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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	No. 09 CR 9202
v.)	
)	Honorable
REGALARDO SMITH,)	Domenica A. Stephenson,
)	Judge, presiding.
Defendant-Appellant.)	

JUSTICE COBBS delivered the judgment of the court.

Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court exceeded the appellate court's mandate when it sentenced defendant to attempt armed robbery.

¶ 2 Following a bench trial, defendant-appellant Regalardo Smith was convicted of two counts of armed robbery, two counts of aggravated battery with a firearm, and one count each of aggravated battery, armed violence, and aggravated unlawful use of a weapon (AUUW) under the Criminal Code of 1961 (the Code) and was sentenced to an aggregate 75 years' imprisonment. On direct appeal, this court affirmed the judgment but vacated Smith's

convictions for AUUW and armed robbery of Tamer Tayeh and modified the mittimus to reflect day-to-day good conduct credit on Smith's conviction for armed robbery of Ahmad Aburomi. Subsequent to the mandate issuing, the trial court corrected the mittimus. In addition, the trial court sentenced Smith on attempt armed robbery of Tayeh. In this appeal, Smith contends that the resentencing was erroneous and requests that this Court vacate his sentence. For the reasons that follow, we vacate and reverse.

¶ 3

I. BACKGROUND

¶ 4

This court previously described the facts underlying defendant's conviction and sentencing in an unpublished opinion on direct appeal. See *People v. Smith*, 2016 IL App (1st) 141116-U. Thus, we recount the facts only to the extent necessary to resolve the issues raised in this appeal.

¶ 5

A. The Altercation

¶ 6

On May 2, 2009, at approximately 10:30 p.m., Tamer Tayeh and Ahmad Aburomi closed their store for the night.¹ As they were walking in the parking lot towards Aburomi's car, Tayeh noticed that Smith was walking behind them. As Tayeh entered the passenger side of the car, Smith "stuck most of his body in the car" and pointed a gun to Tayeh's head while repeatedly asking, "[w]here's the money." Aburomi gave Smith his cell phone and \$40 from the center console of his car. Smith took the money and cell phone and asked for "the rest of the money." He patted Tayeh's pockets and used his gun to poke through Tayeh's bag of snacks.

¶ 7

At this point, Tayeh grabbed Smith's right wrist and forced him from the car. Tayeh fell on top of Smith but released him when he heard footsteps from behind. Tayeh turned and

¹ The store is located at the corner of Roosevelt and Central Park in Chicago, Illinois.

saw a woman walking nearby. He told her that Smith had a gun and asked her to call the police. However, the woman screamed and fled the scene. Smith attempted to run away but Tayeh grabbed him and both men fell backwards. This time, Smith landed on top of Tayeh and the men struggled as Tayeh attempted to "restrain" and disarm Smith. Tayeh held down Smith's right hand by the wrist and tried to stop Smith from moving. Tayeh denied touching the gun at any time, however, the gun fired three shots during the struggle.

¶ 8 Tayeh was struck by one of the bullets. The police arrived and pursued Smith through the parking lot until he reached a fence. Smith climbed over the fence, however, another officer found him and brought him back to the parking lot. There, Aburomi identified Smith and the items that Smith had taken from him for the police.

¶ 9 Tayeh and Aburomi were taken to the hospital in separate ambulances. At the hospital, the police officers presented Tayeh and Aburomi with photos of a gun. Both men identified the gun as belonging to Smith. Tayeh was treated for bullet wounds to his kidney, ureter, colon, and left thigh. He required a colostomy, reverse colostomy, colonoscopy, and an additional surgery to remove kidney stents. Due to these injuries, Tayeh suffered bloody bowel movements and continuous pain. Post surgery, he was left with one functioning kidney and a "foot long scar." A bullet was lodged in his spine and he had a "graze wound" to his right ankle.

¶ 10 Smith was charged with four counts of attempt murder, one count of armed violence, two counts of aggravated battery with a firearm, two counts of armed robbery armed with a firearm, six counts of armed robbery, two counts of unlawful vehicular invasion, one count of aggravated battery, and two counts of AUUW.

¶ 11 On direct examination, Aburomi testified that he tried to drag Smith toward a homeless shelter and during this attempt Smith bit his right hand. When the police arrived Smith fled the scene leaving the gun with Aburomi. On cross-examination, Aburomi testified that as he dragged Smith towards the homeless shelter, he was "holding the gun, and holding the gun down with [Smith]."

¶ 12 Officer Granville testified that he heard gunshots near Roosevelt and Central Park at approximately 10:30 p.m. on the night of the incident. He drove to the parking lot where he saw Tayeh on the ground, Aburomi, standing and yelling and Smith running through the lot. Granville drove after Smith until Smith climbed over the fence. Granville immediately issued a flash message describing Smith's clothing and then returned to Aburomi where he recovered the gun. Other officers found Smith and brought him to the parking lot where Granville identified him. Granville identified a photograph of the gun at trial.

¶ 13 Officer Sandoval also testified that he heard gunshots near Roosevelt and Central Park at approximately 10:30 p.m. He received a flash message from Granville, saw Smith running, and found him in an outdoor stairwell of a nearby house. Sandoval observed an item fall from Smith. As other officers detained Smith, Sandoval directed officer Nomellini to recover the item that Smith had dropped, which they determined was \$40. Sandoval also recovered a cell phone from Smith. Officer Delis testified that after midnight on May 3, 2009, he performed a gunshot residue (GSR) test on Smith. Delis collected and inventoried samples from Smith's right and left hands.

¶ 14 Scott Rochowicz, a forensic scientist with the Illinois State Police, testified that he analyzed the samples from Smith's GSR kit and found that the back of his left hand was positive for GSR. Smith's right hand tested negative for GSR. Rochowicz opined that Smith

either "discharged a firearm, contacted a PGSR related item, [or] was in close proximity to a firearm when it was discharged." Only one particle containing antimony, barium, and lead was found on Smith's right hand, and a minimum of three particles containing all three elements was needed for a "positive conclusion." Rochowicz stated that GSR could be removed by "any physical activity done with the hands," including contact with another person's hands.

¶ 15 Joseph Wohrstein, a forensic scientist for the Illinois State Police, testified that he looked for "latent prints" on the gun, cartridge cases, and magazine but he could not find any prints that could be compared to Smith's fingerprints. However, Wohrstein opined that even if no fingerprints were "lifted" from an item, it does not mean that a particular person did not touch it.

¶ 16 At the close of the State's case, Smith moved for a directed finding, arguing, *inter alia*, that the State had not proven "who actually discharged the firearm" during the incident. The court denied Smith's motion and following closing arguments, the trial court found Smith guilty of: (1) five counts of armed robbery; (2) two counts of aggravated battery with a firearm; (3) one count of armed violence; (4) two counts of vehicular invasion; (5) one count of attempted armed robbery; (6) one count of aggravated battery, and (7) two counts of AUUW.

¶ 17 Smith filed a motion for a new trial which the court denied. After merging the attempt armed robbery of Tayeh into the armed robbery with a firearm of Tayeh, and merging certain other counts and vacating one count of AUUW, the court sentenced Smith to an aggregate 95 years' imprisonment. Smith filed a motion to reconsider which the court granted and his sentence was reduced to an aggregate 75 years' imprisonment. This included the concurrent

sentences of 30 years for the armed robbery of Aburomi (10 years plus a 20-year enhancement for personally discharging a firearm), 15 years for armed violence, eight years for aggravated battery with a firearm to Aburomi, five years for aggravated battery of Aburomi, and three years for AUUW, as well as 35 years for the armed robbery of Tayeh (10 years plus a 25-year enhancement) and 10 years for aggravated battery with a firearm to Tayeh, both to be served consecutively to his 30 year sentence. Smith's second motion to reconsider was denied.

¶ 18

B. Direct Appeal

¶ 19

On direct appeal Smith argued, *inter alia*, that his conviction for armed robbery with a firearm of Tayeh should be vacated because the State failed to prove that he took property from Tayeh. *People v. Smith*, 2016 IL App (1st) 141116-U, ¶ 25. The State conceded this issue and we vacated the armed robbery conviction and related 35-year sentence. The State also conceded that the trial court erred in sentencing Smith to serve 85% of his sentence and ruling that he could not receive good-conduct credit for the armed robbery of Aburomi where the court did not enter a finding, nor did the evidence show that Aburomi sustained great boldly harm. *Id.* ¶ 41. Consequently, we found that the mittimus must be corrected to reflect Smith's day-to-day good conduct credit for his conviction of armed robbery of Aburomi.

¶ 20

Addressing Smith's other arguments this court also vacated Smith's AUUW conviction finding that the State failed to prove Smith lacked a valid Firearm's Owner's Identification Card *Id.* ¶ 24. However, we affirmed Smith's convictions for aggravated battery with a firearm to both victims where the evidence showed that Smith knowingly and intentionally discharged a firearm. *Id.* ¶ 31. Further, we affirmed the conviction and 20-year sentencing enhancement for armed robbery of Aburomi where the evidence showed that Smith

personally discharged a gun. *Id.* ¶ 37. Accordingly, our order reflected that the trial court's decision was "Affirmed as modified; mittimus corrected." *Id.* The case was not remanded.

¶ 21 C. Subsequent Trial Court Proceedings

¶ 22 On November 9, 2016, the trial court discussed the appellate court's ruling with the State and Smith's defense attorney. Smith was not present. The trial court recognized that Smith's attempt armed robbery with a dangerous weapon other than a firearm of Tayeh (Count 16) had merged into armed robbery with a firearm of Tayeh (Count 13), but believed that Smith needed to be sentenced on Count 16 because Count 13 was vacated.² The trial court stated, "we need to correct it even though the Appellate Court did [not] say to do that. If I do [not] it would be an invalid sentence." The court by agreement of the parties continued the case for a December 6, 2016 hearing date.

¶ 23 On December 6, 2016, with Smith present, the trial court stated that "because certain counts were not addressed by the appellate court, I find they must be addressed in order for me to correct the mittimus." On Count 16, the trial court sentenced Smith to 10 years to be served consecutively with the 10 year sentence previously entered by the trial court for the aggravated battery of Tayeh. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 Smith raises numerous claims on appeal that can be grouped into five separate issues: (1) the trial court exceeded the scope of the appellate court's mandate by sentencing Smith to an attempt robbery count after his armed robbery conviction was vacated; (2) this court should vacate the attempt armed robbery conviction because attempt robbery with a dangerous weapon other than a firearm is not a lesser-included offense of armed robbery with a firearm;

² The record is silent as to why the hearing was called.

(3) his sentence should be served concurrently rather than consecutively because there was a single injury and no showing of severe bodily injury during the commission of the attempt armed robbery; (4) the trial court failed to comply with 730 ILCS 5/5-4-1 (West 2016) when it resentenced Smith; and (5) his defense counsel was ineffective because Smith's arguments were not raised at his resentencing. We need only address the first issue.

¶ 26 Smith argues that the trial court exceeded the scope of this court's mandate by resentencing him on the attempt armed robbery count after his armed robbery conviction was vacated. The State concedes that the circuit court exceeded the scope of this court's mandate; however, the State argues that the circuit court properly sentenced Smith on the attempt armed robbery conviction under the revestment doctrine. See *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 352 (2002) (reviewing *de novo* whether our supreme court's mandate required the trial court to allow the plaintiff's motion to amend the complaint).

A. Appellate Court's Mandate

¶ 27 We begin our analysis by noting that a trial court must obey the clear and unambiguous directions in a mandate issued by a reviewing court. *People ex rel. Daley v. Scherier*, 92 Ill. 2d 271, 276 (1982). When a reviewing court issues a mandate, it vests the trial court with jurisdiction to take only such action as it conforms to that mandate. *Id.* Any other order issued by the trial court is outside the scope of its authority and void for lack of jurisdiction. *Id.* at 277. Even where this court's directions are erroneous, the trial court is nonetheless required to strictly follow those directions. *Scherier*, 92 Ill. 2d at 277 (citing *People ex rel. Campo v. Matchett*, 394 Ill. 464, 469 (1946)).

¶ 28 In the present case, the parties agree that the circuit court exceeded the scope of this court's mandate. At sentencing, the trial court merged the attempt armed robbery count

(Count 16) with the armed robbery with a firearm count (Count 13). On direct appeal, this Court vacated Smith's conviction for armed robbery with a firearm of Tayeh (Count 13). *Smith*, 2016 IL App (1st) 14116-U, ¶ 25. The case was not remanded. On November 9, 2016, the circuit court discussed the appellate court's ruling with the State and Smith's defense attorney without Smith present. The circuit court recognized that Count 16 merged into Count 13, but stated that Smith needed to be sentenced on Count 16 because Count 13 was vacated. The circuit court stated "we need to correct it even though the appellate court did [not] say to do that." At the next proceeding, the trial court stated that "because certain counts were not addressed by the appellate court, I find they must be addressed in order for me to correct the mittimus."

¶ 29 The circuit court, itself, acknowledged that the sentencing was outside the scope of this court's order. Its statements indicate that it properly interpreted the mandate and recognized that the case was not remanded to the trial court. Nevertheless, the court determined that in order to correct the mittimus, it needed to address the convictions that the appellate court's order had not discussed. The mandate from the order vacating Smith's conviction for armed robbery with a firearm of Tayeh and modifying the mittimus did not instruct the circuit court to sentence Smith on the attempt armed robbery conviction. *Smith*, 2016 IL App (1st) 141116-U, ¶¶ 1-2, 42-43. Therefore, we find that the circuit court clearly was not vested with jurisdiction to sentence Smith on the attempt armed robbery conviction.

¶ 30 Additionally, we note that Count 16, the attempt armed robbery, is an included offense of Count 13 for armed robbery. See 720 ILCS 5/2-9(b) (West 2016). Thus, the circuit court properly merged the counts during sentencing and effectively vacated Count 16. See *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 61 ("The effect of a trial court merging one

conviction into another conviction is vacatur of the merged conviction.”) Although the trial court felt it needed to “correct” defendant’s sentence to address Count 16 after this court vacated defendant’s conviction on Count 13, the trial court was without authority to do so. Reversal by this court does not “impliedly carr[y] with it a remandment for the imposition of sentence on alleged incomplete judgments of conviction.” *People v. Baker*, 85 Ill. App. 3d 661, 663 (1980). Had the State filed a petition for rehearing pursuant to Supreme Court Rule 367(a), Ill. S. Ct. R. 367(a) (eff. Nov. 1, 2017), seeking remandment of the cause, then it would have been possible for the circuit court to impose a sentence for the count of attempt armed robbery. See *Baker*, 85 Ill. App. 3d at 663-64 (recognizing a reviewing court’s authority to remand the cause for entry of sentence on a judgment of conviction for which no sentence has been imposed where the cause is properly appealed from a final judgment of conviction on another offense).

¶ 31 Here, we did not remand the case to the trial court. Absent a petition for rehearing seeking remandment, this court’s judgment in the direct appeal became final and precluded the State from seeking the reinstatement of the revived count of attempt armed robbery. See *Baker*, 85 Ill. App. 3d at 664 (finding, *inter alia*, that the absence of a petition for rehearing on the remandment of the imposition of a sentence precluded the State from seeking reinstatement of the sentence).

¶ 32 B. Revestment Doctrine

¶ 33 The State argues that although the circuit court exceeded the scope of this court’s mandate the circuit court properly sentenced Smith on the attempt armed robbery conviction pursuant to the revestment doctrine. We disagree.

¶ 34 "Under the revestment doctrine, litigants may revest a trial court with personal and subject matter jurisdiction, after the 30-day period following the final judgment." *People v. Bannister*, 236 Ill. 2d 1, 10 (2009). "For the revestment doctrine to apply, both parties must (1) actively participate in the proceedings; (2) fail to object to the untimeliness of the late filing; and (3) assert the positions that make the proceedings inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment." (Emphasis in original.) *People v. Bailey*, 2014 IL 115459, ¶ 25. If any one of those requirements remains unmet, the revestment doctrine does not apply and the trial court is without jurisdiction to act. *Id.* ¶ 25.

¶ 35 We find that the State misperceives the requirements that need to be satisfied for the circuit court to be revested with jurisdiction. Here, the case is well beyond the 30-day period following the final judgment. The proceedings were not a product of both parties' desire to revest the circuit court with jurisdiction; rather they appeared back in the circuit court following the appellate court's decision. The parties were not actively participating in the proceedings at the circuit court; the record shows that the parties were merely present for the circuit court to correct the mittimus. As such, the first prong is not satisfied and the revestment doctrine cannot apply to this case.

¶ 36 As we have determined that the circuit court has exceeded the mandate, we find that the trial court did not have jurisdiction to enter the judgment on the attempt armed robbery charge. Accordingly, the sentence attempt armed robbery of Tayeh is vacated.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we vacate the sentence and reverse the circuit court of Cook County.

No. 1-17-0320

¶ 39 Sentenced vacated; circuit court reversed.