2014 IL App (1st) 130173-U

SIXTH DIVISION
December 19, 2014

No. 1-13-0173

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. 82 C 10696
	)	
MILTON McGEE-BEY,	)	Honorable
	)	William J. Kunkle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Where we had jurisdiction over appeal from dismissal of postconviction petition for lack of standing due to a completed sentence, we affirmed the dismissal over defendant's argument that his conviction and sentence were void, which was raised for the first time on appeal, but corrected the mittimus

¶ 2 Defendant, Milton McGee-Bey, appeals from the November 2012 summary dismissal of his *pro se* postconviction petition at the first stage for lack of standing. On appeal, defendant argues for the first time that he was convicted and sentenced on the offense of residential burglary after revocation of his probation for burglary and, therefore, the conviction and sentence

are void. Defendant requests that the mittimus be corrected to reflect a conviction of burglary. We affirm the dismissal of defendant's postconviction petition because he lacked standing to bring a postconviction petition and find his conviction and sentence were not void. We do correct the mittimus to show the correct offense.

¶ 3 On November 15, 1982, defendant was charged by information with residential burglary. On May 17, 1983, defendant pled guilty. The record demonstrates the plea was on an amended charge of burglary. The periodic imprisonment order and probation order identified defendant's offense as burglary. The entry on the half-sheet for that date states "the motion to amend information sustained from residential burglary to burglary;" "defendant now enters plea[] of guilty to amended information;" and defendant was found "guilty of burglary in manner and form as charged in amended information." The half-sheet also shows that "[r]esidential burglary" has been changed to "burglary"; "dwelling" has been changed to "building;" and the statutory citation of the offense was amended. Defendant was sentenced to three years' probation, with periodic imprisonment on weekends, for the first three months of probation.

¶ 4 In July 1983, the State filed a petition to revoke defendant's probation alleging that he had violated the periodic imprisonment condition. On September 7, 1983, following a hearing, the circuit court revoked defendant's probation and resentenced him to a four-year prison term. The half-sheet entry for that date shows the circuit court "revoked and terminated" probation and sentenced defendant to four years' imprisonment without naming the offense with "credit for time served on probation" and "mittimus to issue *instanter*." The notification of felony conviction on that date indicates defendant was charged with residential burglary, but was convicted of burglary on an amended charge, and was being "resentenced on violation of

probation" to four years' imprisonment. However, the mittimus states defendant was resentenced for a charge of residential burglary.

¶ 5 On August 30, 2012, defendant filed a postconviction petition challenging his probation revocation proceedings in 1983, and the length of his sentence. On November 16, 2012, the circuit court dismissed the postconviction petition stating, in part that "[p]etitioner has long since served his sentences and is not entitled to postconviction relief." Defendant timely filed a notice of appeal.

¶ 6 The parties agree that defendant had completed his sentence when he filed his postconviction petition in 2012. Therefore, he lacked standing to bring a postconviction petition under section 5/122-1(a) of the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1(a) (West 2012). Because defendant lacked standing to bring his postconviction petition, the circuit court did not err in dismissing defendant's postconviction petition.

¶ 7 Defendant argues for the first time on appeal that the conviction and the four-year sentence imposed for his violation of probation are void, because the circuit court resentenced him on the original charge of residential burglary instead of the amended charge of burglary. Defendant requests only a correction of the mittimus to reflect his conviction was on burglary, not residential burglary.

¶ 8 Defendant's argument poses two threshold issues: whether this court has jurisdiction and, if so, whether defendant's argument that his conviction and sentence are void can be considered in that it was raised for the first time on appeal.

¶ 9 The State asserts the circuit court did not have jurisdiction over defendant's postconviction petition in that defendant lacked standing under the Act. In turn, the State argues

this court does not have jurisdiction to consider any issue except whether the circuit court had jurisdiction.

¶ 10 The State, in support of its argument, cites *People v. Vinokur*, 2011 IL App (1st) 090798. In *Vinokur*, the Third Division held that a postconviction claim of a void sentence was not cognizable on appeal when the petitioner lacked standing under the Act due to the completion of his sentence. The *Vinokur* court recognized that a void order may be attacked at any time, either directly or collaterally, but only in a proceeding properly pending in the courts. *Id.* ¶ 16 (citing *People v. Flowers*, 208 Ill. 2d 291, 308 (2003)). This court compared the *Vinokur* defendant's lack of standing under the Act with the belated postplea motion under Supreme Court Rule 604(d) (Ill. S. Ct. R. 604(d) (eff. Feb. 6, 2013)), in *Flowers* and concluded that "the appeal before us is proper, we only have the authority to determine whether the trial court was correct in dismissing defendant's petition for lack of standing." *Vinokur*, 2011 IL App (1st) 090798, ¶ 18 (citing *Flowers*, 208 Ill. 2d at 307). Notably, the *Vinokur* court acknowledged *People v. Thompson*, 209 Ill. 2d 19 (2004), which held that "*Flowers* did not affect the court's decision to consider the merits of the defendant's void sentence claim on appeal from the dismissal of his postconviction petition because his postconviction petition and his appeal from its dismissal were both properly before the court." *Vinokur*, 2011 IL App (1st) 090798, ¶ 18 (citing *Thompson*, 209 Ill. 2d at 28-29)).

¶ 11 However, in *People v. Henderson*, 2011 IL App (1st) 090923, the Fourth Division disagreed with the *Vinokur* court's determination that "a lack of standing has the same effect as the jurisdictional defect addressed in *Flowers*," and found that standing does not affect subject-matter jurisdiction in Illinois. *Id.* ¶ 40 (citing *People v. Four Thousand Eight Hundred Fifty Dollars ($4,850) United States Currency*, 2011 IL App (4th) 100528, ¶ 14). The *Henderson*

court, thus, considered on appeal the defendant's claim of a void conviction despite his lack of standing under the Act. *Henderson*, 2011 IL App (1st) 090923, ¶¶ 38-41. More recently, the Second District in *People v. Vasquez*, 2013 IL App (2d) 120344, followed *Henderson* rather than *Vinokur* when considering a postconviction claim for credit against fines which can be raised at any time, despite a defendant's lack of standing under the Act. In so holding, the court explained:

> "The problem with the reasoning in *Vinokur* is that it conflates the legal principles of standing and subject matter jurisdiction. In *Flowers*, which the *Vinokur* court relied on, the supreme court found that the trial court lacked subject matter jurisdiction to hear the defendant's motion to reconsider, meaning that the trial court had no authority to consider the merits of the defendant's motion and that its ruling was void. [Citation.] This was not the situation in *Vinokur*, where the trial court had subject matter jurisdiction over the defendant's postconviction petition. Though the defendant in *Vinokur* lacked standing to file a postconviction petition to address his constitutional claim, the defendant's lack of standing did not divest the trial court of subject matter jurisdiction, and thus the reviewing court could consider the defendant's voidness challenge." *Id.* ¶ 21.[1]

¶ 12 Following *Vasquez* and *Henderson*, we conclude that a defendant's lack of standing under the Act is not jurisdictional. Thus, the circuit court had jurisdiction over defendant's postconviction petition. Defendant timely appealed the summary dismissal of his postconviction petition, an act vesting us with jurisdiction in the general sense. Ill. S. Ct. R. 651(a), (d) (eff. Feb.

[1] We note that our supreme court recently cited *Vinokur* in *People v. Bailey*, 2014 IL 115459, but only for the principle that a lack of jurisdiction in the circuit court does not bar the appellate court from exercising jurisdiction, but limits it to considering the issue of jurisdiction below. *Vasquez*, 2013 IL App (2d) 120344, ¶ 29.

6, 2013 as amended) ("procedure for an appeal in a post-conviction proceeding shall be in accordance with the rules governing criminal appeals, as near as may be"); Ill. S. Ct. R. 606(a) (eff. Feb. 6, 2013 as amended) ("Appeals shall be perfected by filing a notice of appeal with the clerk of the trial court. *** No step in the perfection of the appeal other than the filing of the notice of appeal is jurisdictional."). The State is correct in noting that a trial court's lack of jurisdiction is not a complete bar to the exercise of jurisdiction by the appellate court. See *Bailey*, 2014 IL 115459, ¶ 29. Rather, under such circumstances, this court is limited to considering the issue of the circuit court's jurisdiction below. *Id*. However, because we find that the circuit court had jurisdiction over defendant's postconviction petition, we are not limited to a consideration of the issue of jurisdiction below, and may consider the claim defendant now raises.

¶ 13 As to the second threshold issue—defendant raising his contention for the first time on appeal—generally, a claim not raised in a postconviction petition cannot be argued for the first time on appeal and the claim is forfeited. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006). However, a void judgment, including a sentence that does not conform to statutory requirements, may be challenged, directly or collaterally at any time, in any court which has jurisdiction. *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). In particular, an attack on a void judgment does not depend on the Act for its viability. *People v. Brown*, 225 Ill. 2d 188, 199 (2007). A judgment is void only if the court which entered it lacked jurisdiction and/or to the extent that the court lacked the power to render that particular judgment. *People v. Gray*, 2013 IL App (1st) 112572, ¶ 10.

¶ 14 Regarding the voidness issue, defendant does not dispute that the circuit court had jurisdiction to resentence him following the revocation of his probation. The circuit court then

had the authority to continue defendant on probation, with or without modifying or enlarging the conditions, or "impose any other sentence that was available *** at the time of initial sentencing." Ill. Rev. Stat. 1983, ch. 38, ¶ 1005-6-4(e).

¶ 15 The record establishes and the parties do not dispute—that defendant pled guilty in May 1983 and that he was resentenced in September 1983 upon violating his probation. Although the record on appeal does not include a transcript or suitable equivalent (see Ill. S. Ct. R. 323(c), (d) (eff. Dec. 13, 2005), and Ill. S. Ct. R. 612(c) (eff. Feb. 6, 2013)), for his guilty-plea proceeding or probation-revocation hearing, the common-law record establishes defendant's initial plea and conviction were for burglary. See *People v. Liekis*, 2012 IL App (2d) 100774, ¶ 33 (absent written orders to the contrary, half-sheet entries are an official record of circuit court orders). Defendant's four-year prison term imposed at resentencing was within the statutory sentencing range of three to seven years' imprisonment for the Class 2 felony of burglary. Ill. Rev. Stat. 1983, ch. 38, ¶¶ 19-1(b); 1005-8-1(a)(5). Therefore, defendant's sentence, after revocation of his probation, was within the applicable statutory limits available at the time of his initial sentencing for burglary and is not void.

¶ 16 However, as to his resentencing, defendant's mittimus states his conviction and sentence were for the offense of residential burglary. Defendant is not seeking to "purge [his] criminal records," and he is not, as the State argues, belatedly arguing reversible error. Defendant is merely asking this court to correct the mittimus to accurately reflect the correct offense.

¶ 17 Under Supreme Court Rule 615(b) (Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999)), this court has the authority to correct a mittimus at any time. See *People v. McNeal*, 405 Ill. App. 3d 647, 681 (2010).

¶ 18 We acknowledge defendant lacked standing under the Act, and that he has completed his sentence. However, as set forth above, this court has jurisdiction over this matter and, under these particular circumstances, we find that the mittimus may be corrected. Thus, defendant's request to correct the mittimus to reflect that his conviction and sentence were for burglary, rather than residential burglary, is granted.

¶ 19 Accordingly, the judgment of the circuit court is affirmed. Under Supreme Court Rule 615(b)(2) (Ill. S. Ct. R. 615(b)(2) (eff. Aug. 27, 1999)), we direct the clerk of the circuit court of Cook County to correct the mittimus to reflect the offense of burglary under Ill. Rev. Stat. 1983, ch. 38, ¶ 19-1.

¶ 20 Affirmed; mittimus corrected.