2016 IL App (3d) 140269-U

Order filed March 15, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0269
v.	)	Circuit No. 05-CF-595
	)	
BRUCE N. MERRICK,	)	Honorable Susan S. Tungate,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court lacked jurisdiction to grant the relief requested in defendant's motion to amend the mittimus and defendant's sentence is not void.

¶ 2 While currently serving an eight-year prison term, defendant, Bruce N. Merrick, filed a motion to amend the mittimus. The motion requested the trial court to reduce his sentence by 11 months because the Department of Corrections (DOC) had not yet confirmed that it would place defendant in an electronic home detention program, even though the sentencing order included a provision that defendant serve the final 11 months of his sentence in such a program. The trial

court denied defendant's motion finding it lacked jurisdiction to consider defendant's untimely motion. Defendant appeals, arguing that the trial court erred when it found that it lacked jurisdiction to reduce his sentence. Alternatively, defendant argues that his sentence is void and he should be resentenced. We affirm.

¶ 3 FACTS

¶ 4 Following a jury trial, defendant was convicted of two counts of aggravated driving while under the influence of alcohol (625 ILCS 5/11-501(a)(1), (a)(2), (d)(1)(F) (West 2004)). The trial court merged the two counts and sentenced defendant to eight years' imprisonment and two years' mandatory supervised release (MSR). The trial court ordered the final 11 months of the 8-year sentence to be served in an electronic home detention program. See 730 ILCS 5/5-8A-3(d) (West 2004). The trial court also ordered defendant to pay fines and fees.

¶ 5 Defendant filed a motion to reconsider his sentence. The trial court held a hearing on the same day and denied the motion in all aspects, except that it reduced one discretionary fine.

¶ 6 On appeal, this court concluded that defendant had been proven guilty beyond a reasonable doubt, defendant's sentence was not excessive, and the trial court did not abuse its discretion when it admitted and considered three victim impact statements during sentencing. *People v. Merrick*, 2012 IL App (3d) 100551.

¶ 7 Subsequently, defendant filed a postconviction petition, which the trial court summarily dismissed as patently without merit. Shortly after the trial court denied the petition, defendant filed an amended postconviction petition. The trial court also denied that petition as patently without merit. Defendant did not appeal either order denying his postconviction petitions.

¶ 8 Next, defendant filed a motion to amend the mittimus, which is the subject of the instant appeal. In the motion, defendant requested the trial court to reduce his sentence by 11 months.

Defendant claimed that the DOC refused to honor the provision in his sentence that the final 11 months of his 8-year sentence should be served in electronic home detention. Defendant attached to the motion a copy of a DOC counselor's notification that it was the DOC's decision whether defendant would be placed in an electronic home detention program. This is the first time defendant raised the issue, as he did not argue it in any previous proceeding.

¶ 9 The trial court (the same judge that sentenced defendant) appointed an attorney to represent defendant on the motion to amend the mittimus. At a hearing on the matter, defense counsel advised the trial court that defendant satisfied the statutory requirements of the applicable statute (730 ILCS 5/5-8A-3(d) (West 2004)) to be eligible for placement in an electronic home detention program. However, defense counsel stated that he had been unsuccessful in obtaining an assurance from the DOC that defendant would be released to electronic home detention 11 months shy of his release date. Defense counsel requested the trial court modify defendant's sentence to provide for his outright release after serving a sentence of 11 months less than the 8-year prison term the trial court originally imposed.

¶ 10 The State responded by arguing that defendant failed to timely challenge his sentence. After hearing the parties' arguments, the trial court denied defendant's motion finding it lacked jurisdiction to consider defendant's claim.

¶ 11 ANALYSIS

¶ 12 I. The Trial Court's Jurisdiction

¶ 13 First, defendant argues that the trial court erred when it found it lacked jurisdiction to consider his motion to amend the mittimus. Defendant contends that the trial court retained jurisdiction to amend the mittimus, even though he filed his motion more than 30 days after sentencing. Specifically, he requests that we remand the matter to allow the trial court to reduce

his sentence by 11 months in the event that the DOC refuses to place defendant in an electronic home detention program.

¶ 14 Upon review, we find defendant's motion was actually a postjudgment motion challenging his sentence and was therefore untimely. "[T]he character of a motion should be determined from its content, and a court is not bound by the title of a document given by a party." *Savage v. Mui Pho*, 312 Ill. App. 3d 553, 559 (2000). "A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed within 30 days following the imposition of sentence." 730 ILCS 5/5-8-1(c) (West 2004). The trial court is without jurisdiction to consider a motion to modify a sentence when it is untimely. *People v. Latona*, 184 Ill. 2d 260, 278 (1998).

¶ 15 In the instant case, defendant requested that the trial court modify the length of his sentence. Unlike the case where a trial court amends the mittimus to correctly apply presentence credit (leaving the length of the sentence unchanged), defendant requested the trial court to remove the 11-month electronic home detention term completely and reduce his sentence accordingly. Even though defendant claims that the purpose of the motion to amend was to correct the mittimus to reflect the trial court's initial intent, his motion in substance is a postjudgment motion to reconsider his sentence in light of the *possible* refusal of the Prisoner Review Board (Board) to admit defendant into the electronic home detention program. See *id.* (noting that while the trial court retains limited jurisdiction to correct insubstantial matters, such as correcting clerical errors in the mittimus it cannot *modify* its judgment after it has lost jurisdiction of the case). Because defendant's postjudgment motion was filed after the expiration of the 30-day period to file such motions, we find that the trial court's dismissal of the motion on jurisdictional grounds was proper.

¶ 16 II. Electronic Home Detention Provision

¶ 17 Alternatively, defendant argues that he can challenge his sentence at any time because his sentence is allegedly void. Specifically, defendant argues that his sentence is void because the statute relied upon by the trial court did not authorize the court to include a provision in defendant's sentence that he serve the final 11 months of his 8-year prison term in an electronic home detention program. According to defendant, the sentencing scheme delegates that authority to the DOC. Therefore, defendant requests this court to remand the matter for resentencing.

¶ 18 Upon review, we find the provision in defendant's sentence regarding electronic home detention is not part of defendant's sentence, but instead, a recommendation by the trial court. As a result, we hold that defendant's sentence does not contain an unauthorized condition.

¶ 19 A defendant convicted of a Class 2 felony, such as defendant, is subject to a term of imprisonment between 3 and 14 years. 730 ILCS 5/5-8-1(a)(5), 5-8-2(a)(4) (West 2004). In addition, a defendant may participate in an electronic home detention program (730 ILCS 5/5-8A-3(e) (West 2004)), which is subject to the eligibility requirements set forth in the Electronic Home Detention Law (730 ILCS 5/5-8A-3 (West 2004)). Specifically at issue in this case is section 8A-3(d) of the Electronic Home Detention Law. For certain convictions, such as defendant's, section 8A-3(d) allows for a period of electronic home detention as an alternative to up to the final 12 months of incarceration, so long as: "(i) the person is 55 years of age or older; (ii) the person is serving a determinate sentence; (iii) the person has served at least 25% of the sentenced prison term; and (iv) placement in an electronic home detention program is *approved by the* [*Board*]." (Emphasis added.) 730 ILCS 5/5-8A-3(d) (West 2004).

¶ 20 Defendant concedes that the trial court had authority to sentence him to a term of imprisonment of eight years with two years' MSR because it was within the statutory range. However, he argues that section 8A-3(d) did not authorize the trial court to include a provision in his sentence that the final 11 months of his 8-year prison term be served in an electronic home detention program because section 8A-3(d) requires the Board to approve his placement in the program, not the trial court.

¶ 21 Although section 8A-3(d) expressly delegates the authority to approve placement of a defendant into an electronic home detention program to the DOC through its Board, we find that it does not prohibit the trial court, as it did here, from *recommending* placement in such a program. *People v. Jones*, 223 Ill. 2d 569, 581 (2006) (the statute's language is the best indicator of legislative intent and it should be given its plain and ordinary meaning). The provision regarding electronic home detention is not part of defendant's sentence. Rather, the provision is a recommended alternative, subject to statutory conditions, to implementing the authorized eight-year sentence the trial court imposed upon defendant. See *People v. Manoharan*, 394 Ill. App. 3d 762, 770 (2009) (finding a trial court's recommendation for placement in an impact incarceration program not part of defendant's judicially imposed sentence to a term of imprisonment). The fact that the Board ultimately decides whether to approve defendant's placement in the program does not render the trial court's sentence unauthorized.

¶ 22 We find our holding supported by the reasoning espoused in *Manoharan*. In *Manoharan*, the trial court accepted a defendant's guilty plea, sentenced him to a term of imprisonment, and recommended the defendant be considered for participation in an impact incarceration program (otherwise known as boot camp) pursuant to section 5-8-1.1 of the Unified Code of Corrections (730 ILCS 5/5-8-1.1 (West 2006)). *Manoharan*, 394 Ill. App. 3d at 762. Section 5-8-1.1

allowed placement in boot camp conditioned upon defendant's acceptance in the program by the DOC (730 ILCS 5/5–8–1.1(a) (West 2006)). *Manoharan*, 394 Ill. App. 3d at 762. Defendant appealed, arguing that the statute authorizing placement in the boot camp program was unconstitutional in that it improperly delegated the length of defendant's sentence from the judicial branch to the DOC. *Id.* at 771. The appellate court rejected defendant's argument finding the boot camp recommendation was not a sentence, but merely an alternative (with accompanying qualifications) to the six-year sentence the trial court actually imposed pursuant to the legislatively enacted statutory sentencing range for the crime for which defendant pled guilty. *Id.* at 772.[1]

¶ 23 Similarly, section 8A-3(d) created an alternative method for the DOC to implement the final months of defendant's judicially imposed prison term. The trial court's sentencing order, which includes a provision that the final 11 months of defendant's sentence be served on electronic home detention is a recommended alternative to the final months of defendant's 8-year sentence to be implemented by the DOC. Defendant's eight-year sentence does not include an unauthorized condition.

¶ 24 Although not necessary to our disposition, we note that even if we were to assume that the electronic home detention program provision was part of defendant's sentence, and therefore, unauthorized, we would hold that his sentence is merely voidable pursuant to *People v. Castleberry*, 2012 IL 116916. Under *Castleberry*, a sentence is only void (as opposed to voidable) where the trial court lacks personal or subject matter jurisdiction to impose defendant's

[1]We acknowledge the factual difference in the boot camp program and the electronic home detention program. Nevertheless, the reasoning is the same—recommending placement in either program is subject to the DOC's decision.

sentence, regardless of whether the sentence is statutorily authorized. *Id.* ¶ 19. In this case, there is no dispute that the trial court had jurisdiction to impose defendant's sentence, including the electronic home detention term (even if the term were unauthorized). As a result, defendant's sentence would not be void.

¶ 25 CONCLUSION

¶ 26 The judgment of the circuit court of Kankakee County is affirmed.

¶ 27 Affirmed.