

**NOTICE**

Decision filed 05/14/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 120471-U

NO. 5-12-0471

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

**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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 01-CF-61
	)	
OTIS H. STEWART,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Justices Goldenhersh and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where no portion of the defendant's sentence is void, and any argument to the contrary would have no merit, appointed counsel on appeal is granted leave to withdraw, and the circuit court's dismissal of the defendant's petition for relief from judgment is affirmed.

¶ 2 The defendant, Otis H. Stewart, appeals from the circuit court's judgment dismissing his petition for relief from judgment. The defendant's appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has filed a motion to withdraw as counsel on the ground that this appeal presents no issue of arguable merit. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant has filed a response to OSAD's motion to withdraw. This court

has examined OSAD's motion, the defendant's response, and the entire record on appeal, and has concluded that OSAD's motion is well taken. OSAD is granted leave to withdraw as counsel, and the judgment dismissing the defendant's petition for relief from judgment is affirmed.

¶ 3

### BACKGROUND

¶ 4 In June 2001, a jury found the defendant guilty of home invasion (720 ILCS 5/12-11(a)(3) (West 2000)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(3) (West 2000)), but acquitted him of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2000)). In February 2002, the circuit court sentenced the defendant to imprisonment for a term of 35 years for home invasion and a term of 20 years for aggravated discharge of a firearm. The court ordered that the two sentences be served consecutively, based on its explicit finding that consecutive sentences were required to protect the public from further criminal conduct by the defendant. On direct appeal to this court, the judgment of conviction was affirmed. *People v. Stewart*, 342 Ill. App. 3d 350 (2003).

¶ 5 In August 2003, the defendant filed his first section 2-1401 petition for relief from judgment. See 735 ILCS 5/2-1401 (West 2002). He claimed that the judgment of conviction was void because the circuit court had not held a preliminary hearing on the amended information on which he had been tried. In September 2003, the circuit court dismissed the petition. In December 2003, the defendant filed a supplement to the petition, wherein he claimed that the State knowingly relied upon perjured testimony before the grand jury in order to secure an indictment against the defendant. In February

2004, the court dismissed the supplement, and reiterated its dismissal of the original section 2-1401 petition. No appeal was taken from these two orders of dismissal.

¶ 6 In March 2004, the defendant filed *pro se* a petition for postconviction relief. See 725 ILCS 5/122-1 to 122-8 (West 2004). He later filed supplements to the petition. The circuit court held an evidentiary hearing on the petition, and subsequently entered an order denying the petition. This court affirmed the order denying the postconviction petition. *People v. Stewart*, 2012 IL App (5th) 100292-U.

¶ 7 On July 30, 2012, the defendant filed another section 2-1401 petition for relief from judgment. He raised two claims: (1) the order for consecutive sentences was void because the defendant committed his two offenses—home invasion, and aggravated discharge of a firearm—as part of a single course of conduct with no substantial change in the nature of his criminal objective, and the sentencing statutes did not authorize consecutive sentences in that circumstance; and (2) the order for an extended term of imprisonment for home invasion was void because home invasion was not the most serious of the two offenses of which the defendant was convicted, and the sentencing statutes did not authorize an extended term except for the most serious offense.

¶ 8 On October 11, 2012, the circuit court held a hearing on the section 2-1401 petition. The State argued that the petition should be dismissed because it was filed more than two years after judgment was entered. The defendant argued that the two-year time limitation on the filing of a section 2-1401 petition was inapplicable in his case because "[t]he sentence is void in and of itself" due to a lack of statutory authorization. In a written order, the court found, *inter alia*, that the judgment was not void, and it dismissed the

petition. The defendant filed a timely notice of appeal from the dismissal order, thus perfecting the instant appeal. The circuit court appointed OSAD to represent the defendant in this appeal.

¶ 9

## ANALYSIS

¶ 10 This appeal is from the circuit court's order dismissing the defendant's section 2-1401 petition. The dismissal of a section 2-1401 petition is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 11 Section 2-1401 of the Code of Civil Procedure provides a method to attack final orders or judgments after 30 days from the entry thereof. 735 ILCS 5/2-1401(a) (West 2012). In general, a section 2-1401 petition must be filed no later than two years after the entry of the order or judgment. 735 ILCS 5/2-1401(c) (West 2012). However, the two-year time limitation does not apply to petitions brought on voidness grounds. See 735 ILCS 5/2-1401(f) (West 2012); *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002) ("Petitions brought on voidness grounds need not be brought within the two-year time limitation."). Furthermore, "[a] void order may be attacked at any time or in any court, either directly or collaterally. \*\*\* In fact, courts have an independent duty to vacate void orders and may *sua sponte* declare an order void." *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). A sentencing order, or any portion of a sentencing order, is void if it is not authorized by statute. *People v. Arna*, 168 Ill. 2d 107, 113 (1995).

¶ 12 The defendant claimed that two portions of his sentencing order are void due to a lack of statutory authorization. This claim is patently incorrect. An examination of the sentencing order reveals that every portion of it was authorized by statute and is therefore

valid.

¶ 13 The defendant was convicted of home invasion and aggravated discharge of a firearm. More specifically, he was convicted of home invasion while armed with a firearm, in violation of section 12-11(a)(3) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-11(a)(3) (West 2000)), and aggravated discharge of a firearm in the direction of a person the defendant knew to be a peace officer, in violation of section 24-1.2(a)(3) of the Criminal Code (720 ILCS 5/24-1.2(a)(3) (West 2000)). The defendant's distinct type of home invasion was "a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/12-11(c) (West 2000). Because the ordinary minimum and maximum terms for a Class X felony were 6 years and 30 years (see 730 ILCS 5/5-8-1(a)(3) (West 2000)), the 15-year mandatory enhancement resulted in a minimum term of 21 years and a maximum term of 45 years for home invasion while armed with a firearm. See also *People v. Guevara*, 216 Ill. 2d 533, 546 (2005) (under section 12-11(c) of the Criminal Code, the distinct sentence for home invasion while armed with a firearm is "Class X plus 15 years"). The defendant's distinct type of aggravated discharge of a firearm was "a Class X felony for which the sentence shall be a term of imprisonment of no less than 10 years and not more than 45 years." 720 ILCS 5/24-1.2(b) (West 2000). The defendant's terms of imprisonment—35 years for home invasion, 20 years for aggravated discharge of a firearm—fall within the statutory ranges of 21-to-45 years and 10-to-45 years, respectively. The length of each sentence was clearly authorized by statute.

¶ 14 As for the consecutiveness of the two sentences, it too was authorized by statute.

Under section 5-8-4 of the Unified Code of Corrections, the circuit court had the authority to impose consecutive sentences if (1) the defendant's two offenses were not part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, and (2) the court found that consecutive sentences were necessary for the protection of the public. See 730 ILCS 5/5-8-4(a), (b) (West 2000). Here, the court explicitly found that consecutive sentences were necessary to protect the public. The defendant argues to this court that his two offenses were part of a single course of conduct with no substantial change in the nature of the criminal objective. This argument is clearly wrong, for the criminal objectives underlying the defendant's two offenses were clearly different. The criminal objective behind the home invasion was to extract money from Robert Mike (the person whose dwelling place the defendant entered without authority) through force or threat of force. The criminal objective behind the aggravated discharge of a firearm was to prevent police officer Brent Bertschi from nabbing him as he ran away from Mike's house. In light of this substantial change in criminal objectives, and the court's finding on the need to protect the public, consecutive sentences were authorized. Therefore, the consecutive-sentencing portion of the sentence is definitely not void.

¶ 15 The defendant, in his response to OSAD's *Finley* motion to withdraw, insists that the decision in *People v. Arrington*, 297 Ill. App. 3d 1 (1998), supports his argument that he maintained a single, unchanged criminal objective—"to rob Mike of his money and escape the scene"—through the entire time he committed his two offenses. His reliance on *Arrington* is misplaced.

¶ 16 The defendant in *Arrington* attempted to rob a store, but he soon abandoned the

attempt and headed for the store's exit. The store's manager blocked the defendant's path. However, the defendant battered the manager, thus clearing his path, and walked out of the store. The appellate court determined that the defendant maintained a single, unchanged criminal objective throughout the attempted robbery of the store and the battery of the store's manager, namely: to rob the store and to escape from the store with the purloined proceeds. *Arrington*, 297 Ill. App. 3d at 5. This analysis has been criticized. See *People v. Hummel*, 352 Ill. App. 3d 269, 272 (2004) ("we cannot agree with the court's conclusion in *Arrington* that any acts committed while a defendant is attempting to escape from the scene of a robbery is necessarily part of the same overarching criminal objective"). For the purpose of deciding this appeal, though, this court merely notes that the facts in *Arrington* are readily distinguished from the instant facts. In *Arrington*, the defendant committed the battery while he was still in the store, the site of the attempted robbery, and he committed that battery in order to effect his escape or departure from the store. In the instant case, the sequence of events was significantly different. Here, the defendant committed the home invasion at Mike's dwelling place, then escaped or departed from Mike's dwelling place, and only afterward did he commit the aggravated discharge of a firearm. The defendant did not discharge his firearm in order to effect his escape or departure from Mike's dwelling place; he already had escaped or departed it. He discharged his firearm in order to prevent a police officer from arresting him for the just-completed home invasion.

¶ 17 The instant facts are more akin to the facts in *Hummel*, wherein a burglary was committed inside a store and an aggravated battery was committed outside the store, on the

store's parking lot. The appellate court in *Hummel* determined that the criminal objective underlying the burglary was to purloin merchandise by stealth, whereas the criminal objective underlying the aggravated battery was to avoid apprehension. *Hummel*, 352 Ill. App. 3d at 273. In the instant case, too, there was a clear change in criminal objectives between the two crimes committed. The original objective was to take money from the home-invasion victim. Once the defendant departed from the site of the home invasion, his objective became the avoidance of arrest for the home invasion.

¶ 18 For the foregoing reasons, no portion of the defendant's sentencing order is void. Every portion was authorized by statute and is therefore valid. Any argument to the contrary would have no merit. Accordingly, OSAD's *Finley* motion to withdraw as counsel is granted, and the judgment of the circuit court is affirmed.

¶ 19 Motion granted; judgment affirmed.