2013 IL App (3d) 110788-U

Order filed October 23, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0788
v.	)	Circuit No. 98-CF-751
	)	
JESSE CORTEZ,	)	Honorable Sarah F. Jones,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Wright specially concurred in the judgment.
Justice McDade specially concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly dismissed defendant's section 2-1401 petition for relief from judgment. Petition was untimely. Additionally, failure to admonish defendant regarding consecutive sentences did not render plea agreement void.

¶ 2 Defendant, Jesse Cortez, pled guilty in the present case to unlawful possession of contraband in a penal institution (720 ILCS 5/31A-1.1(b) (West 1996)), an offense he committed while incarcerated on a first degree murder conviction. As mandated by statute (730 ILCS 5/5-8-

4(f) (West 1996)), the plea agreement ordered that his present sentence run consecutively to the murder sentence, because defendant committed the former while incarcerated on the latter.

¶ 3 Unbeknownst to the State and the trial court, at the time defendant pled guilty in the present case, he had recently pled guilty to a third offense, aggravated battery of a peace officer (720 ILCS 5/12-4(b)(6), (e) (West 1998)), also committed while defendant was imprisoned for murder. When the State became aware of defendant's conviction for aggravated battery, it moved to amend defendant's mittimus in the present case to reflect that his present sentence should run consecutively to his sentence for aggravated battery. The court granted the motion.

¶ 4 Defendant filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), arguing that the amendment to the mittimus rendered his plea agreement and sentence void. The trial court granted the State's motion to dismiss, and defendant appealed. On appeal, defendant contends the petition should have been granted because: (1) his present sentence was not statutorily required to run consecutively to his aggravated battery sentence; and (2) the amended mittimus rendered his guilty plea involuntary and therefore void. We affirm.

¶ 5 FACTS

¶ 6 On February 18, 1997, while serving a 35-year prison sentence for first degree murder, defendant committed unlawful possession of contraband in a penal institution. 720 ILCS 5/31A-1.1(b) (West 1996). Defendant entered a negotiated plea agreement in which he agreed to plead guilty to the charge and be sentenced to six years' imprisonment, to be served consecutively to his murder sentence. The parties agreed to waive a presentence investigation report. The court asked about defendant's criminal history, and defense counsel replied that defendant had a drug

conviction in 1990 and an attempted murder conviction in 1993.

¶ 7 Unbeknownst to the State and the court–and, hopefully, defense counsel–defendant had recently pled guilty to aggravated battery of a peace officer (720 ILCS 5/12-4(b)(6), (e) (West 1998)), a Class 3 felony. That charge arose from a May 17, 1998, incident that occurred while defendant was in custody on the murder conviction. As mandated by statute (730 ILCS 5/5-8-4(f) (West 1998)), the guilty plea in the aggravated battery case provided that the sentence for aggravated battery run consecutively to the sentence for murder.

¶ 8 In sum, defendant's mittimuses in the present case and the aggravated battery case required that his sentences for possession of contraband and aggravated battery be served consecutively to his sentence for first degree murder. The mittimuses, however, did not reflect whether the sentences for aggravated battery and possession of contraband should be served consecutively or concurrently to each other.

¶ 9 The State learned of the aggravated battery sentence and, on July 19, 1999, moved to amend the mittimus in the present case to reflect that defendant's present sentence be served consecutively to both his murder sentence *and* his aggravated battery sentence. Defense counsel appeared and did not oppose the State's motion. The court granted the motion, and defendant's mittimus in the present case was amended to reflect that defendant's present sentence and his aggravated battery sentence be served consecutively to one another.

¶ 10 Defendant later filed a section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2010)) entered in his aggravated battery case, claiming that his negotiated sentence was void because the sentence fell outside the applicable sentencing range. On appeal, the appellate court found defendant's plea agreement void and remanded with instructions to allow

defendant to withdraw his guilty plea. *People v. Cortez*, 2012 IL App (1st) 102184.

¶ 11 On May 27, 2011, while defendant's appeal relating to the aggravated battery petition was pending, he filed a section 2-1401 petition (735 ILCS 5/2-1401 (West 2010)) challenging the judgment in the present case. The petition was filed nearly 12 years after the judgment was entered and the mittimus was amended. The trial court granted the State's motion to dismiss, with no explanation. Defendant appeals.

¶ 12 After filing the present appeal, defendant entered into a new plea agreement in his Cook County aggravated battery case. The new agreed sentence provides that the aggravated battery sentence run consecutively to the murder sentence.[1] The order did not reference whether the aggravated battery sentence would run concurrently or consecutively to defendant's sentence in the present case.

¶ 13 ANALYSIS

¶ 14 Defendant raises two alternative theories to support his argument that the circuit court erred in dismissing his petition for relief from judgment (735 ILCS 5/2-1401 (West 2010)). First, defendant argues that the sentence imposed under the amended mittimus is void because the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4 (West 1998)) does not require his present sentence to be served consecutively to his aggravated battery sentence. Second, in the alternative, defendant argues that if the Code does require his present sentence and aggravated battery sentence to be served consecutively–and therefore, the amended mittimus was in compliance with the law–his guilty plea under the amended mittimus was involuntary and

[1]Presiding Justice Wright's special concurrence overlooks the fact there exists a Cook County conviction for the same offense referred to in the amended mittimus.

therefore voidable. We review *de novo* the dismissal of a petition for relief from judgment. *People v. Laugharn*, 233 Ill. 2d 318 (2009).

¶ 15 A. Consecutive Sentence

¶ 16 The Code (730 ILCS 5/5-8-4 (West 1998)) requires that defendant's present sentence and aggravated battery sentence be served consecutively to one another. Under section 5-8-4(f) of the Code, "[a] sentence of an offender committed to the Department of Corrections at the time of the commission of the offense shall be served consecutive to the sentence under which the defendant is held by the Department of Corrections." 730 ILCS 5/5-8-4(f) (West 1998). Defendant committed the present crime on February 18, 1997, and was charged on May 6, 1998. He committed the aggravated battery on May 17, 1998. At the time he committed the aggravated battery, then, defendant was "held by the Department of Corrections" on both his murder sentence and the pending present charge of possession of contraband. As a result, defendant's sentences in the present case and the aggravated battery case are statutorily required to run consecutively to one another.

¶ 17 Defendant argues that at the time he committed the aggravated battery, he was not "held by the Department of Corrections" (730 ILCS 5/5-8-4(f) (West 1998)) in the present case, because he had not yet pled guilty. We disagree. Although defendant had not yet pled guilty in the present case on May 17, 1998, he was nonetheless "held" in pretrial custody on the present charge, in addition to being "held" for the murder sentence he was serving. As a result, defendant's sentences in the aggravated battery case and the present case were required to run consecutively to one another. 730 ILCS 5/5-8-5(f) (West 1998). Requiring mandatory sentences in this situation comports with the intent of the legislature because "[w]here an offender is

already incarcerated, the prospect of a concurrent sentence may not serve as an effective deterrent to future crime[.] *** A mandatory consecutive sentencing requirement provides this deterrent." *People ex rel. Gibson v. Cannon*, 65 Ill. 2d 366, 373 (1976).

¶ 18 B. Involuntary Plea

¶ 19 In the alternative, defendant argues that his guilty plea was involuntary because he was not admonished that his sentence in the present case would be served consecutively to his aggravated battery sentence. See Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997).

¶ 20 We need not determine whether defendant's guilty plea was involuntary because the claim was not timely raised in defendant's section 2-1401 petition. A section 2-1401 petition for relief from judgment must be filed within two years of the order of judgment. 735 ILCS 5/2-1401(c) (West 2010). The present petition was filed nearly 12 years after the entry of the guilty plea and the amendment to the mittimus. However, there is an exception to the two-year limitation for section 2-1401 petitions that challenge void judgments. 735 ILCS 5/2-1401(f) (West 2010). Defendant argues that his petition falls within that exception because an involuntary plea is void. This argument lacks even the slightest merit.

¶ 21 An involuntary guilty plea is not void. *People v. Hubbard*, 2012 IL App (2d) 101158. A judgment is void only if the court lacked jurisdiction. *People v. Davis*, 156 Ill. 2d 149 (1993); *Hubbard*, 2012 IL App (2d) 101158. "Voluntariness or involuntariness of a guilty plea has no bearing on jurisdiction, so that an involuntary plea cannot render a conviction void." *Hubbard*, 2012 IL App (2d) 101158, ¶12. Cases cited by defendant, such as *People v. White*, 2011 IL 109616, are inapposite. In *White*, the defendant's sentence and plea were void because the sentence appealed from was outside the statutorily authorized range. *Id.* To the contrary, in the

present case, the sentence resulting from the amended mittimus was consistent with the statutory requirements–as explained *infra*–and therefore is not void. See *Hubbard*, 2012 IL App (2d) 101158. Defendant failed to file his section 2-1401 petition within two years. 735 ILCS 5/2-1401(c) (West 2010). The circuit court correctly dismissed it.

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of Will County is affirmed.

¶ 24 Affirmed.

¶ 25 PRESIDING JUSTICE WRIGHT, specially concurring.

¶ 26 I concur in the result for the reasons that follow.

¶ 27 On May 4, 1999, in Cook County case No. 98-CR-17179, defendant pled guilty to an aggravated battery that occurred on May 17, 1998. The trial court sentenced defendant to serve two years in the Department of Corrections, consecutive to his 35-year murder sentence in Cook County case No. 92-CR-8378. Approximately six weeks later, on June 28, 1999, in Will County case No. 98-CF-751, defendant pled guilty to the offense of unlawful possession of contraband in a penal institution. The alleged date of the possession of contraband offense was February 18, 1997.

¶ 28 On June 28, 1999, the mittimus in Will County case No. 98-CF-751 stated the six-year sentence, in that case, would be served consecutively to defendant's 35-year murder sentence imposed by the Cook County court in 92-CR-8378. The mittimus for the Will County case was later amended by the Will County court on July 19, 1999, to provide that defendant's six-year sentence imposed by the Will County court would not begin until after he completed both the 35-year sentence for murder imposed by another court in Cook County case No 92-CR-8378 and the

consecutive two-year sentence for aggravated battery ordered in Cook County case No. 98-CR-17179.

¶ 29 Defendant filed his notice of appeal in this case, involving the contraband charge, on October 20, 2011. Specifically, defendant claims the six-year sentence he received for the contraband charge was void, thereby triggering an exception to the two-year limitations period for his second 2-1401 petition for relief from judgment, filed in the trial court on May 27, 2011.

¶ 30 While this appeal was pending, the First District appellate court, on June 29, 2012, set aside defendant's two- year sentence for aggravated battery in Cook County case No. 98-CR-17179. *People v Cortez*, 2012 IL App (1st) 102184. Consequently, the sentence for aggravated battery, as identified in the amended mittimus in Will County case No. 98-CF-751, no longer exists. Similarly, the defendant's concerns that his six-year sentence in this case should be set aside by this court as void because, at the time he was originally sentenced in Will County in 1999, he expected to serve the six-year sentence immediately following his 35 year murder sentence.

¶ 31 Now, based on the outcome of his appeal in the First District, his two-year sentence for aggravated battery no longer exists. Therefore, defendant's six-year sentence in this case will not be delayed by two years and will commence, absent further court order, after the 35-year sentence for murder is fulfilled. For this reason alone, without respect to the timing of the 2-1401 petition, I conclude the contentions of error raised in this appeal are moot and defendant is not entitled to have this court restore the original mittimus or remand the matter to the trial court to allow defendant to withdraw his guilty plea, if desired.

¶ 32 JUSTICE McDADE, specially concurring.

¶ 33 I agree that defendant's plea of guilty to possession of contraband was not void and his petition pursuant to §2-1401 of the Code of Civil Procedure was, therefore, properly dismissed as untimely. I, therefore, concur in the result reached in this decision.

¶ 34 I write separately because I do not agree with the author's interpretation of section 5-8-4(f) of the Unified Code of Corrections (730 ILCS 5/5-8-4(f) (1998)). That section provides:

> "A sentence of an offender [who is] committed to the Department of Corrections at the time of the commission of the offense shall be served consecutive to *the sentence under which* the defendant is held by the Department of Corrections." (Emphasis added.)

¶ 35 The plain language of that section warrants two observations. First, it does not appear to contemplate the imposition of sentences consecutive to more than one offense. Rather it refers to " '*the* sentence' under which the defendant is held." (Emphasis added.) This suggests to me that any sentences resulting from offenses committed by the defendant while incarcerated should run consecutively to the offense which initially lodged him in the correctional facility.

¶ 36 Second, the plain language does not support the author's conclusion that "defendant's sentences in the present case and the aggravated battery case are statutorily required to run consecutively to one another." Even if the language authorizes the multiple sequencing of sentences sought by the State, it does not, in this case, permit the sentence for possession of contraband to run consecutively to the sentence for aggravated battery. Simply put, although defendant was clearly "held" in the Department of Corrections on the contraband charge, he had

not been *sentenced* on it. There was no existing sentence for the contraband sentence to follow except the 35-year sentence for murder. It thus appears to me that defendant could make a persuasive argument that his plea was involuntary but for the fact that, in waiting 12 years to make that argument, he has lost his vehicle for advancing it.

¶ 37 If Justice Schmidt is correct in concluding that the statute permits tacking on of sentences *ad infinitum* – and he cites no case for that specific proposition – the sentence for aggravated battery should be consecutive to that for possession of contraband, not the other way around.