]ven though the defendant cannot be charged with predatory criminal sexual assault, this does not prevent the State from charging the defendant with an offense in existence when the assaults occurred." *Jaramillo*, 307 Ill. App. 3d at 915 (citing *Tellez-Valencia*, 295 Ill. App. 3d 122 (1998), *aff'd* 188 Ill. 2d 523 (1999).

¶ 28 Applying all of the aforementioned principles to the facts of this case, for the reasons that follow, we are compelled to conclude that defendant's two convictions for predatory criminal sexual assault of a child are void. Here, the indictment alleged that defendant committed, in relevant part, the offense of predatory criminal sexual assault of a child on May 15 and 16, 1996. The reenacting Public Act became effective on May 29, 1996, 13 days after the date the indictment alleged that defendant committed the offenses. The offense, therefore, was nonexistent at time of the assault and defendant's two convictions for predatory criminal sexual assault of a child are void. See *Tellez-Valencia*, 188 Ill. 2d at 526; *Jaramillo*, 307 Ill. App. 3d at 915.

¶ 29 In addition, the charging instrument as it pertains to the two counts of predatory criminal sexual assault is invalid. See *Tellez-Valencia*, 188 Ill. 2d at 527 ("[T]he defect caused by charging an offense based upon a statute not in effect when the alleged offense occurred is fatal, rendering the entire instrument invalid, and warranting reversal of defendants' convictions."); see also *People v. Wasson*, 175 Ill. App. 3d 851, 854 (1988) ("A charging instrument fails to state an offense if the statute under which the defendant is charged and prosecuted is not in effect on the date of the alleged offense. A conviction on a defective instrument must be reversed."). The charging instrument in the case at bar, therefore, is invalid because it charged offenses which were not in existence on the date of the offense, that is, the offense of predatory criminal sexual assault of a child. Accordingly, the conviction must be reversed.

¶ 30 The appropriate remedy here, where an essential part of the negotiated plea agreement–the actual underlying offense–was nonexistent is to consider the plea agreement void

and remand the cause to the trial court to allow defendant the opportunity to withdraw his guilty plea or to proceed to trial. In so doing, we caution the parties to be cognizant of the fact that, although the State cannot charge defendant with the crime of predatory criminal sexual assault insofar as that crime was not in existence at the time of the assault in question, the State is clearly not prevented from charging defendant with "an offense in existence when the assaults occurred." See *Jaramillo*, 307 Ill. App. 3d at 915.

¶ 31 Recently, our supreme court addressed the intersection of plea agreements and the voidness doctrine in *People v. White*, 2011 IL 109616, and clarified that, even in the context of a negotiated guilty plea, a judgment that does not conform to statutory guidelines is void, and that the proper relief is to allow the defendant to withdraw his guilty plea and proceed to trial, if he so chooses. In *White*, the defendant was charged with first degree murder, armed robbery, and attempted armed robbery in connection with the shooting of a taxi cab driver. *White,* 2011 IL 109616, ¶ 3. The defendant pleaded guilty to first degree murder and possession of contraband in a penal institution in exchange for consecutive prison sentences of 28 and 4 years, respectively. *White,* 2011 IL 109616, ¶ 4. The factual basis for the plea established that a firearm was used in the commission of the murder offense. *White,* 2011 IL 109616, ¶ 4. Specifically, the parties stipulated that, if the case proceeded to trial, the evidence would show that the defendant and the codefendant planned to rob the taxi driver and were both inside the taxi when the driver was shot with a handgun. *White,* 2011 IL 109616, ¶ 5. It was further stipulated that, after the driver was shot, the defendant took the handgun from the codefendant and put it in his back pocket. *White,* 2011 IL 109616, ¶ 6.

¶ 32 The defendant subsequently filed motions to withdraw his guilty plea. *White,* 2011 IL 109616, ¶¶ 8-9. In addition to arguing that he did not understand the implication of pleading guilty, the defendant also alleged that he was not properly admonished about the relevant sentencing range. *White,* 2011 IL 109616, ¶ 9. The defendant specifically argued that he was subject to the 15-year mandatory firearm enhancement provision of the first degree murder statute (see 730 ILCS 5/5-8-1(a)(1)(d)(I) (West 2004)) for being armed with a firearm while committing the offense, and that he was therefore subject to a 35- to 70-year prison sentence rather than a 20- to 60-year sentence. *White,* 2011 IL 109616, ¶ 9. Accordingly, the defendant argued that the 28-year sentence he received, which was below the mandatory 35-year minimum, was not authorized by statute but was void, and that his plea agreement should be vacated. *White,* 2011 IL 109616, ¶ 9.

¶ 33 The trial court disagreed with the defendant and denied his motion to withdraw his guilty plea, but the appellate court reversed. *White,* 2011 IL 109616, ¶ 11-12. Our supreme court agreed with the appellate court, holding that the defendant's sentence was void. *White,* 2011 IL 109616, ¶ 20. In so doing, our supreme court in *White* first reiterated that courts may not impose a sentence inconsistent with the governing statutes even where the parties and trial court agree to that sentence. *White,* 2011 IL 109616, ¶ 20. The court cited *People v. Arna*, 168 Ill. 2d 107, 113 (1995) for the proposition that "[a] sentence which does not conform to a statutory requirement is void." *White,* 2011 IL 109616, ¶ 20. The court concluded that since the factual basis for the defendant's plea established that the victim died of a gunshot wound, the 15-year sentencing enhancement was mandatory and the defendant's 28-year sentence, which did not contain the

enhancement, was void. *White,* 2011 IL 109616, ¶ 26. Accordingly, the supreme court remanded the case to the trial court with directions to permit the defendant to withdraw his guilty plea. *White,* 2011 IL 109616, ¶ 29.

¶ 34 Thereafter, this court in *People v. Cortez*, held that, under *White,* a defendant challenging a guilty plea which was based in part on a void sentence should have his cause remanded to the trial court with instructions to allow the defendant to withdraw his guilty plea and to proceed to trial if he so chooses. *People v. Cortez*, 2012 IL App (1st) 102184, ¶ 19 (2012). In so doing, the court noted:

> " 'While an illegal contract is generally void *ab initio*, a plea agreement is void when an essential part of the agreed exchange is unenforceable or illegal under the relevant statutes. *People v. Gregory*, 379 Ill. App. 3d 414, 419-20 (2008). Whether a void term or aspect of the sentence was essential is determined by its relative importance in light of the entire agreement. *Gregory*, 379 Ill. App. 3d at 420.' *People v. Donelson*, 2011 IL App (1st) 092594, ¶ 14, *appeal allowed*, 360 Ill. Dec. 5, No. 113603 (March 28, 2012)." *Cortez*, 2012 IL App (1st) 102184, ¶ 18.

¶ 35 Here, we find defendant's plea is void. The unenforceable aspect of the agreement–two of the four crimes for which defendant was sentenced pursuant to the plea are void–is an essential aspect of the agreement. See *People v. Hughes*, 2012 IL 112, 817, ¶ 68 ("A plea bargain has often been compared to an enforceable contract."); see also *Gregory*, 379 Ill. App. 3d at 420 (a

plea agreement is void when an essential part of the agreed exchange is unenforceable or illegal under the relevant statutes). The agreement the State made with defendant cannot be fulfilled because it was predicated on a void statute.[4] Moreover, the structure of the sentences imposed on

---

[4] Our decision herein should not be interpreted as a general invalidation of all guilty pleas based on statutes that were not in effect at the time of the crime. We are in agreement with the Fifth District's statement in *Turner*:

> "[Our supreme court's] decision to invalidate Public Act 89-428 was not a statewide reversal of every conviction obtained under that act. We also disagree with the State's view of what the supreme court accomplished when it handed down the decision that reversed the convictions of Robbie Moore and Gomecindo Tellez-Valencia. The supreme court did no more than reverse the convictions of two people who were unhappy with them and who had a reason to have them undone. No one else's case was before the court. The supreme court did not possess the power to instantly invalidate the conviction of every person prosecuted under Public Act 89-428. To be sure, the decision creates a reason for any prisoner who was convicted under that act to have the conviction vacated. But the decision does not automatically undo the convictions of sexual predators who do not seek relief by initiating proceedings before some court." *People v. Turner*, 325 Ill. App. 3d

defendant in exchange for his guilty plea also demonstrates that the void convictions were an essential and inseparable part of the agreement. For example, the trial court ordered defendant to serve his sentence for aggravated battery of a child consecutively to the sentences received for the two void convictions of predatory criminal sexual assault, and the sentence received for the crime of aggravated kidnaping was to be served concurrently to his other sentences. The proper remedy here is to remand the cause to the circuit court to allow defendant to withdraw his guilty plea and proceed to trial, if he so chooses.

¶ 36 The State argues in its brief on appeal as well as in oral argument before this court that the reenactment of the statute transforms defendant's conviction from a void conviction to a voidable conviction. Under this logic, because the offense was in existence in June 2000 when defendant entered into his guilty plea, defendant could properly be charged and convicted of the offense at that time. The State argues that the "only remaining question is whether or not the offense could retroactively be applied to petitioner." Citing to *People v. Henserd*, 136 Ill. App. 3d 928, 939 (1985), the State then argues that "such ex post facto questions are not jurisdictional and are clearly subject to waiver."

¶ 37 This argument does not persuade us, as it is clear under the specific language of *Thompson*, a case our supreme court issued nine years after the appellate decision in *Henserd*, that "a sentence, or portion thereof, that is not authorized by statute is void" and can be attacked at anytime. *Thompson*, 209 Ill. 2d at 22-25. Here, the statute did not exist at the time of

---

185, 190 (2001).

defendant's crime and therefore, as discussed above, defendant's sentence is void. Once a statute is found unconstitutional and void *ab initio*, as in the case at bar, it is as though the statute never existed. *People v. Brown*, 225 Ill. 2d 188, 199 (2007). A defendant cannot be properly convicted and sentenced under the nonexistent statute. *Tellez-Valencia*, 188 Ill. 2d at 527 ("[T]he defect caused by charging an offense based upon a statute not in effect when the alleged offense occurred is fatal, rendering the entire instrument invalid, and warranting reversal of defendants' convictions.). Contrary to the State's argument, the reenactment of a statute does not transform convictions garnered under the nonexistent statute from void to merely voidable.

¶ 38 Nor does the State's argument that the reenacted law should be applied retroactively to defendant because there would be no *ex post facto* problem where the "original enactment of the offense of predatory criminal sexual assault of a child served as an 'operative fact' to put petitioner on notice of the potential penalties of his conduct" persuade us differently. The State's argument presupposes that Public Act 89-462, which created the offense of predatory criminal sexual assault, may be applied retroactively to acts which occurred prior to its effective date, but cites no authority to that effect. The Second Division of this court, however, has previously held that PA 89-462 may not be applied retroactively to acts occurring prior to its effective date. *Tellez-Valencia*, 295 Ill. App. 3d at 124-25, *aff'd*, 188 Ill. 2d 523. Specifically, it determined that, because the Public Act which reenacted the offense of predatory criminal sexual assault constituted a substantive change in the law and became effective after the defendant had committed the offense, it could not be applied retroactively to him. *Tellez-Valencia*, 295 Ill. App. 3d at 124-25, *aff'd*, 188 Ill. 2d 523. The court noted:

> "Generally, amendments to statutes are construed to apply prospectively and not retroactively. *People v. Digirolamo*, 179 Ill. 2d 24, 50 (1997). However, where the legislature intends retroactive application and the amendment affects procedural and not substantive rights, it applies retroactively to cases pending on direct appeal. *Digirolamo*, 179 Ill. 2d at 50.
>
> Nothing in the language of the reenacting law (Public Act 89-462) indicates that the legislature intended retroactive application. The legislature enacted Public Act 89-462 on May 29, 1996, and made it effective the same day. The express language of the act makes it applicable only to offenses that occurred on or after May 29, 1996. Thus, the legislature did not intend the law to be applied retroactively to the defendant in this case. See *People v. Wasson*, 175 Ill. App. 3d 851, 854 (1988)." *Tellez-Valencia*, 295 Ill. App. 3d at 124-25, *aff'd*, 188 Ill. 2d 523.

We see no need to deviate from this sound reasoning.

¶ 39 III. CONCLUSION

¶ 40 In conclusion, we find that the conviction of defendant for two counts of predatory criminal sexual assault of a child for acts which occurred prior to the effective date of the reenacting law (Public Act 89-462) is void. For the reasons outlined above, we remand this case to the trial court with instructions to allow defendant to withdraw his guilty plea and proceed to

trial, if he so chooses.

¶ 41 Remanded with directions.