

NOTICE
The text of this order may
be changed or corrected
prior to the time for filing of
a Petition for Rehearing or
the disposition of the same.

No. 1-17-1383
Order filed May 22, 2019

Third Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 94 CR 22233
)	
TONY ROBINSON,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

SUMMARY ORDER

¶ 1 Defendant Tony Robinson appeals from the dismissal of his *pro se* "Petition to Vacate a Void Judgment," which he brought pursuant to section 2-1401(f) of the Code of Civil Procedure. 735 ILCS 5/2-1401(f) (West 2016).

¶ 2 Following a 1997 jury trial, defendant was convicted of first degree murder for fatally shooting nine-year-old Joseph Orr in the back as he played in a clubhouse outside his home. The trial court sentenced defendant to an extended term of 100 years in prison. On direct appeal, we affirmed and corrected the mittimus to reflect one conviction for murder. *People v. Robinson*,

Appendix A

No. 1-97-2639 (1999) (unpublished order under Supreme Court Rule 23). Defendant thereafter unsuccessfully challenged his conviction and sentence in three postconviction petitions. *People v. Robinson*, Nos. 1-00-2785 (2002), 1-06-1428 (2008) (unpublished orders under Supreme Court Rule 23), 1-10-1108 (2011) (unpublished summary order under Supreme Court Rule 23(c)).

¶ 3 On February 2, 2017, defendant filed the section 2-1401 petition at issue in the instant case, challenging his extended-term sentence as void. Specifically, defendant argued that his sentence was void because (1) the victim's age was not charged in the indictment, pled to, or proved beyond a reasonable doubt; (2) he was actually innocent of the "element" of knowingly murdering an individual under the age of 12; (3) the trial court was precluded from imposing an extended-term sentence because the jury found him guilty under a theory of accountability; (4) the "*de facto* life sentence" imposed on "an immature young adult with a history of mental health problems" was unconstitutional; and (5) the statute under which he was sentenced was declared unconstitutional and was never properly re-enacted.

¶ 4 The circuit court denied the petition on March 24, 2017, stating that there was no basis in law upon which it could grant defendant the relief defendant sought. Defendant's late notice of appeal was allowed on May 9, 2017.

¶ 5 The Office of the State Appellate Defender, which was appointed to represent defendant on appeal, has filed a motion in this court requesting leave to withdraw based on counsel's conclusion that an appeal in this cause would be frivolous. The motion was made pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and is supported by a memorandum. Copies of the

motion and memorandum were sent to defendant and he was advised that he might submit any points in support of his appeal.

¶ 6 Defendant has responded, challenging counsel's conclusion that there is no basis to consider the petition where it was filed almost 18 years after the statutory two-year deadline for filing and no exceptions to the statute of limitations apply. Citing subsection (f) of section 2-1401, which provides that "[n]othing contained in this Section affects any existing right to relief from a void order or judgment" (735 ILCS 5/2-1401(f) (West 2016)), defendant maintains that his extended-term sentence is void for all the reasons argued in his petition and, therefore, not subject to the procedural bar of timeliness.

¶ 7 Defendant's argument seems to stem from *People v. Arna*, 168 Ill. 2d 107, 113 (1995), in which our supreme court held that a "sentence which does not conform to a statutory requirement is void" and that the appellate court has the "authority to correct it at any time." However, our supreme court abolished this "void sentence rule" in *People v. Castleberry*, 2015 IL 116916, ¶¶ 1, 19. Since *Castleberry*, a defendant may no longer rely on the void sentence rule to challenge a statutorily nonconforming sentence in perpetuity. *People v. Price*, 2016 IL 118613, ¶ 17. As relevant here, a defendant may not rely on the void sentence rule to escape the two-year statutory time bar for filing a section 2-1401 petition. *Id.* ¶ 35. Post-*Castleberry*, a judgment will be deemed void only in two circumstances: where it was entered by a court that lacked personal or subject-matter jurisdiction, or where it was based on a statute that is facially unconstitutional and void *ab initio*. *Id.* ¶ 31.

¶ 8 In the instant petition, defendant challenged his sentence as void for a number of reasons. Only one of his arguments actually raises a cognizable post-*Castleberry* voidness claim and

merits discussion: that the statute under which the trial court imposed his extended-term sentence was declared unconstitutional and was never properly re-enacted. At sentencing in this case, the trial court stated that defendant was eligible for an extended-term sentence both because the victim was under 12 years old and because defendant had been convicted of residential burglary within 10 years prior to the murder. Defendant is correct that in *People v. Cervantes*, 189 Ill. 2d 80 (1999), our supreme court declared void *ab initio* the "Safe Neighborhoods Law" (Pub. Act 88-680, eff. Jan. 1, 1995), one provision of which included the subsections regarding extended-term sentencing under which defendant was sentenced. See *People v. Brown*, 225 Ill. 2d 188, 198-99 (2007) (discussing the effect of the *Cervantes* decision).

¶ 9 A defendant is entitled to be sentenced either under the law that was in effect at the time of his offense or under the law that was in effect at the time of sentencing. *People v. Calhoun*, 377 Ill. App. 3d 662, 664 (2007). Here, defendant's offense occurred on August 9, 1994, and he was sentenced on May 2, 1997. At sentencing, the trial court did not specify whether it was relying on the date of the offense or the date of the sentencing hearing. However, that circumstance makes no difference, as at both of those points in time, section 5-5-3.2(b) of the Unified Code of Corrections allowed a trial court to impose an extended-term sentence upon any offender who, as relevant here, committed a felony against a person under 12 years of age, or was convicted of first degree murder within 10 years of having been previously convicted of any of a list of enumerated offenses, including residential burglary. 730 ILCS 5/5-3.2(b)(4)(i), (7) (West Supp 1997); 730 ILCS 5/5-3.2(b)(4)(i), (7) (West 1994).

¶ 10 Here, if defendant was sentenced based on the version of the statute in effect at the time of the crime, then there is no question of voidness because the Safe Neighborhoods Law was

enacted after that date. If defendant was sentenced based on the version of the statute in effect at the time of sentencing, thus under the Safe Neighborhoods Law, then voidness becomes a consideration. However, when a law is declared void *ab initio*, the version of the law in existence prior to its amendment by the void legislation nevertheless remains in effect. *Brown*, 225 Ill. 2d at 200. Here, the version of the extended-sentencing law in existence before the enactment of the Safe Neighborhoods Law provided for extended sentencing based on the felony victim being under 12 years of age and based on the murder defendant having been previously convicted of residential burglary. 730 ILCS 5/5-3.2(b)(4)(i), (7) (West 1994). As such, defendant's sentence is authorized by statute and is not affected by *Cervantes*. Defendant's voidness argument does not save him from the procedural bar of untimeliness.

¶ 11 We have carefully examined the record in this case, counsel's memorandum, and defendant's response, and have found no issues of arguable merit to be raised in an appeal. We therefore grant the motion of the State Appellate Defender for leave to withdraw as counsel and affirm the judgment of the circuit court.

¶ 12 This order is entered in accordance with Supreme Court Rule 23(c)(2), (4) (eff. Apr. 1, 2018).

¶ 13 Affirmed.

1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF C O O K)

3 IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
4 COUNTY DEPARTMENT - CRIMINAL DIVISION

5 THE PEOPLE OF THE)
6 STATE OF ILLINOIS,)
) Plaintiff,)
7 vs.) No. 94 CR 2223304
)
8 TONY ROBINSON,)
) Defendant.)

9
10 **REPORT OF PROCEEDINGS** of the hearing had
11 before the Honorable WILLIAM G. LACY, Judge of
12 the Criminal Division, heard on the 24th day of
13 March, 2017.

14
15 APPEARANCES:

16 HONORABLE KIMBERLY M. FOXX,
17 State's Attorney of Cook County, by:
18 MS. KIM L. WARD,
Assistant State's Attorney,
19 appeared for the People.

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21
22
23 Paula A. Vering, CSR, RPR, Official Court Reporter
24 2650 South California Avenue, 4th Floor
Chicago, Illinois 60608
License No. 084-003159

1 THE COURT: All right. Tony Robinson.

2 Mr. Robinson has filed a pro se 1401 petition
3 alleging a number of things. Basically alleging that
4 he could not be sentenced to the extended term that
5 Judge Palmer sentenced him to because the age of
6 the victim was not in the charging document,
7 also because it was under a theory of accountability and
8 that he was sentenced to a de facto life sentence and
9 he should not be so -- that should not have occurred
10:43:00AM 10 because of his tender age.

11 Well, it indicates he was not a minor
12 at the time of this offense. He was 22 years old.

13 After reviewing Mr. Robinson's petition,
14 the Court finds there is no basis in de facto law upon
15 which to grant the relief he seeks.

16 Therefore, the petition will be denied and
17 the Clerk will notify the petitioner of the Court's
18 ruling.

19 Off call.

10:43:54AM 20 (Whereupon, which were all
21 the proceedings had in
22 the above-entitled cause.)
23
24

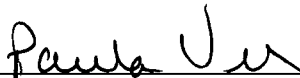
1 STATE OF ILLINOIS)
2) SS.
3 COUNTY OF C O O K)

4 I, PAULA A. VERING, an Official Court Reporter
5 for the Circuit Court of Cook County, Illinois,
6 do hereby certify that I reported in shorthand
7 the proceedings had on the hearing in the above-entitled
8 cause; that I, therefore, caused the foregoing to be
9 transcribed into typewriting, which I hereby certify to
10 be a true and accurate transcript of the proceedings.

11

12

13



Official Court Reporter
C.S.R. No. 084-003159
Circuit Court of Cook County
County Department - Criminal Division

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17

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19

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21

22

23 Dated this 10th day

24 of July, 2017.



SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

Tony Robinson
Reg. No. B-04117
Hill Correctional Center
P.O. Box 1700
Galesburg IL 61402

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

September 25, 2019

In re: People State of Illinois, respondent, v. Tony Robinson, petitioner.
Leave to appeal, Appellate Court, First District.
124982

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 10/30/2019.

Very truly yours,

Carolyn Taft Gosbell

Clerk of the Supreme Court

Appendix C