

FIFTH DIVISION
AUGUST 29, 2014

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
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 9698
)	
BRIAN MILLER,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Denial of defendant's petition for relief from judgment affirmed where the trial court's failure to specifically assign the mandatory term of MSR to defendant's sentence did not render the sentence void; however, the sentence entered on armed robbery with a firearm conviction, which did not include the 15-year firearm enhancement, was void, requiring that sentence be vacated and matter remanded for resentencing with directions.

¶ 2 Defendant Brian Miller appeals from an order of the circuit court of Cook County denying his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). He maintains that the trial court's failure to

order him to serve a term of mandatory supervised release (MSR) at sentencing created a void order, and thus the denial of his section 2-1401 petition was erroneous.

¶ 3 Following a bench trial in 2009, defendant was convicted of armed robbery with a firearm, and sentenced to nine years' imprisonment. Defendant filed a notice of appeal from that judgment and this court subsequently granted his motion to dismiss it. *People v. Miller*, No. 1-09-1822 (2010) (dispositional order).

¶ 4 On November 27, 2012, defendant, through counsel, filed the section 2-1401 petition at bar alleging that his MSR term was void because the trial court did not mention it in its sentencing pronouncement or list it in the mittimus, and the Illinois Department of Corrections (IDOC) impermissibly added a three-year term of MSR to his sentence. Defendant maintained that the MSR term was void, and it could be attacked at any time. He also maintained that his MSR term was an unconstitutional extension of his sentence, and that he should be released from serving that term.

¶ 5 On January 28, 2013, the circuit court denied defendant's section 2-1401 petition. The court found that when it sentenced defendant after a bench trial, it did not advise him of the MSR term, but because it was a bench trial, "there was no benefit of [the] bargain for the defendant in this particular matter," and therefore such admonishment was not required.

¶ 6 On appeal, defendant contends that the circuit court erred in denying his petition because he set forth a valid cause of action regarding the imposition of a term of MSR. He claims that the idea that a sentence can be imposed on a defendant "by operation of law" has three constitutional problems: 1) there is no automatic way for MSR to be imposed as the law has "neither tongue nor hands," and IDOC cannot remedy the omission by the court, 2) the court is

the only agent authorized to impose the sentence, and 3) the recent change in the law requiring inclusion of the MSR term in the written order (Pub. Act 97-531 (eff. Jan. 1, 2012) (amending 730 ILCS 5/5-8-1(d) (West 2010)) belies the claims that there was an automatic way for this to occur and that the court has no role in imposing the MSR terms. He, therefore, requests that his sentence be reduced by the MSR term.

¶ 7 The State responds that defendant's petition was properly denied because it was untimely filed, and his contention is without merit. The record shows that defendant filed his section 2-1401 petition one year after the two-year limitations period expired. 735 ILCS 5/2-1401(c) (West 2010). As such, it is facially untimely and defendant has not alleged or shown any basis for excusing the tardy filing.

¶ 8 Defendant replies that he is not barred from seeking relief because he is attacking a void judgment. Although a void judgment may be challenged at any time through a section 2-1401 petition (*People v. Harvey*, 196 Ill. 2d 444, 447 (2001)), we must first determine whether the judgment is actually void (*People v. Balle*, 379 Ill. App. 3d 146, 151 (2008); *People v. Lott*, 325 Ill. App. 3d 749, 751-52 (2001)).

¶ 9 When defendant was sentenced in 2009, the Unified Code of Corrections (Unified Code) provided, in relevant part, that "every sentence shall include as though written therein a term in addition to the term of imprisonment. *** [S]uch term shall be identified as a mandatory supervised release term *** [which] shall be as follows: (1) for first degree murder or a Class X felony *** 3 years." 730 ILCS 5/5-8-1(d)(1) (West 2008). In *People v. McChriston*, 2014 IL 115310, ¶¶ 10-11, the supreme court rejected the defendant's argument, raised in a section 2-1401 petition, that his constitutional rights were violated by the imposition of the MSR term

where the court did not refer to it at sentencing or include it in the sentencing order, and IDOC improperly added the three-year term to his sentence. Construing the plain language of section 5-8-1(d) of the Unified Code, prior to the 2012 amendment which requires the MSR term to be written in the sentencing order (730 ILCS 5/5-8-1(d) (West 2012)), the supreme court held that a sentence includes a period of MSR "as if it were written within the sentence," even if the trial court did not mention the MSR period at sentencing or include it in the sentencing order. *McChriston*, 2014 IL 115310, ¶ 17. The same court explained that IDOC did not add the MSR term but, instead, the term was added to the defendant's sentence by operation of law, *i.e.*, automatically. *McChriston*, 2014 IL 115310, ¶¶ 16-17, 23; see also *People v. Ross*, 2014 IL App (1st) 120089, ¶ 39.

¶ 10 In presenting his argument, defendant relies, as did the defendant in *McChriston*, on *People v. Kerns*, 2012 IL App (3d) 100375, and *Hill v. United States ex rel. Wampler*, 298 U.S. 460 (1936). The supreme court, however, overruled *Kerns*, which held that the IDOC improperly imposed a term of MSR under section 5-8-1(d)(4) of the Unified Code, and rejected defendant's reliance on *Wampler*, 298 U.S. at 461-64, in which the United States Supreme Court found that the provision added by the clerk that the defendant remain imprisoned until he paid the court-ordered fine was void. *McChriston*, 2014 IL 115310, ¶¶ 11, 23. The supreme court explained that this option was available to the court at sentencing, but that it was discretionary and not mandatory as in the case at bar, and further, that the MSR term did not increase the sentence as it attached automatically as though written into the defendant's sentence. *McChriston*, 2014 IL 115310, ¶ 31. We thus find defendant's reliance on *Wampler* misplaced,

and, accordingly, conclude that defendant's sentence was not void on this basis, and that his section 2-1401 petition was untimely.

¶ 11 Notwithstanding, the State maintains that defendant's sentence was void because the trial court did not include the mandatory 15-year firearm add-on penalty required by section 18-2(a)(2) of the Criminal Code of 2008 (720 ILCS 5/18-2(a)(2) (West 2008)) to his sentence. As a result, the State requests this court to vacate the nine-year term imposed by the trial court and remand the cause for resentencing to include the 15-year enhancement.

¶ 12 In response, defendant filed in this court a motion to withdraw his appeal as moot or in the alternative an extension of time to file his reply brief. In this motion, defendant alleged that he has completed his sentence in the underlying case, and has been transferred to Cook County Jail on December 20, 2013, for a new case. He maintained that the State is not entitled to the relief they have requested because they did not file a cross-appeal, and the matter is moot. The State does not dispute that defendant has served his sentence, but maintains that a sentence which does not include the statutorily required 15-year firearm add-on-penalty is void and may be corrected at any time, citing *People v. Arna*, 168 Ill. 2d 107, 112-23 (1995).

¶ 13 This court denied defendant's motion to withdraw his appeal, but allowed him to file a reply brief in which he maintains that only the part of the sentence that exceeds the statutory authority is void, not the entire sentence itself, and that the concept of void judgments only encompasses lack of jurisdiction or authority. Our supreme court, however, has held that a sentence is void if it does not conform to a statutory requirement. *Arna*, 168 Ill. 2d at 113; see, e.g., *People v. Harris*, 203 Ill. 2d 111, 121 (2003) (defendant's concurrent sentences which were required by statute to be served consecutively were void).

¶ 14 Defendant further maintains that a sentence cannot be enlarged by this court's judgment, relying on *St. Pierre v. United States*, 319 U.S. 41, 42 (1943). In *St. Pierre*, the petitioner served and completed five months' imprisonment for contempt of court for failing to divulge the name of the persons whose money he had embezzled, and the Supreme Court granted *certiorari* on the petitioner's question of whether he was constitutionally immune from self-incrimination. *St. Pierre*, 319 U.S. at 42. On review, the Supreme Court held that the issue was moot as it could not enlarge the sentence and reversal of the judgment would not undo what has been done or restore the petitioner the penalty of the term of imprisonment which he has served. *St. Pierre*, 319 U.S. at 42-43. *St. Pierre*, however, did not address the question here of whether defendant's sentence was void, and, therefore, is factually inapposite. Moreover, this court is not enlarging the sentence, but, rather, is remanding for the trial court to impose the sentences as statutorily mandated. *People v. Mabry*, 398 Ill. App. 3d 745, 758 (citing *Arna*, 168 Ill. 2d at 112).

¶ 15 Defendant, nonetheless, contends that the validity of a sentence becomes moot once it is served, citing *People v. Lieberman*, 332 Ill. App. 3d 193, 195 (2002). However, in *Lieberman*, we held that a sentence is not served until the completion of any MSR term. *Lieberman*, 332 Ill. App. 3d at 196. See also *People v. Correa*, 108 Ill. 2d 541, 546-47 (1985) (finding that a defendant could raise an issue under the Post-Conviction Hearing Act because "although the defendant was not imprisoned, he had not served his sentence at the time the petition was filed"). According to the record, the term of the three-year MSR in the instant case began on May 14, 2012, meaning that it will not be completed until 2015. Thus, since defendant has not yet completed his MSR term, he has not served his sentence and the issue of its validity is not moot.

¶ 16 As to defendant's contention that the State failed to preserve this issue for review, we note, as indicated above, that the supreme court has held that where a sentence does not conform to a statutory requirement, such as the firearm sentencing add-on, it is void, and the appellate court may correct it at any time. *Arna*, 168 Ill. 2d at 113; *People v. Thompson*, 209 Ill. 2d 19, 25 (2004). Accordingly, we find no procedural barrier to our consideration of the argument. *People v. Boand*, 362 Ill. App. 3d 106, 138 (2005). We also find *People v. Ramos*, 339 Ill. App. 3d 891, 905 (2003), cited by defendant, factually distinguishable from the case at bar which involves void sentences, where in *Ramos*, the trial court's decision to merge certain convictions was at issue and the State was found to have waived it.

¶ 17 Turning to the substantive matter, defendant maintains that the firearm enhancement is not properly assessed and offers several reasons why *People v. Blair*, 2013 IL 114122, which held that the sentencing enhancement in the armed robbery statute was revived by Public Act 95-688, should not apply to his conviction. He first maintains that *People v. Hauschild*, 226 Ill. 2d 63 (2007), which declared the firearm add-on unconstitutional, was binding authority at the time he was sentenced since no contrary rulings had appeared. He also maintains that *Blair's* determination that the firearm enhancement was constitutional only applied to cases on direct appeal when its ruling was announced which his was not.

¶ 18 We observe that in June 2007, the supreme court found the 15-year enhancement provided for in the armed robbery statute (720 ILCS 5/18-2 (West 2000)) unconstitutional because the sentence was more severe than the sentence for the identical offense of armed violence based on robbery, and therefore violated the proportionate penalties clause of the Illinois Constitution. *Hauschild*, 226 Ill. 2d at 86-87. The legislature subsequently passed Public

Act 95-688 § 4 (eff. Oct. 23, 2007), which amended the statute governing armed violence so that it no longer punished conduct identical to that in the armed robbery statute, and effectively removed robbery as a predicate offense for armed violence. In 2013, the supreme court held that Public Act 95-688 revived the sentencing enhancement for armed robbery by curing the proportionality violation through the amendment of the comparison statute. *People v. Blair*, 2013 IL 114122, ¶¶ 27, 35.

¶ 19 The record here shows that defendant committed the offense in 2008 and was sentenced in 2009. Both events occurred after Public Act 95-688 was enacted, and became effective in October 2007, thereby reviving the 15-year firearm enhancement declared unconstitutional in *Hauschild*. In *Blair*, the supreme court confirmed the validity of that enactment which allowed the State to obtain an enhanced sentence for armed robbery. *Blair*, 2013 IL 114122, ¶ 27. It is thus clear that the add-on penalty was in effect at the relevant times, and that defendant was subject to the add-on penalty. Since the nine-year sentence imposed by the court did not conform to the statutory requirement, it is void. *Arna*, 168 Ill. 2d at 113; *People v. Montiel*, 365 Ill. App. 3d 601, 606 (2006).

¶ 20 In reaching that conclusion, we find, contrary to defendant's contention, that *Blair's* determination that the firearm enhancement was constitutional does not apply solely to cases on direct appeal when *Blair* was announced. *Blair* did not announce a new constitutional rule, which would apply to all cases pending on direct review but not retroactively to cases on collateral review. *People v. Davis*, 2014 IL 115595, ¶ 36. Rather, the supreme court in *Blair*, 2013 IL 114122, ¶¶ 22, 35, merely confirmed the constitutionality of the firearm add-on penalty for armed robbery with the enactment of Public Act 95-688 less than five months after *Hauschild*

was decided, thereby curing the proportionate-penalties violation. *Blair* held that the Public Act 95-688 revived the 15-year enhancement and did not revive the enhancement itself. *People v. Smith*, 2014 IL App (1st) 103436, ¶ 99. It was the statute, not *Blair* itself, that revived the enhancement. *Smith*, 2014 IL App (1st) 103436, ¶ 99.

¶ 21 The sentencing mandate of Public Act 95-688 was therefore in effect when defendant was arrested in 2008, sentenced in 2009, and at the time defendant's conviction became final. As such, the law should have been utilized in the first place, and may be applied on collateral review. *People v. Smith*, 2013 IL App (3d) 110738, ¶¶ 12-13; *People v. Kizer*, 318 Ill. App. 3d 238, 246 (2000).

¶ 22 Reviewing courts have determined that sentences which do not include the mandatory firearm enhancement are void. *People v. Smith*, 2013 IL App (3d) 110738, ¶ 10. See also *People v. White*, 2011 IL 109616, ¶ 21; *Montiel*, 365 Ill. App. 3d at 606 (holding that a sentence is void where it did not include mandatory fees and fines). These rulings are consistent with the supreme court's determination that where the court exceeds its authority and enters a lesser sentence than which the statute mandates, such sentence is illegal and void. *White*, 2011 IL 109616, ¶ 20; accord *People v. Malchow*, 306 Ill. App. 3d 665, 675-76 (1999).

¶ 23 In light of the foregoing, we find that the trial court did not err in denying defendant's section 2-1401 petition based on the MSR issue, but that the sentence imposed on his armed robbery with a firearm conviction which did not include the required add-on was void requiring that the cause be remanded for resentencing to include the 15-year firearm enhancement. *People v. Orasco*, 2014 IL App (3d) 120633, ¶ 36.

¶ 24 Affirmed in part and vacated in part; cause remanded with directions.