2012 IL App (1st) 100665-U

THIRD DIVISION
February 24, 2012

No. 1-10-0665

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. 01 CR 22689
	)	
TERRELL BELL,	)	Honorable
	)	Thomas V. Gainer,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: *Sua sponte* denial of defendant's petition for relief from judgment affirmed where claim that his guilty plea was involuntary could not deprive the trial court of its jurisdiction to enter judgment against him.

¶ 2 Defendant Terrell Bell appeals the *sua sponte* denial of his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). He contends that the circuit court erred in denying his petition as untimely where he claimed that his guilty plea was void because it was based on an unfulfilled promise by the State that he would only have to serve 50% of his sentence.

¶ 3 The record shows that on May 24, 2004, defendant requested a pretrial conference "with the lawyers" to determine what sentence the trial court would impose on him in exchange for a guilty plea. The trial court explained to defendant that upon the end of the conference, he would have an opportunity to confer with defense counsel about whether to plead guilty and accept "the sentence that I've indicated that I would impose." Following the conference, defense counsel indicated for the record that he had relayed the results of the conference to his client and that defendant wished to plead guilty to the charges of felony murder and armed robbery, "in return for the 25 year Illinois Department of Corrections sentence that the Court indicated that he would impose on him at the 402 conference" and the State's dismissal of the remaining charges.

¶ 4 Before accepting his plea of guilty, the trial court acknowledged the agreement between the parties and ascertained that defendant understood the nature of the charges and the possible penalties, the three-year term of mandatory supervised release after completing his prison sentence, and the consequences of pleading guilty. Defendant was specifically informed that the murder charge was a nonprobationable offense carrying a sentence of 20 to 60 years' imprisonment, and he persisted in his guilty plea "of his own free will." When asked whether "anyone promised you anything other than a total of 25 years in the Department of Corrections to cause you to plead guilty," defendant answered, "no." When asked whether "anyone threaten[ed] you in any way to cause you to plead guilty," defendant answered, "no." Defendant then stipulated to the factual basis for the charges, and the trial court accepted his plea of guilty, entered judgments of conviction, and sentenced him in accordance with the negotiated plea, with credit for 1,155 days already served in custody. After defendant was admonished of his right to appeal and how to perfect it, the trial court asked the parties if there was anything further that needed to be spread of record with regard to the basis of defendant's guilty plea, and the parties

answered, "no." On June 23, 2004, the trial court vacated the 25-year sentence on the armed robbery conviction, finding that it merged into the felony murder conviction.

¶ 5 Defendant filed a notice of appeal from that judgment without first filing a motion to withdraw his guilty plea, and this court dismissed the appeal after granting appointed counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). *People v. Bell*, No. 1-05-1567 (2006) (unpublished order under Supreme Court Rule 23). In October 2008, defendant filed a *pro se* post-conviction petition claiming ineffective assistance of trial counsel, which the circuit court summarily dismissed as frivolous and patently without merit. Defendant did not appeal that dismissal.

¶ 6 On September 29, 2009, defendant filed the subject *pro se* petition pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2008)). As relevant to this appeal, defendant alleged that during the May 24, 2004 conference pursuant to Supreme Court Rule 402 (eff. July 1, 1997), "the prosecutor had at which time made an offer of (25) years at the (50%) day-for-day sentencing rate," and it was not until he was in prison that "he was informed by his assigned correctional counselor that his current sentence was at the (100%) sentencing rate pursuant to the truth-in-sentencing provisions, which is not apart [*sic*] of the terms that this petitioner agreed to on May 24, 2004, and more importantly, is not the provisions that the [court] announced in the sentencing hearing." In support of his claim, defendant filed his own affidavit stating that he was led to "believe," on the advice of counsel and the prosecutor that his negotiated plea would be to 25 years "at the (50%) sentencing provisions," and that he was later "blind-sided with the information by his assigned correctional counselor that his sentence is at the (100%) sentencing provision."

¶ 7 In a written order entered on January 22, 2010, the circuit court *sua sponte* denied defendant's section 2-1401 petition as untimely. The court noted that defendant failed to allege

any facts that would support the filing of the petition more than five years after his guilty plea and that the claims asserted would have been apparent to him within two years of the entry of that judgment. This appeal follows.

¶ 8 Defendant contends that the circuit court erred in denying his petition as untimely where he claimed that his guilty plea was void as it was based on an unfulfilled promise by the State that he would only have to serve 50% of his sentence. Initially, we observe that the circuit court may deny a section 2-1401 petition *sua sponte* "where the claimant cannot possibly win relief." *People v. Thompson,* 377 Ill. App. 3d 945, 949 (2007) (*quoting People v. Vincent,* 226 Ill. 2d 1, 11, 13 (2007)). After *de novo* review of such dismissal (*Vincent,* 226 Ill. 2d at 14), we may affirm the order of the circuit court on any basis supported by the record, regardless of the actual grounds relied upon by the circuit court (*People v. Harvey,* 379 Ill. App. 3d 518, 521 (2008)).

¶ 9 We observe that the circuit court may deny a petition for relief from judgment, on its own motion, on any basis except for timeliness. *People v. Malloy,* 374 Ill. App. 3d 820, 824 (2007). The two-year period set forth in section 2-1401 of the Code is a statute of limitation and not a jurisdictional prerequisite (*Malloy,* 374 Ill. App. 3d at 824); and, accordingly, the State must raise the time limitation as an affirmative defense (*People v. Berrios,* 387 Ill. App. 3d 1061, 1063 (2009)). Here, the State did not raise the timeliness of defendant's petition, and, thus, the circuit court erred in denying the petition solely on that basis. *Berrios,* 387 Ill. App. 3d at 1063. That said, any error that results from an erroneous dismissal is harmless where, as here, the petition is without merit, and the lack of merit cannot be cured by an amendment to the petition. *Malloy,* 374 Ill. App. 3d at 824-25. We note defendant does not argue on appeal that he would be able to amend his petition to avoid the time limitation of section 2-1401.

¶ 10 Relying on *People v. Washington,* 38 Ill. 2d 446 (1967), defendant asserts that his guilty plea was induced by the State's unfulfilled promise during the Rule 402 conference that he would

only have to serve 50% of his 25-year sentence. He submits that the State's unfulfilled promise rendered his plea involuntary, and therefore void. Defendant acknowledges in his reply brief that in *People v. Smith*, 406 Ill. App. 3d 879, 887 (2010), this court observed that a violation of Rule 402, a procedural rule, renders a conviction merely voidable, not void. Defendant argues that *Smith* is factually distinguishable because his petition and affidavit allege an improper inducement of his guilty plea unrebutted by the record. According to defendant, his claim of improper inducement is not contradicted by the record because "he does not dispute that he agreed to plead guilty in exchange for a sentence of 25 years in prison." He acknowledges stating "on the record that he was not promised any sentence other than the 25-year sentence because that was what he was promised," but emphasizes that "[w]hat was not discussed during these proceeding [*sic*] was how much of that 25-year sentence [he] would have to serve and if he had been promised anything in regard to good time credit."

¶ 11 The flaw in defendant's argument is that even assuming the involuntary nature of his plea, the facts here, as represented by defendant, do not result in a void judgment. *People v. Hubbard*, 2012 IL App (2d) 101158, ¶¶ 21-22. Defendant raises no suggestion of a lack of personal or subject matter jurisdiction, and we observe that the trial court had authority to accept defendant's guilty plea, to enter a judgment of conviction, and to sentence defendant to 25 years' imprisonment. Rather, defendant argues "that his guilty plea was void because it was induced by an unfulfilled promise of leniency and therefore involuntary," ultimately relying on the statement of the United States Supreme Court in *Machibroda v. United States*, 368 U.S. 487, 493 (1962), to that effect, and which the Illinois Supreme Court quoted in *Washington*, 38 Ill. 2d at 449-450.

¶ 12 In *People v. Hubbard*, the appellate court noted that federal courts often say that involuntary guilty pleas are void because they violate due process. *Hubbard*, 2012 IL App (2d) 101158, ¶ 24. However, the United States Constitution does not require Illinois courts to adhere

to this formulation of the voidness doctrine in considering its own laws. *Hubbard*, 2012 IL App (2d) 101158, ¶ 24. To be sure, federal law allows a claim of an involuntary guilty plea to be procedurally defaulted if not raised on direct appeal, whereas Illinois law allows defendant an unlimited time to seek vacatur of a void judgment. *Hubbard*, 2012 IL App (2d) 101158, ¶ 25.

¶ 13 More importantly, the Illinois Supreme Court has not adopted the federal voidness standard; the Illinois voidness doctrine holds that judgments are void only if they are entered by a court lacking jurisdiction (*People v. Davis*, 156 Ill. 2d 149, 155-56 (1993)), and our supreme court continues to adhere to this formulation (*In re M.W.*, 232 Ill. 2d 408, 414 (2009)). *Hubbard*, 2012 IL App (2d) 101158, ¶¶ 16, 26; accord *Jordan v. Bangloria*, 2011 IL App (1st) 103506, ¶ 10. As defendant notes, this court recently observed that a "void" guilty plea does not bear the same meaning as a void judgment which is subject to attack at any time. *Smith*, 406 Ill. App. 3d at 888. We conclude that an involuntary guilty plea such as that alleged by defendant is not an error that could deprive the trial court of jurisdiction to accept his guilty plea, to enter a judgment of conviction, and to sentence him to 25 years' imprisonment, the agreed sentence. *Hubbard*, 2012 IL App (2d) 101158, ¶ 28. Under these circumstances, defendant's claim that his guilty plea was void fails, and any error by the circuit court in denying the petition as untimely, is harmless. *Malloy*, 374 Ill. App. 3d at 825.

¶ 14 Even if defendant could challenge the voluntariness of his plea, he has not shown that his guilty plea was involuntary based on the representation concerning good conduct credit. *Smith*, 406 Ill. App. 3d at 888. In *People v. Corby*, 139 Ill. App. 3d 214 (1985), the defendant sought to withdraw his guilty plea based on an inaccurate representation concerning the amount of good conduct credit he could possibly earn. At a hearing on the motion to withdraw, the parties stipulated that the defendant was told that he could receive 90 days off each year of his 14-year sentence, based on the Department of Corrections' interpretation of the statutory provision

allowing good conduct credit. However, the supreme court subsequently interpreted the provision in a way that allowed the defendant to earn only 90 days' total credit. The trial court denied the defendant's motion to withdraw his guilty plea, and this court affirmed on the basis that the defendant was aware of the inherently contingent nature of good conduct credit. We held that, "[b]ecause of this contingency the defendant cannot claim that he was prejudiced so as to be entitled to withdraw his guilty pleas when the Department later changed its policy as to the amount of good time credit that could be awarded." *Corby,* 139 Ill. App. 3d at 219. As in *Corby,* defendant's postjudgment allegations show that any promise of good conduct credit was subject to truth-in-sentencing provisions.

¶ 15 Finally, to the extent that defendant claims the representation concerning good conduct credit was a significant promise inducing his plea, that claim is rebutted by the record, which shows that defendant expressly indicated that no promises other than the 25-year agreed upon sentence induced him to enter the plea.

¶ 16 For the reasons stated, we affirm the order of the circuit court of Cook County denying defendant's petition for relief from judgment.

¶ 17 Affirmed.