2012 IL App (1st) 102862-U

SECOND DIVISION
August 7, 2012

No. 1-10-2862

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. 05 CR 3179
	)	
FRANK GOLEN,	)	Honorable
	)	Colleen McSweeney-Moore,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Concurrent sentences entered on negotiated plea of guilty vacated as void, cause remanded for resentencing with an aggregate sentencing cap of 45 years' imprisonment; defendant failed to make a substantial showing that plea was involuntary or that trial counsel was ineffective to require further proceedings under the Act; accordingly, judgment vacated in part and affirmed in part.

¶ 2 Defendant Frank Golen appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends for the first time on appeal that his guilty plea should be vacated because the concurrent sentences imposed by the trial court

were void. He also contends that he made a substantial showing that his plea was involuntary due to the side effects of his medication for mental illnesses, and that his trial counsel was ineffective for failing to request a fitness hearing.

¶ 3 The record shows that on December 20, 2005, defendant entered a negotiated plea of guilty to first degree murder and armed robbery, and was sentenced to concurrent, respective terms of 45 and 25 years' imprisonment. The transcript of the guilty plea proceeding shows that the court asked defendant if it was "true" that he wished to plead guilty to one count of first degree murder and one count of armed robbery, and defendant responded, "[y]es, sir." The court then explained the sentencing ranges for the charged offenses, and when the court asked defendant if his signature was on the jury waiver, if he understood what a jury trial was and that by signing the document he was giving up his right to a jury trial, defendant responded, "[y]es." The court also asked defendant if any force, threats, or promises were made to him in exchange for his plea of guilty, and he stated, "[n]o, sir."

¶ 4 The State then presented the factual basis for the plea showing that the then 23-year-old defendant formulated a plan in late 2004 to rob the 70-year-old victim. On December 27, 2004, defendant met the victim in a motel room where he used a hammer to beat the victim about the head until he was unresponsive. He then rifled through the victim's pockets taking what he wanted from them. Defendant later sold the victim's car. The court accepted the factual basis and defendant's pleas noting that it found that defendant understood the nature of the charges and possible penalties that apply, and that defendant voluntarily, knowingly, and understandingly waived his right to a jury trial.

¶ 5 Before imposing sentence, the court asked defendant if there was anything he wished to say, and he responded, "I would like to apologize to the family for what I have done." The court then imposed the agreed-upon concurrent sentences of 45 years' imprisonment for first degree murder and 25 years' imprisonment for armed robbery. When the court inquired if the sentences

imposed were consistent with defendant's understanding of the agreement, defendant responded, "[y]es." The court then admonished defendant of his appeal rights, but defendant made no attempt to vacate his pleas, or otherwise perfect an appeal from the judgment entered thereon.

¶ 6 On September 29, 2008, defendant filed a *pro se* post-conviction petition alleging that he was denied effective assistance of trial counsel because counsel failed to seek a fitness hearing despite being aware that he was taking psychotropic medication. He alleged that he had informed counsel that he was taking such medication for major depression and auditory hallucinations, that he has been taking medication on and off since he was a child, and that he has a history of being hospitalized for attempted suicide, depression and auditory hallucinations, but that counsel failed to bring this to the trial court's attention. Defendant also stated that psychotropic medication is an important signal that a defendant may not be competent to plead guilty, and maintained that he was unable to assist his defense counsel "in the right manner" because of the side effects from the medication he was taking. He claimed that had a fitness hearing been held, he would have been found unfit, and never would have pleaded guilty.

¶ 7 In support of his petition, defendant attached his psychiatric medical records dating back to April 13, 1994, when he was 12 years of age and first admitted to Chicago-Read Mental Health Center for suicidal verbalizations, and threats to his parents. During that initial stay, defendant complained of having auditory hallucinations, which "were seen as hypnogogic in nature." The next psychiatric medical record is from March 2005, when defendant, who was then incarcerated in this case, was referred to the psychiatric unit for depression, reports of auditory hallucinations, and attempted suicide. After being hospitalized, he indicated that he was never going to kill himself, and had wanted to be transferred to the psych unit. According to the progress notes from the month defendant was admitted, he reported a history of auditory hallucinations telling him "he is bad," and in April 2005, he again attempted suicide.

¶ 8 The progress notes dated November 30, and December 1 and 2, 2005, indicate that defendant was cooperative during the interviews, exhibited no behavioral problems, was calm, alert, and not delusional. He also stated that he was depressed about his case and had been offered 50 years' imprisonment and had a conference coming up with the judge concerning his plea. At that time, defendant did not report any auditory hallucinations. These records further reveal that at the time defendant entered his guilty plea on December 20, 2005, he was taking Zoloft, and Trazodone. The progress notes from December 22, 2005, indicate that defendant told the interviewer what happened with his case, and that he appeared pleasant, a little down, but stable on medication.

¶ 9 Thereafter, defendant was appointed counsel who, on December 4, 2009, filed an amended post-conviction petition alleging, *inter alia*, that the amended petition did not replace the *pro se* petition, but, rather, added to it. In the amended petition, counsel alleged that trial counsel was ineffective for failing to investigate, and adequately consult with defendant, that he misinformed and misled him concerning the agreed sentence, and coerced him into pleading guilty. Counsel further alleged that the chemical intrusions and altering effects of the psychotropic medication that defendant was prescribed and taking before and during plea negotiations, rendered defendant's plea involuntary and unknowing. He explained that the prescribed medication made defendant too drowsy and confused to properly focus on his case, and unable to fully understand the plea agreement; and that because he would hear voices in addition to that of his attorney, he was unable to fully comprehend his plea hearing. Counsel thus maintained that defendant's plea should be vacated, and the charges reset anew for trial.

¶ 10 In support of the petition, counsel attached an excerpt from the guilty plea proceeding and defendant's affidavit. In the latter, defendant averred that he entered a negotiated plea, but that the plea was not fully knowing and voluntary in that his attorney told him he should plead guilty because he would not succeed at trial. Defendant further averred that he felt he had no choice,

but to accept the offer, because if he did not, he would receive a more severe sentence; and that during the plea proceedings, he was taking psychotropic medication ("Respodal, Trazodone, Seroqual, and Zolioft [*sic.*]") for major depression and auditory hallucinations. Defendant further attested that the effects of the medication made him unable to adequately assist in his defense, and too drowsy and confused to properly focus on his case. He also averred that he would hear voices in addition to that of his attorney, and that due to the effects of the medication, he did not fully comprehend the plea agreement, specifically noting that he did not understand the questions posed to him at the plea proceeding. He further averred that when he did not understand a question, his counsel told him whether to respond with a yes or no, and that he did not respond knowingly or voluntarily. He finally averred that due to his counsel's representation and the effects of the medication, his plea was not voluntarily, knowingly and intelligently made.

¶ 11 Counsel also attached seven pages of defendant's medical history, which showed that defendant was taking Albuterol from July 14, 2005, to October 6, 2005, and Zoloft, Valproic Acid, Risperidone, and Trazodone from September 22, 2005, to November 3, 2005. The documents further show that defendant attempted suicide on November 29, 2005, at which time he was on Trazodone, and had last taken Risperdone, Zoloft, and Ativan two days prior to that date. Counsel also attached prescriptions, including one dated November 2005 for six weeks worth of Zoloft, Trazodone, Risperidone and another medication which was short-handed and indecipherable. These medical records show that defendant was taking Zoloft and Trazodone from December 5, 2005, through December 19, 2005.

¶ 12 In accordance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984), counsel filed a certificate of compliance stating that he communicated by mail and phone with defendant, read his *pro se* petition, and ascertained "his deprivation of constitutional rights." He further stated that he had reviewed the petition and plea hearing transcript, and filed an amended petition.

¶ 13 The State filed a motion to dismiss alleging in a footnote that, in the amended post-conviction petition, defense counsel stated that the amended petition augmented the *pro se* petition, however, counsel informed the State on January 20, 2010, that the amended petition was a "superceding document and that it would not be necessary to address the claims in the *pro se* petition." The State indicated that "based on that conversation," it would solely address the amended petition in its motion to dismiss.

¶ 14 The State alleged therein that defendant waived the issue of the voluntariness of his plea in a post-conviction proceeding where he could have raised it in a motion to withdraw his plea but did not, and that defendant's claims are refuted by the record. The State also alleged that defendant's claim that he misunderstood the sentence he was going to receive was unsupported, and his allegation that his plea was not voluntarily, knowingly or intelligently made was a self-serving, conclusory allegation that was refuted by the record. The State further claimed that the medical records attached to defendant's petition show that he stopped taking psychotropic medication 47 days prior to his guilty plea, and that there was no evidence, short of his self-serving statements, that the medication would have the effects he claimed.

¶ 15 On August 25, 2010, a proceeding was held on the State's motion to dismiss defendant's post-conviction petition before a circuit court judge who had not taken the plea. Post-conviction counsel noted that defendant has a *pro se* petition, and that he has filed an amended petition with two arguments which the State responded to in its motion to dismiss. The State then argued, in relevant part, that defendant indicated on the record that the sentences were consistent with his understanding of the agreement, and explained that defendant entered a fully negotiated plea. Defense counsel responded that his claims were supported by the medical records attached to the petition regarding the psychotropic medication which were matters outside the record. Counsel also maintained that defendant was on this medication through December 22, 2005, and noted that he pleaded guilty on December 20, 2005. The State replied that the medication was last

taken six weeks prior to his guilty plea, and there was no evidence that it precluded defendant from entering a knowing and voluntary plea.

¶ 16 After hearing the arguments of counsel, the court granted the State's motion to dismiss defendant's post-conviction petition. In doing so, the court noted that the half sheet reflects that on July 13, 2005, the State indicated that it would not seek the death penalty, and in exchange, entered into a fully negotiated plea of guilty with defendant on December 20, 2005. The court also noted that some of defendant's allegations are outside the record, but that the record belied his claim that he did not understand the plea proceedings or was somehow misled where it reflected that he freely, voluntarily and knowingly entered the plea. The court also concluded that defendant did not substantiate his claim regarding the effects of the purported psychotropic medication on his guilty plea.

¶ 17 On appeal, defendant claims, for the first time, that his sentences were void because they were ordered to run concurrently when the relevant sentencing statute required the imposition of consecutive sentences. He also maintains that the void sentences rendered his guilty plea void, and, therefore, that his guilty plea should be vacated. The State concedes that the concurrent sentences are void, but maintains that the actual plea agreement was not void, and that this court should remand for resentencing with a sentencing cap of 45 years' imprisonment.

¶ 18 Defendant's challenge to the validity of his negotiated sentences is made for the first time on appeal from the second-stage dismissal of his post-conviction petition . Although allegations that are not raised in a defendant’s post-conviction petition cannot be raised for the first time on appeal (*People v. Jones*, 213 Ill. 2d 498, 508 (2004)), a void sentence can be corrected at any time and is not subject to waiver or forfeiture (*People v. Donelson*, 2011 IL App (1st) 092594, ¶8, appeal allowed No. 113603). We thus consider the merits of his claim.

¶ 19 At the time defendant committed the instant offenses, section 5-8-4(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4(a) West 2004)) provided that:

> "When multiple sentences of imprisonment are imposed on a defendant at the same time *** the sentences shall run concurrently or consecutively as determined by the court. *** The court shall impose consecutive sentences if [] one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(a)(I) (West 2004).

¶ 20 Here, defendant was convicted of first degree murder and armed robbery during which he inflicted severe bodily injury by bludgeoning the victim to death with a hammer. Based on section 5-8-4 of the Code the court should have imposed consecutive sentences on defendant's convictions of first degree murder and attempted robbery, rendering the concurrent sentences imposed void. *Donelson*, at ¶9, 12, citing *People v. White*, 2011 IL 109616, ¶31. We note that had defendant pled guilty to count V, felony murder, the trial court would not have been required to impose a consecutive sentence on the armed robbery count as it would be considered an included offense. *People v. Coady*, 156 Ill. 2d 531, 537 (1993). Indeed, the armed robbery count would not have supported a separate conviction and sentence, however, the concurrent sentence imposed would only have been voidable, not void, and therefore would not have supported a post-conviction claim for relief. *Coady*, 156 Ill. 2d at 540.

¶ 21 The State concedes that the concurrent sentences are void, but disputes the remedy for the error. Defendant maintains that because his sentence is void, the guilty plea should be vacated. The State responds that the guilty plea as a whole is not void, and that this court should remand for resentencing with a cap of 45 years' imprisonment, relying primarily on *Donelson*. In his reply brief, defendant argues that *Donelson* is contrary to *White* and longstanding law, and that the proper remedy is to vacate the agreement.

¶ 22 In *White*, defendant was sentenced pursuant to a negotiated plea agreement to 28 years' imprisonment for first degree murder to run consecutively to a sentence of 4 years' imprisonment for possession of contraband while in a penal institution. *White*, ¶¶4, 7. Nine days later, defendant filed a motion to vacate his guilty plea alleging that he was subject to the 15-year mandatory firearm enhancement provision (730 ILCS 5/5-8-1(a)(1)(d)(I) (West 2010)), making the actual sentencing range 35 to 70 years. *White*, ¶9. The circuit court denied the motion, but the reviewing court found that the sentence was void and invalidated the entire plea agreement, then remanded the cause to the circuit court for defendant to withdraw his plea, if he so chose. *White*, ¶¶11, 14. The supreme court affirmed that judgment, finding that the firearm enhancement applied, and that defendant's sentence was void because it did not conform to the statutory requirements; and, because defendant was promised a sentence that he could not legally receive, the entire plea agreement was also void. *White*, ¶ ¶19, 21.

¶ 23 In *Donelson*, defendant entered negotiated pleas of guilty to first degree murder, home invasion, and aggravated criminal sexual assault in exchange for concurrent prison sentences totaling 50 years. *Donelson*, ¶¶3, 4. Six years later, defendant filed a petition for relief from judgment (735 ILCS 5/2-1401(f) (West 2010)), claiming that his plea was involuntary, and that his counsel provided ineffective assistance. The circuit court dismissed defendant's petition, and defendant appealed, asserting for the first time, that because section 5-8-4 of the Code required consecutive sentences and he was sentenced to concurrent terms, his plea was void and should be vacated. *Donelson*, ¶¶5, 7. This court agreed that the sentences were void based on the requirement of section 5-8-4, but that defendant's guilty plea was not void where the 50-year sentence fell within the range of the aggregate of consecutive sentences that could be imposed. *Donelson*, ¶¶9, 13, 18-19 (the range for murder was 20 to 60 years and the range for the other two offenses was 6 to 30 years, meaning the minimum was 32 years with the maximum being 120 years' imprisonment). This court concluded that the plea agreement, taken as a whole, was

not void, and that the appropriate remedy was to enforce the overall plea agreement consistent with the relevant statutes by vacating the void sentence and remanding for resentencing with a mandatory consecutive sentence aggregate of 50 years' imprisonment. *Donelson,* ¶19.

¶ 24 In doing so, this court acknowledged *White*, but found it distinguishable on the key issue of whether the plea agreement was void. *Donelson,* ¶15. This court explained that in *White*, the aggregate sentence imposed, 32 years' imprisonment, was contrary to the statutory authority which mandated a minimum sentence of 35 years' imprisonment, and thus, had the supreme court remanded only the sentence, the circuit court would not have been able to impose the total number of years to which defendant had agreed. *Donelson*, ¶15. Based on those distinct circumstances, *White* determined that the plea agreement was void. *Donelson*, ¶15. In highlighting this difference, this court further observed that, unlike *White,* the plea agreement in its case was achievable in that it fell within the range of the minimum and maximum of the total of the consecutive sentences permitted by statute, and thus concluded that the agreement was not contrary to statutory authority and, consequently, not void. *Donelson*, ¶18-19.

¶ 25 Defendant's protestations to the contrary, we find this case akin to *Donelson,* and reach the same result. As in *Donelson*, ¶18, the plea agreement in this case, taken as a whole, is not contrary to statutory authority, and thus not void. Defendant pleaded guilty in exchange for a total of 45 years' imprisonment, and given the sentencing range of 6 to 30 years for armed robbery and 20 to 60 years for murder (730 ILCS 5/5-8-1(a)(3), 4.5-20 (West 2010)), he could properly be sentenced to consecutive terms totaling 45 years' imprisonment. *Donelson*, ¶18. Accordingly, we find that the appropriate remedy is to enforce the overall plea agreement consistent with the relevant statute by vacating the void sentence and remanding for resentencing to a total prison term, with mandatory consecutive sentencing, of not more than 45 years. *Donelson,* ¶15, 18-19.

¶ 26 In reaching this conclusion, we have considered *People v. Johnson*, 338 Ill. App. 3d 213 (2003), and *People v. Hare*, 315 Ill. App. 3d 606 (2000), cited by defendant, and continue to find them distinguishable as we did in *Donelson*. In *Johnson.* 338 Ill. App. 3d ast 216, and *Hare*, 315 Ill. App. 3d at 607-11, defendants received sentences that could not be statutorily achieved, *i.e.*, probation when probation was not statutorily permitted, and four years' imprisonment when the minimum was six years, respectively; and as a consequence, the plea agreements were unenforceable. Here, on the other hand, the aggregate sentence of 45 years' imprisonment fell within the sentencing range of the total of consecutive sentences that were statutorily required. 730 ILCS 5/5-8-1(a)(3), 4.5-20 (West 2010); 730 ILCS 5/5-8-4(d)(1) (West 2010). The plea agreement in the case at bar is, therefore, not contrary to statutory authority, and is enforceable, not void.

¶ 27 Defendant further contends that the circuit court improperly dismissed his petition where he made a substantial showing that his guilty plea was involuntary and that his counsel was ineffective for failing to request a fitness hearing. He claims that the side effects of the psychotropic medication he was taking and the symptoms of his mental illness rendered him unable to understand the terms of his plea or to assist in his defense. We observe that defendant has raised no issue regarding the remaining claims in his *pro se* and amended petitions, and has thus waived them for review. *Pendleton*, 223 Ill. 2d at 476.

¶ 28 At the second stage of post-conviction proceedings, defendant is required to make a substantial showing of a constitutional violation. *People v. Lofton*, 2011 Il App (1st) 100118, ¶¶27, 28, citing *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). All well-pleaded facts in the petition that are not rebutted by the record are to be taken as true, and our review of the circuit court's dismissal of a petition at the second stage is *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 29 In stating his claim, defendant relied on his own affidavit and records showing his history of mental illness dating back to 1994, and treatment therefore. While he was incarcerated in

2005, for this case, he was treated for depression and auditory hallucinations with Zoloft, Trazodone, Risperidone, and, at times, Ativan. However, a defendant is not presumed unfit to stand trial by virtue of the fact that he is taking psychotropic medication. *People v. Stokes*, 333 Ill. App. 3d 655, 659-60 (2002). The medical records defendant attached to his petition show that he was not delusional around the time he pleaded guilty, that he was able to relay the status of his plea proceedings to the personnel at the psychiatric hospital, and was stable on medication. This status is also reflected in the transcript of the guilty plea proceeding which shows that defendant was attentive to the proceedings, indicated his understanding of the admonishments given, responded appropriately to the court's questions, asked for forgiveness for his actions, and indicated no confusion or misunderstanding of the nature of the pleadings. *People v. Maury*, 287 Ill. App. 3d 77, 83 (1997). Defendant's claim is thus belied by the record (*Maury*, 287 Ill. App. 3d at 83), and we conclude that he failed to make a substantial showing that his plea was involuntary to warrant further proceedings under the Act.

¶ 30 We reach the same conclusion with regard to his claim of ineffective assistance of plea counsel for failing to request a fitness hearing. In determining whether defendant presented a substantial showing of ineffective assistance of trial counsel to warrant further proceedings under the Act, we are guided by the standard set forth in *Strickland*. *People v. Morris*, 335 Ill. App. 3d 70, 78 (2002), citing *Strickland v. Washington*, 466 U.S. 668 (1984). Under that standard, defendant must establish that counsel's performance fell below an objective standard of reasonableness, and that but for the deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. For the reasons that follow, we find that defendant has not made such a case.

¶ 31 Defendant maintains that he presented a substantial showing that his trial counsel was ineffective for failing to request a fitness hearing where counsel knew defendant was on psychotropic medications and suffered from depression and auditory hallucinations and had to

prompt his answers at the plea proceeding. To establish that trial counsel's alleged incompetency prejudiced him within the meaning of *Strickland*, defendant must show that facts existed at the time of his trial or plea that would have raised a *bona fide* doubt of his ability to understand the nature and purpose of the proceedings and assist in his defense. *People v. Johnson*, 206 Ill. 2d 348, 361-62 (2002)*; People v. Alberts*, 383 Ill. App. 3d 374, 378 (2008). The critical inquiry is whether the facts presented in defendant's post-conviction petition raised a *bona fide* doubt as to his fitness to stand trial. *Alberts*, 383 Ill. App. 3d at 378. Since the outside internet and book resources defendant has cited in his appellate brief to support his post-conviction petition were not included in his petition, they will not be considered. *People v. Anderson*, 375 Ill. App. 3d 121, 138-39 (2007).

¶ 32 The fact that one suffers from a mental illness does not necessarily render him unfit to stand trial (*People v. Weeks*, 393 Ill. App. 3d 1004, 1012 (2009)); and, as noted above, a defendant is not presumed unfit to stand trial by virtue of the fact that he is being treated with psychotropic medications (*Stokes*, 333 Ill. App. 3d at 659-60; see also 725 ILCS 5/104-21(a) (West 2010)). Rather, the question is whether that person can understand the nature of the proceedings against him and cooperate in his defense. *People v. Harris*, 206 Ill. 2d 293, 305 (2002).

¶ 33 The supporting documentation defendant relies upon to establish his claim includes medical records showing that in late November and December 2005, defendant was stable on medication, not delusional, and able to relay the current status of his plea proceedings. The record further shows that at the plea proceeding on December 20, 2005, defendant indicated that he understood the nature of the proceedings which the court had explained to him, he wished to plead guilty; and articulated a clear statement of apology for his actions before being sentenced. *Harris*, 206 Ill. 2d at 305; *People v. Wilborn*, 2011 Il App (1st) 092802, ¶58. The transcript thus shows that he was attentive and aware of the nature of the guilty plea proceeding, and at prior

proceedings before the court, he was able to converse with his counsel regarding his case, and participated in a Supreme Court Rule 402 (eff. July 1, 1997) conference with counsel, the State, and the court. Under these circumstances, we find that defendant failed to present a substantial showing of ineffective assistance of trial counsel for failing to request a fitness hearing to warrant further proceedings under the Act. *Harris*, 206 Ill. 2d at 305; *Weeks*, 393 Ill. App. 3d at 1012.

¶ 34 Based on the foregoing, we vacate defendant's sentences and remand to the trial court for resentencing to impose consecutive sentences with an aggregate cap of 45 years' imprisonment and affirm the judgment in all other respects.

¶ 35 Vacated in part; affirmed in part.