2016 IL App (1st) 143027-U

No. 1-14-3027

FIFTH DIVISION
December 23, 2016

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. 99 CR 4984
	)	
ELVIS BUFORD,	)	The Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

O R D E R

¶1 *HELD*: Defendant's section 2-1401 petition for relief from judgment was properly dismissed where, following *People v. Castleberry,* 2015 IL 116916, he could not challenge his sentence as void.

¶2 Defendant, Elvis Buford, appeals the trial court's dismissal of his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). Defendant contends that his negotiated consecutive sentences for first degree murder and concealment of a homicidal death are void because they are not mandated by statute.

Defendant argues that he may challenge his sentence at any time under the void sentence rule provided in *People v. Arna*, 168 Ill. 2d 107 (1995). Defendant further argues that our supreme court's recent abolishment of the void sentence rule in *People v. Castleberry*, 2015 IL 116916, cannot be applied retroactively to his case. Based on the following, we affirm the dismissal of defendant's section 2-1401 petition for relief from judgment.

¶3 FACTS

¶4 In May 2004, defendant pled guilty to first degree murder and concealment of a homicidal death in relation to the murder and dismemberment and disposal of Raphael Rush in December 1998. Pursuant to the terms of a negotiated plea agreement, defendant was sentenced to consecutive sentences of 20 years' imprisonment for the murder count and 2 years' imprisonment for the concealment count. Prior to entry of the plea, the trial court questioned whether the sentences for the murder and concealment would be concurrent. The State responded in the negative, stating that defendant would be sentenced to two consecutive sentences. Defense counsel agreed, stating, "I believe that is the law as explained to Mr. Buford, that because of the nature of the charge it has to go consecutive." The trial court sentenced defendant pursuant to the terms of the negotiated guilty plea. Defendant did not withdraw his guilty plea nor file a direct appeal.

¶5 Then, on April 30, 2014, defendant filed a *pro se* petition for relief from judgment claiming the trial court impermissibly imposed consecutive sentences that were not mandated by statute. The trial court denied defendant's section 2-1401 petition. This appeal followed.

¶6 ANALYSIS

¶7 "Section 2-1401 of the Code constitutes a comprehensive statutory procedure authorizing a trial court to vacate or modify a final order or judgment in civil and criminal proceedings."

People v. Thompson, 2015 IL 118151, ¶ 28 (citing *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31). In general, a petition seeking relief under section 2-1401 must be filed more than 30 days from entry of the final order, but not more than 2 years after its entry. 735 ILCS 5/2-1401 (a), (c) (West 2014). Courts, however, have recognized an exception to the ordinary two-year deadline and the requisite allegations of due diligence and a meritorious defense when the petition challenges a void judgment. *Warren County Soil & Water Conservation District*, 2015 IL 117783, ¶ 48 (citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002)). A claim seeking to vacate a judgment as void is purely a legal question that we review *de novo*. *Thompson*, 2015 IL 118151, ¶ 25.

¶8 Nearly 10 years after being sentenced, defendant raised a challenge to his consecutive sentences as a violation of section 9-3.1(b) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-3.1(b) (West 2000)), which did not mandate a consecutive sentence for a concealment of a homicidal death conviction. Defendant contends that, because the trial court impermissibly imposed a non-mandatory consecutive sentence, his consecutive sentence is void. Defendant's challenge is based on the *Arna* "void sentence rule," wherein a sentence not conforming to a statutory requirement is deemed void. *Arna*, 168 Ill. 2d at 113. Our supreme court, however, recently abolished the void sentence rule in *Castleberry*, 2015 IL 116916, ¶ 19. See *Thompson*, 2015 IL 118151, ¶ 33. In so doing, the supreme court reasoned that the original jurisdiction of the trial court is granted by the Illinois Constitution, not by statute. *Castleberry*, 2015 IL 116916, ¶ 18. As such, a trial court's failure to comply with a statutory requirement cannot affect the court's original jurisdiction. *Id*. Therefore, pursuant to *Castleberry*, a criminal sentence cannot be considered void for lacking statutory authorization. *People v. Cashaw*, 2016 IL App (4th) 140759, ¶ 21. Instead, presuming the court had both personal and subject-matter jurisdiction in a

given case, which defendant has not challenged here, a sentence imposed erroneously by a court is merely voidable and not subject to collateral attack. *People v. Mitros*, 2016 IL App (1st) 121432, ¶ 19 (citing *Castleberry*, 2015 IL 116916, ¶¶ 11, 15) ("only the most fundamental defects, such as the lack of personal or subject-matter jurisdiction, render a judgment void").

¶9 Defendant acknowledges *Castleberry* and the recent abolishment of the void sentence rule; however, he insists that *Castleberry* announced a new rule that does not have retroactive application. Defendant argues that, because his section 2-1401 petition was filed while *Arna* was still in effect, *Castleberry* does not apply to his case. We disagree.

¶10 In general, a new rule of criminal procedure is applicable to all cases pending on direct review, but not applicable to cases brought on collateral review. *People v. Smith*, 2015 IL 116572, ¶ 24. Both the United States and Illinois Supreme Courts have acknowledged that determining whether a court pronounces a new rule is difficult. *Teague v. Lane*, 489 U.S. 288, 301 (1989); *People v. Morris*, 236 Ill. 2d 345, 359 (2010). "A case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. In other words, a rule is considered new if it was not required by established precedent at the time that a defendant's conviction became final. *Id*.; see also *Morris*, 236 Ill. 3d at 359.

¶11 Here, both parties contend that *Castleberry* set out a new rule; however, the parties disagree as to its retroactive application. We, instead, agree with the recent decisions of this court holding that *Castleberry* did not announce a new rule. See *Mitros*, 2016 IL App (1st) 121432; *People v. Smith*, 2016 IL App (1st) 140887; *People v. Stafford*, 2016 IL App (4th) 140309.

¶12 In *Smith*, 2016 IL App (1st) 140887, this court held that "*Castleberry* did not announce a new rule, but merely abolished the rule stated in *Arna*, thereby reinstating the rule in effect

before *Arna*: a sentence that did not comply with statutory guidelines was only void if the court lacked personal or subject matter jurisdiction." *Id*. ¶ 29. In *Stafford*, the Fourth District examined the holding in *Smith* and agreed, providing, "*Castleberry* did not create a new rule but merely abolished one." *Stafford*, 2016 IL App (4th) 140309, ¶¶ 32-33. The *Smith* and *Stafford* courts, however, reached different conclusions regarding the result as to retroactivity. In *Smith*, this court held "[b]ecause *Castleberry* did not announce a new rule" it "cannot be applied retroactively." *Smith*, 2016 IL App (1st) 140887, ¶ 30. In contrast, the *Stafford* court concluded that "[b]ecause *Castleberry* did not create a new rule, its holding *does* apply retroactively." (Emphasis in original.) *Stafford*, 2016 IL App (4th) 140309, ¶ 33 (citing *Teague*, 489 U.S. at 301).

¶13 We respectively disagree with *Smith*'s ultimate conclusion regarding retroactivity. As this court most recently found in *Mitros*, we too conclude that *Castleberry* did not announce a new rule and, therefore, it applies retroactively to defendant in this case. *Mitros*, 2016 IL App (1st) 121432, ¶ 29. We find support for our conclusion in *Thompson*, wherein, albeit without conducting an analysis regarding retroactivity, the supreme court stated that a void sentence challenge was no longer valid post-*Castleberry*. *Thompson*, 2015 IL 118151, ¶ 33. As a result, the supreme court in *Thompson* applied *Castleberry* to a section 2-1401 petition that had been filed while *Arna* remained good law, effectively giving *Castleberry* retroactive effect. See *id*.

¶14 We note that the supreme court is currently considering this matter in *People v. Price*, No. 118613 (Ill. May 27, 2015) (oral arguments held on March 22, 2016)). Unless and until directed otherwise, we find that, under *Castleberry*, defendant cannot now challenge his sentence as void. We, therefore, conclude that defendant's section 2-1401 petition was dismissed properly.

¶15 CONCLUSION

¶16 Defendant's section 2-1401 petition for relief from judgment was properly dismissed where he can no longer challenge his sentence as void at any time. We affirm the judgment of the trial court.

¶17 Affirmed.