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No. 3-08-0961

Order filed April 5, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	No. 92-CF-876
)	
WILLIAM SIMPSON,)	Honorable
)	Robert P. Livas,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

Held: The trial court did not err when it denied defendant's section 2--1401 petition. Specifically, defendant's conviction for felony murder was not void because the predicate offense of residential burglary properly supported it; thus, he was not entitled to relief under section 2--1401.

In August 1993, the court convicted defendant William Simpson of first degree murder (Ill. Rev. Stat. 1991, ch. 38, par. 9--1(a)(2)), felony murder (Ill. Rev. Stat. 1991, ch. 38, par. 9--1(a)(3)), and residential burglary (Ill. Rev. Stat. 1991, ch. 38, par. 19--3)). The court imposed a

60-year term of imprisonment on defendant's felony murder conviction, and did not impose a sentence on his remaining convictions. Thereafter, on August 5, 2008, defendant filed a petition for relief from a void judgment pursuant to section 2--1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2--1401 (West 2008)), which the trial court denied. Defendant appeals the trial court's decision denying his section 2--1401 petition on the grounds that his felony murder conviction is void because the offense of residential burglary cannot support a conviction for felony murder. We affirm.

FACTS

On April 21, 1992, the State charged defendant with first degree murder, felony murder, and residential burglary alleging defendant and Maurice Terrell caused the death of Jackie Nykaza in the course of burglarizing her home on March 13, 1992.

During a bench trial in August 1993, the State's evidence established that Nykaza returned to her home while defendant and Terrell were burglarizing her residence. Upon her unexpected return, defendant punched Nykaza in the face and neck, knocking her unconscious. While defendant was in Nykaza's home, Nykaza was also stabbed, kicked in the head, and strangled. Eventually, defendant and Terrell carried Nykaza's body into a bedroom and then set fire to the home before leaving with a gun cabinet.

After the close of evidence, defense counsel offered closing arguments to the court. Defense counsel argued that even if the State's evidence proved defendant was guilty of residential burglary, the State could not prove him guilty of felony murder because residential burglary was not a "forcible felony" that would support a felony murder conviction. See Ill. Rev. Stat. 1991, ch. 38, pars. 2--8; 9--1(a)(3). Defense counsel noted that the statute does not

designate residential burglary as a predicate offense for felony murder and further argued that the instant residential burglary did not meet the "saving clause" contained in the statutory definition of a forcible felony. See Ill. Rev. Stat. 1991, ch. 38, par. 2--8.¹ In response, the State argued to the court that since burglary was an offense specifically enumerated in the statutory definition of forcible felony, then residential burglary would also meet the definition of forcible felony.

After receiving closing arguments, the court took the matter under advisement, and subsequently found defendant guilty of all three offenses as charged. Regarding the offense of felony murder, the court stated "[a]s to the charge of [felony m]urder as contained in Count 2 based upon the commission of a forcible Felony, the Defendant is found guilty."

Defendant filed a motion for a new trial, alleging, among other things, that residential burglary was not an enumerated predicate offense for felony murder and that a felony murder conviction based on residential burglary was not "a legally permitted result." Following a hearing on October 18, 1993, the court denied defendant's petition for a new trial and proceeded to hear arguments from the State and defendant on sentencing. The court took the matter under advisement, and on October 28, 1993, it sentenced defendant only on his felony murder conviction and imposed a 60-year term of imprisonment.

Defendant appealed his sentence, and this court affirmed. *People v. Simpson*, No. 3-93-0857 (1995) (unpublished order under Supreme Court Rule 23). Thereafter, on November 5, 2001, defendant filed a petition for postconviction relief. The trial court denied the

¹The "saving clause" specifically provided that other than the enumerated offenses, "any other felony which involve[d] the use or threat of physical force or violence" also constituted a forcible felony. Ill. Rev. Stat. 1991, ch. 38, par. 2--8.

petition at the second stage of proceedings as untimely. Defendant appealed, and we affirmed. *People v. Simpson*, No. 3–05–0260 (2007) (unpublished order under Supreme Court Rule 23).

On August 5, 2008, defendant filed the instant *pro se* petition to vacate a void judgment pursuant to section 2--1401 of the Code. Defendant attempted to serve his 2--1401 petition on the State by placing the petition in the institutional mail at the Menard Correctional Center. In this petition, defendant alleged that his conviction for felony murder was void because the predicate offense of residential burglary could not support this conviction based on the law as it existed at the time of his trial. The petition also included the allegations that appellate counsel was ineffective for failing to include this contention in his motion for new trial.

The State filed a limited appearance with a motion to dismiss defendant's petition based on lack of proper service of process on the State as required by Illinois Supreme Court Rules 105 and 106 (Ill. S. Ct. R. 105 (eff. Jan. 1, 1989); R. 106 (eff. Aug. 1, 1985)) which required defendant to serve his 2--1401 petition by summons, certified mail, or publication. The State claimed that defendant did not comply with Rules 105 and 106 and the court could not enter an order against the State due to lack of personal jurisdiction. Alternatively, citing *People v. Johnson*, 236 Ill. App. 3d 125 (1992), the State argued that defendant's conviction for felony murder was not void based on existing case law decided before defendant's trial which held that residential burglary constituted a sufficient predicate offense to support a felony murder conviction, and that the facts established that the instant residential burglary was in fact a forcible felony. The State further contended that since defendant's conviction was not void, the trial court should dismiss defendant's petition as untimely.

The court conducted a hearing on defendant's section 2--1401 petition on November 14,

2008. The State first argued that the trial court should grant their motion to dismiss because defendant failed to properly serve them. The State contended that Supreme Court Rules 105 and 106 required defendant to serve them by publication, service of summons, or by certified mail, and in this case "[t]he service was by regular mail, and it[was] on that basis that the State object[ed] to the Court's jurisdiction to enter an order against the State." The court responded "that [the State] waived lack of service," to which the State responded that a court order dated August 8, 2008, "expressly state[d] that [the State] objected to service." The court nonetheless ruled that defendant "won the first point" and directed the State to proceed with their argument. The State then contended that the court should grant their motion to dismiss defendant's section 2--1401 petition because it was untimely and substantively without merit.

The court took the matter under advisement. It ultimately denied defendant's 2--1401 petition after finding that although residential burglary was not an enumerated offense under the felony murder statute, the case law indicated that residential burglary was a forcible felony and that offense would support a felony murder conviction at the time of defendant's trial. The court also noted that a section 2--1401 petition could not be used as a substitute for a direct appeal. See *People v. Pinkonsly*, 207 Ill. 2d 555 (2003). Defendant appeals this ruling.

ANALYSIS

In this appeal, defendant submits that the court erred by denying his *pro se* section 2--1401 petition because the felony murder conviction based on the felony of residential burglary is void. Before addressing the merits of this argument, we first address the State's contention on appeal that the trial court, and therefore this court, lacks jurisdiction over the State because defendant did not properly serve the State with the instant petition as required by Supreme Court

Rules 105 and 106.

Illinois Supreme Court Rules 105 and 106 (Ill. S. Ct. R. 105 (eff. Jan. 1, 1989); R. 106 (eff. Aug. 1, 1985)), require a defendant to serve the State with a section 2--1401 petition by: (1) summons; (2) certified mail; or (3) publication. When a defendant fails to comply with Rules 105 and 106, the trial court does not acquire proper personal jurisdiction over the State, and, as a result, the trial court cannot enter an order against it. See *People v. Mescall*, 347 Ill. App. 3d 995 (2004). Here, at the hearing on the State's motion to dismiss defendant's section 2--1401 petition, the State contended that defendant failed to properly serve them; thus, the trial court should grant their motion to dismiss on this basis. However, the trial court denied the State's request to dismiss based on lack of personal jurisdiction over it, informing defendant that he "won the first point." The State has not appealed this ruling, and based on the court's finding that the State waived lack of personal service, we turn to the court's ruling regarding the substantive merit and the timeliness of defendant's section 2--1401 petition.

A section 2--1401 petition must be filed within two years after the entry of the judgment being challenged. 735 ILCS 5/2--1401(c) (West 2008). An exception to this limitation is made for judgments that are void, as a void judgment may be attacked at any time. See *People v. Harvey*, 196 Ill. 2d 444 (2001). However, if a defendant files an untimely section 2--1401 petition and asserts that the underlying judgment is void in an instance when it is not void, the trial court may properly dismiss defendant's petition as untimely. See *People v. Sims*, 378 Ill. App. 3d 643 (2007). In this case, defendant filed his section 2--1401 petition on August 8, 2008, more than two years after the trial court entered the original October 28, 1993, judgment against him. Thus, defendant's petition is untimely. Consequently, we must consider whether

defendant's conviction for felony murder is void before we can ascertain whether to excuse the untimeliness of defendant's petition.

Paragraph 9--1(a)(3) of the Criminal Code of 1961 (the Criminal Code), provides that a defendant commits felony murder if, in causing the victim's death, "he is attempting or committing a forcible felony." Ill. Rev. Stat. 1991, ch. 38, par. 9--1(a)(3). The applicable version of the Criminal Code further defined a forcible felony as "treason, first degree murder, second degree murder, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, arson, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." Ill. Rev. Stat. 1991, ch. 38, par. 2--8.

Prior to defendant's trial, the First District of the Appellate Court recognized that residential burglary was not an enumerated predicate offense of felony murder, but concluded that it was a forcible felony because it "involve[d] the use or threat of physical force or violence against any individual" (Ill. Rev. Stat. 1991, ch. 38, par. 2--8). *Johnson*, 236 Ill. App. 3d 125. The *Johnson* court also noted that the legislature subsequently amended paragraph 2--8 of the Criminal Code to include residential burglary as an enumerated forcible felony. *Johnson*, 236 Ill. App. 3d 125; see also 720 ILCS 5/2--8 (West 1994).

Our review of the record indicates that the trial court was very much aware that residential burglary was not an enumerated predicate offense of felony murder based on the arguments of defense counsel. Furthermore, the record reveals that the court was also aware that the State claimed the offense of residential burglary would support a felony murder conviction provided that the court found that residential burglary in the instant case satisfied the "saving

clause" considerations of the statutory definition of a forcible felony. Ill. Rev. Stat. 1991, ch. 38, par. 2--8. After taking the matter under advisement following the arguments of the parties, the court announced a finding of guilt for felony murder "based upon the commission of a forcible Felony." Arguably, the court intended this declaration to constitute its finding that the residential burglary in this case met the statutory requirements of the "saving clause" and thereby qualified as a forcible felony even though this offense was not specifically enumerated in the statutory definition of forcible felony.

In the absence of "strong affirmative evidence to the contrary," the trial court is presumed to know the law and to have properly applied it. See *People v. Howery*, 178 Ill 2d. 1, 32 (1997). Since the record does not indicate otherwise, we must presume that the trial court knew the law and properly applied it when announcing the decision in this case. Therefore, we conclude that the trial court made the requisite finding to support a felony murder conviction.

Furthermore, our review of the record does not indicate that the court erred by finding that the circumstances of this case involved a forcible felony that resulted in the death of the occupant of the residence. Here, defendant punched the victim with enough force to knock her unconscious, and the victim was also beaten, stabbed and strangled during the course of the burglary to her residence. We also note that, at the time of defendant's trial, other reviewing courts previously held that residential burglary constituted a forcible felony. See *Johnson*, 236 Ill. App. 3d 125.

Therefore, we conclude that since defendant's conviction for felony murder was properly based on the predicate offense of residential burglary, it is not void. Consequently, since defendant sought to attack a valid judgment in a section 2--1401 petition more than two years

after the trial court entered the original judgment, the trial court properly granted the State's motion to dismiss defendant's section 2--1401 petition.

CONCLUSION

For the foregoing reasons, the judgment of the trial court of Will County is affirmed.

Affirmed.