2012 IL App (1st) 100906-U

FIFTH DIVISION
February 24, 2012

No. 1-10-0906

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. 90 CR 4349
	)	
PAUL PARISI,	)	Honorable
	)	Nicholas R. Ford,
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* dismissal of defendant's untimely section 2-1401 petition for relief from judgment, and imposition of fine affirmed.

¶ 2 Defendant Paul Parisi appeals from the *sua sponte* dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Civil Procedure) (735 ILCS 5/2-1401 (West 2006)) by the circuit court of Cook County, and the assessment of $105 in filing fees and costs. He principally maintains that the circuit court erred in dismissing his section 2-1401 petition because the grand jury indictment was untimely filed, thereby rendering

his convictions and sentences void, and requiring that his cause be remanded for further proceedings.

¶ 3 In 1992, a jury found defendant guilty of first degree murder, home invasion, and armed robbery. On direct appeal, this court affirmed those convictions, but remanded the cause for the imposition of sentences on each conviction. *People v. Parisi*, No. 1-92-3572 (1994) (unpublished order under Supreme Court Rule 23). On remand, the circuit court imposed 30-year prison terms for his convictions of home invasion and armed robbery which he is serving concurrently with the 90-year extended term imposed on his murder conviction.

¶ 4 Defendant subsequently filed two separate *pro se* petitions for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)), which were summarily dismissed by the circuit court. This court affirmed the dismissal orders entered in each case. *People v. Parisi*, Nos. 1-96-2857 (1999), 1-01-3339 (2003) (unpublished orders under Supreme Court Rule 23).

¶ 5 On October 1, 2007, defendant filed the instant *pro se* section 2-1401 petition alleging, in relevant part, that his convictions and sentences were void because he was arrested on January 16, 1990, and the grand jury indictment was filed 31 days later, on February 16, 1990. Defendant claimed that this untimely filing violated section 109-3.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/109-3.1) (West 2006)) which required that either a preliminary investigation be conducted or that he be indicted within 30 days of being taken into custody.

¶ 6 On October 15, 2007, the circuit court dismissed defendant's petition, and defendant appealed. The State Appellate Defender (SAD), who was appointed to represent him, filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), based on her conclusion that an appeal would be without arguable merit. While that motion was pending, the supreme court issued its decision in *People v. Laugharn*, 233 Ill. 2d 318 (2009), prohibiting the

sua sponte dismissal of a section 2-1401 petition within 30 days of its filing. As a consequence, the State subsequently filed a motion for summary remand. This court granted the State's motion, vacated the circuit court's dismissal order, and remanded the cause for further proceedings consistent with *Laugharn*. *People v. Parisi*, No. 1-07-3098 (2009) (dispositional order).

¶ 7 On February 24, 2010, the circuit court considered defendant's section 2-1401 petition anew, and denied it. In its written order, the circuit court found that defendant failed to show the existence of a meritorious claim or due diligence in filing his petition.

¶ 8 On appeal, defendant contends that the circuit court erred in dismissing his section 2-1401 petition. He maintains that his convictions and sentences are void because the indictment entered against him was untimely filed 31 days after he was taken into custody.

¶ 9 The purpose of a section 2-1401 petition is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry. *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). To obtain relief under this section, defendant must file a petition no later than two years after the entry of the order of judgment (735 ILCS 5/2-1401 (West 2008)), and set forth a meritorious defense or claim, due diligence in presenting that defense or claim to the circuit court, and due diligence in filing the petition (*People v. Glowaki*, 404 Ill. App. 3d 169, 171 (2010)). Absent an evidentiary hearing on a petition, our review of the dismissal of a section 2-1401 petition is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14-15 (2007).

¶ 10 In this case, defendant's section 2-1401 petition was filed more than 20 years after the two-year limitations period expired. 735 ILCS 5/2-1401(c) (West 2006). Defendant, nonetheless, contends that he is not barred from seeking relief because he is attacking a void judgment. Although a void judgment may be challenged at any time through a section 2-1401 petition (*People v. Harvey*, 196 Ill. 2d 444, 447 (2001)), the initial question is whether the

judgment is void (*People v. Balle*, 379 Ill. App. 3d 146, 151 (2008); *People v. Lott*, 325 Ill. App. 3d 749, 751-52 (2001)). For the reasons that follow, we find that it was not.

¶ 11 Section 109-3.1 of the Code (725 ILCS 5/109-3.1 (West 2006)), which was in effect at the operative time, provided, in relevant part, that a person in custody in this State for the alleged commission of a felony shall "receive" either a preliminary examination or an indictment by grand jury within 30 days from the date he was taken into custody. The record here shows that defendant was arrested on January 16, 1990, and that a true bill was filed in this case on February 16, 1990. The record further shows that on May 8, 1990, defendant filed a motion to dismiss the indictment claiming that he was indicted on January 31, 1990, and raising a sufficiency of the evidence issue based on the grand jury testimony presented by a Chicago police detective. A hearing on the motion was held on June 5, 1990, and it was subsequently denied on August 16, 1990.

¶ 12 In its written order, dismissing the instant section 2-1401 petition, the circuit court found that defendant was indicted within 30 days of his arrest and failed to advance a claim for relief. In reaching that conclusion, the court specifically noted that defendant was arrested on "January 16, 1990 and his *January 1990 indictment* was filed on February 16, 1990." (Emphasis added.) Although defendant claims that the court miscalculated the number of days, which showed a total of 31 days, we observe that it is the ruling of the court that is reviewed on appeal and not the reasoning provided by the circuit court. *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008).

¶ 13 For purposes of section 109-3.1, the date the indictment is "received" is the date the grand jury indicts defendant, and not the date the indictment is filed or defendant is arraigned. *People v. Robinson*, 163 Ill. App. 3d 384, 390-91 (1987). In this case, defendant stated in his motion to dismiss the indictment that he was indicted on January 31, 1990, *i.e.*, 15 days after his arrest, which falls within the statutory time frame.

¶ 14 Notwithstanding, we further observe that a claim that receipt of the indictment was untimely and thus in violation of section 109-3.1 of the Code can be waived if defendant fails to raise it prior to trial. 725 ILCS 5/114-1(a)(11), (b) (West 2006)); *People v. Carter*, 168 Ill. App. 3d 237, 247 (1988). In this case, defendant filed a motion to dismiss the indictment, but did not raise the timeliness issue relied on in his 2-1401 petition as a ground. Under these circumstances, he has forfeited that issue for review. 725 ILCS 5/114-1(a)(11), (b) (West 2006)); *Carter*, 168 Ill. App. 3d at 247.

¶ 15 Moreover, delay alone does not render a subsequent conviction void. *People v. Dees*, 85 Ill. 2d 233, 237-39 (1981). Rather, defendant must show actual and substantial prejudice from the delay, and once he does so, the burden shifts to the State to show the reasonableness, if not the necessity, of the delay. *Carter*, 168 Ill. App. 3d at 247. Here, defendant has not shown any prejudice, let alone, a delay. Thus, we find no error by the circuit court in dismissing his petition.

¶ 16 Finally, defendant claims in a single sentence that the court erred in assessing him $105 in filing fees and costs because he did not file a frivolous section 2-1401 petition. In support of that claim he cites a post-conviction case where this court vacated the frivolous filing fee after finding that defendant had sufficiently alleged a claim of actual innocence. *People v. Sparks*, 393 Ill. App. 3d 878, 886-88 (2009). Here, defendant has made no comparable showing, and his single-sentence contention without relevant supporting authority is insufficient to warrant review of the issue; accordingly, we find it waived. *People v. Johnson*, 385 Ill. App. 3d 585, 608-09 (2008).

¶ 17 In light of the foregoing, we affirm the order of the circuit court of Cook County.

¶ 18 Affirmed.