

No. 1-10-1189

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 98 CR 17857
)	
ESMELIX LEYVA,)	The Honorable
)	Arthur F. Hill, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justice Hall and Justice Karnezis concurred with the judgment.

ORDER

¶ 1 **Held:** Where the record fails to support defendant's claim that the trial judges improperly refused to exercise their discretion as to his requests for appointment of counsel, defendant is not entitled to reversal and remandment of his section 2-1401 petition; the circuit court's judgment is affirmed.

¶ 2 Defendant, Esmelix Leyva, appeals from the order dismissing his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)), in part, on the ground the petition was untimely. On appeal, defendant does not contend his petition was improperly dismissed, but that the trial judges erred by failing to exercise their discretion in ruling on his requests for the appointment of counsel, which he made during the section

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2-1401 proceedings. We affirm.

¶ 3 The record shows that, following a 1999 jury trial, defendant was found guilty of home invasion and attempted-aggravated criminal-sexual assault. The trial court sentenced defendant to 50 years' imprisonment on the home invasion conviction and 15 years' imprisonment on the attempted-aggravated criminal-sexual assault conviction, to be served consecutively. On direct appeal, this court affirmed defendant's convictions and modified his sentences to run concurrently. *People v. Leyva*, No. 1-99-2818 (2001) (unpublished order under Supreme Court Rule 23).

¶ 4 Eight years later, on September 11, 2009, defendant filed a section 2-1401 petition which alleged: (1) defendant was convicted solely on circumstantial and uncorroborated evidence; (2) defendant was not proven guilty beyond a reasonable doubt; (3) defendant's convictions violated the one-act, one-crime rule; and (4) the trial court erred by introducing his previous rape conviction. Defendant included in his section 2-1401 petition, a motion for DNA testing. Defendant also moved for the appointment of counsel. The State filed a motion to dismiss defendant's motion for DNA testing, arguing in part that identification had not been an issue at trial.

¶ 5 At a hearing on December 2, 2009, Judge John J. Fleming asked defendant if he had anything to say regarding the State's motion to dismiss his motion for DNA testing. Defendant asked the court to appoint counsel to assist him as to the DNA motion. Judge Fleming denied defendant's request for counsel, granted the State's motion to dismiss, and the State's request for an extension of time to file a response to defendant's section 2-1401 petition. The court then addressed several subsequently filed motions of defendant, including a motion for judgment by default on his original section 2-1401 petition, a petition for writ of *habeas corpus*, a renewed motion for appointment of

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counsel, and an amended petition for relief from judgment. Before Judge Fleming continued the case for a hearing on January 28, 2010, the following colloquy occurred:

"DEFENDANT: Would it be possible for you to appoint an attorney for me?

THE COURT: It's possible. I won't do it today. You are not entitled on a civil matter, a 1401 petition, to an appointed lawyer."

¶ 6 On January 28, 2010, the State filed its motion to dismiss defendant's section 2-1401 petition, alleging his petition was untimely, barred by the doctrines of waiver and *res judicata*, and it lacked merit. Judge Arthur Hill presided over the January 28 proceedings, where, with defendant present, the assistant State's Attorney explained the procedural background of the case and then stated:

"[D]efendant] has recently filed a *** 1401 petition. At that time he requested that Judge Fleming appoint a public defender to represent him. Judge Fleming entertained and denied his request. It was within his discretion according to the statute and allowed us to respond to the petition."

Defendant did not object to or seek correction of this recitation by the State.

¶ 7 After confirming, on the record, he received a copy of the State's motion to dismiss his petition, defendant asked the court if it was "possible to renew" his motion for new counsel. Judge Hill responded, "Judge Fleming already ruled on that," and continued the case to March 25, 2010, in order to provide defendant with time to respond to the State's motion to dismiss.

¶ 8 On March 25, 2010, the court was presented with additional filings by defendant, including a motion to strike the State's motion to dismiss his section 2-1401 petition, and a motion for an evidentiary hearing. In those motions, defendant, in his response to the State's timeliness objection,

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asserted his convictions were void and could be attacked at any time, and reiterated the claims in his original 2-1401 petition.

¶ 9 At a hearing on the State's motion to dismiss his section 2-1401 petition, defendant proclaimed his innocence, and argued that certain evidence had been hidden at trial. In response, the State maintained defendant's section 2-1401 petition was untimely and contained issues already considered or which should have been raised on direct appeal. After hearing the arguments, Judge Hill, in a written order, granted the State's motion to dismiss defendant's section 2-1401 petition and denied defendant's request for relief. Judge Hill found defendant's petition was untimely, his claims were waived, and his factual arguments were without merit.

¶ 10 On appeal, defendant does not challenge the court's ultimate ruling on his section 2-1401 petition. Instead, he takes issue with the treatment of his requests for appointment of counsel, maintaining the trial judges erroneously failed to exercise their discretion as to his requests. Defendant asserts that, had counsel been appointed, the attorney might have drafted a meritorious section 2-1401 petition. Therefore, defendant asks that we reverse the dismissal of his petition and remand this cause for the trial court to exercise its discretion as to his request for the appointment of an attorney.

¶ 11 Section 2-1401 establishes a procedure for seeking relief from judgments, in both criminal and civil cases, more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2008). The rules of civil practice govern proceedings under this section, even in criminal proceedings. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). In general, a section 2-1401 petition must be filed within two years of the entry of judgment. 735 ILCS 5/2-1401(c) (West 2008). However, this time limitation does

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not apply to petitions brought on voidness grounds. *People v. Wuebbels*, 396 Ill. App. 3d 763, 765 (2009). The trial court may dispose of a section 2-1401 petition which is ripe for adjudication *sua sponte*. *Vincent*, 226 Ill. 2nd at 13-14.

¶ 12 There is no explicit right to the assistance of counsel in connection with a section 2-1401 petition. See *People v. Pinkonsly*, 207 Ill. 2d 555, 568 (2003) (section 2-1401 of the Code does not specify any level of assistance by counsel). The Illinois Supreme Court has ruled that, although indigent criminal defendants may receive appointed counsel to represent them regarding civil actions, such as *mandamus* and *habeas corpus* petitions, appointed counsel is not required in such civil proceedings. See *Tedder v. Fairman*, 92 Ill. 2d 216, 226-27 (1982). Defendant asserts the trial court had the discretion to appoint the public defender to act as his attorney under 55 ILCS 5/3-4006 (West 2008).

¶ 13 Defendant, citing *People v. Queen*, 56 Ill. 2d 560 (1974), and *People v. Partee*, 268 Ill. App. 3d 857 (1994), argues that the courts' treatment of his motions for appointment of counsel requires reversal and remandment. In *Queen*, our supreme court held: "There is error when a trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented." *Queen*, 56 Ill. 2d at 565. See also *Partee*, 268 Ill. App. 3d at 869 ("where a circuit court erroneously believes that it has no discretion in a matter, its ruling on a matter requiring the exercise of discretion must be reversed on appeal where it palpably fails to exercise that discretion.")

¶ 14 First, the record does not demonstrate Judge Fleming refused to exercise his discretion regarding defendant's request for counsel in an erroneous belief that he did not have the discretion or authority to do so. At the hearing on December 2, 2009, defendant asked Judge Fleming to

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appoint an attorney to represent him as to his section 2-1401 proceedings. In response, Judge Fleming stated: "[i]t's possible. I won't do it today. You are not entitled on a civil matter, a 1401 petition, to an appointed lawyer."

¶ 15 Defendant admits that Judge Fleming, in fact, recognized he had the discretionary authority to grant his motion for the appointment of counsel. He contends Judge Fleming refused to exercise his discretion. We disagree. Instead, we agree with the State that the record shows Judge Fleming was aware defendant did not have a right to the appointment of counsel in a section 2-401 proceeding, that he had the discretion to make such an appointment, but denied the request. The record does not establish a refusal or palpable failure on the part of Judge Fleming to exercise his discretion as to the appointment of counsel. Considering the court's comments in their entirety, the court clearly denied defendant's motion for appointed counsel. Moreover, defendant's subsequent behavior during the proceedings demonstrates he understood Judge Fleming had denied his motion. For example, on January 28, 2010, when the State summarized the previous proceedings with defendant present, the State noted Judge Fleming had discretion to appoint counsel, but denied defendant's motion for appointment of counsel. Defendant did not object to this characterization of the proceedings, nor did he attempt to correct the record. To the extent that Judge Fleming's comments could be considered tentative, they, at most, can only be interpreted to allow for the possibility that the court might reconsider its denial of counsel in the future.

¶ 16 Defendant further argues that, on January 28, 2010, Judge Hill, by deferring to Judge Fleming's prior ruling, erred because Judge Fleming never exercised his discretion and never ruled on defendant's request for the appointment of counsel. Defendant claims that, as a result, neither

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judge exercised his discretion as to the appointment of counsel.

¶ 17 Defendant and the State are in agreement that interlocutory orders "should be modified or vacated by a successor judge only after careful consideration." *Balciunas v. Duff*, 94 Ill. 2d 176, 187 (1983). The parties also agree that a prior order should not be reversed simply on the basis of a disagreement as to the manner the prior court exercised its discretion. *Id.* at 188. Finally, there is an agreement that a successor judge should change a prior order "only if there is a change of circumstances or additional facts which warrant such action." *Id.*

¶ 18 As stated above, the record shows Judge Fleming did, in fact, deny defendant's motion for the appointment of counsel. The record does not show Judge Hill believed he had no discretion as to the appointment of counsel or to consider defendant's renewal of his motion to appoint counsel. In fact, the State's attorney, in discussing the background of the case and Judge Fleming's denial of counsel, specifically noted the discretionary power of the court to appoint counsel. We also note that judges are presumed to know and follow the law (*People v. Stoffel*, 239 Ill. 2d 314, 327 (2010)), and there is no indication in the record that Judge Hill did not know the law regarding his role in reviewing interlocutory orders. Furthermore, Judge Hill did not fail to exercise the discretion vested in him to consider the motion for appointment of counsel. Instead, Judge Hill, by affirming Judge Fleming's decision, denied defendant's request to renew a motion for appointment of counsel. We thus find Judge Fleming and Judge Hill did not refuse to exercise their discretion as to defendant's requests for the appointment of counsel because of an erroneous understanding that they did not have discretion.

¶ 19 We find *People v. Moore*, 207 Ill. 2d 68 (2003), relied on by defendant, distinguishable from

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the case at bar. In *Moore*, defendant filed a *pro se* post-trial motion for the appointment of counsel, other than the public defender, alleging the public defender had rendered ineffectiveness of counsel during trial. The supreme court remanded the cause because, it was clear from the record, that the trial court not only failed to conduct an initial inquiry into the defendant's *pro se* allegations of trial counsel's ineffectiveness as required by *People v. Krankel*, 102 Ill. 2d 181 (1984), for appointment of counsel, but also was "unaware of this rule." *Moore*, 207 Ill. 2d at 77-79. Furthermore, "the trial court operated under the legal misapprehension that defendant's claim could be resolved by appointment of different counsel on appeal." *Id.* at 75. Defendant's section 2-1401 petition does not allege ineffectiveness of trial counsel, and his motions for appointment of counsel did not require a *Krankel* inquiry. Here, by contrast, Judge Fleming understood he had discretion, considered defendant's request for counsel, and denied it. When defendant sought to renew his motion, Judge Hill considered the request as defendant's attempt to change or modify a prior interlocutory order and affirmed the original order of Judge Fleming.

¶ 20 We also disagree with defendant's argument, based on *People v. Laugharn*, 233 Ill. 2d 318 (2009), that reversal and remandment are required because the trial judges failed to follow "required procedures in disposing" of his section 2-1401 petition. First, there was no procedural error as discussed above. The trial judges in the instant case did not improperly refuse or palpably fail to exercise their discretion as to defendant's requests for appointment of counsel. Second, *Laugharn* is inapplicable. In *Laugharn*, the *sua sponte* dismissal of a section 2-1401 petition was reversed on ripeness grounds as the trial court dismissed the petition within the first 30 days of its filing without a response by the State. In contrast, defendant's section 2-1401 petition was briefed by the State and

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defendant. The court also permitted defendant to file numerous additional motions and gave him the opportunity to present oral argument on his petition. The issues decided by Judge Hill were ripe for adjudication, therefore, *Laugharn* does not require reversal of the order dismissing his petition and denying relief.

¶ 21 Defendant argues that reversal is necessary because the State cannot show the absence of counsel did not impact the outcome of the proceedings. In *People v. Gibson*, 136 Ill. 2d 362 (1990), our supreme court interpreted the holding in *Queen* to suggest that a failure or refusal to exercise discretion was to be assessed in the context of the entire proceeding. *Id.* at 379-80. It is defendant who "has the burden to prove that prejudice resulted from the trial court's failure to exercise its discretion." *People v. Ware*, 407 Ill. App. 3d 315, 349 (2011), (citing *People v. Chapman*, 194 Ill. 2d 186, 223 (2000)). Even if the trial court judges had refused to exercise their discretion to appoint counsel, defendant has failed to establish prejudice. As discussed, defendant did not have a right to counsel. Defendant has asserted, generally, the importance of legal representation and speculation as to the existence of issues which were not raised, but has not demonstrated actual prejudice caused by the lack of counsel in the presentation of his tardy section 2-1401 petition.

¶ 22 Affirmed.