

NOTICE

Decision filed 12/27/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 120192-U
NO. 5-12-0192
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

FLOYD CUMMINGS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Randolph County.
)	
v.)	No. 11-MR-105
)	
MICHAEL ATCHISON,)	Honorable
)	Eugene E. Gross,
Defendant-Appellee.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

- ¶ 1 *Held*: Where plaintiff failed to state a cause of action and where his claims were barred by *res judicata*, the judgment of the circuit court is affirmed.
- ¶ 2 Plaintiff, Floyd Cummings, is currently incarcerated at Menard Correctional Center where he is in the custody of defendant, Michael Atchison, warden of that facility. Plaintiff appeals the dismissal of his *habeas corpus* complaint. He asks this court to vacate his sentence and conviction for armed robbery and remand the case for a new sentencing hearing. For the following reasons, we affirm.

¶ 3 **BACKGROUND**

¶ 4 Following a jury trial, plaintiff was found guilty of armed robbery. He was sentenced to natural-life imprisonment as a habitual criminal pursuant to section 33B-1 of the Habitual Criminal Act (720 ILCS 5/33B-1 (West 2000) (repealed by Pub. Act 95-1052, § 93 (eff. July 1, 2009))). He was sentenced as a habitual criminal because he had a previous conviction

for armed robbery from 1984 in Michigan and was convicted of murder in 1967 in Illinois. On direct appeal, plaintiff argued that his natural-life sentence for armed robbery was unconstitutional according to the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) as well as the due process clause because armed robbery and armed violence predicated on robbery committed with a category III weapon were identical offenses with disproportionate sentences. The appellate court affirmed plaintiff's conviction and sentence. *People v. Cummings*, 351 Ill. App. 3d 343 (2004). The Illinois Supreme Court denied leave to appeal. *People v. Cummings*, 212 Ill. 2d 539 (2004) (table). The United States Supreme Court denied *certiorari*. *Cummings v. Illinois*, 544 U.S. 1051 (2005).

¶ 5 Plaintiff then filed a *pro se* postconviction petition. In that petition, plaintiff again argued that his natural-life sentence was unconstitutionally disproportionate. The circuit court dismissed the postconviction petition. The appellate court affirmed, finding, in part, that plaintiff's claim was barred by *res judicata* in that it had already been rejected on direct appeal. *People v. Cummings*, 375 Ill. App. 3d 513 (2007). The Illinois Supreme Court denied leave to appeal. *People v. Cummings*, 226 Ill. 2d 592 (2007) (table). Next, plaintiff filed a federal petition for *habeas corpus* which was rejected by the federal court because the petition was based on the state constitution and not the federal constitution. *United States ex rel. Cummings v. Rednour*, No. 08-C-5723 (N.D. Ill. Oct. 22, 2010).

¶ 6 Plaintiff filed the current petition for *habeas corpus* on June 29, 2011. In his petition, plaintiff again argued that his sentence was unconstitutionally disproportionate. The circuit court of Will County granted defendant's motion to transfer the action to Randolph County. On January 26, 2012, defendant filed a motion to dismiss the *habeas corpus* complaint pursuant to sections 2-615 and 2-619(a)(4) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 2-619(a)(4) (West 2010)). Plaintiff subsequently filed a response to

defendant's motion to dismiss. On April 12, 2012, the circuit court granted defendant's motion to dismiss without specifying under which provision of the Code it was granting the motion. This appeal followed.

¶ 7

ANALYSIS

¶ 8 A motion to dismiss under section 2-615 of the Code admits all well-pleaded facts and tests the legal sufficiency of the complaint. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). We review a ruling on a section 2-615 motion *de novo*. *Id.* A motion filed pursuant to section 2-615 of the Code argues that the other party failed to state a claim that would entitle him to relief. *Id.*

¶ 9 We review a dismissal pursuant to section 2-619 of the Code *de novo*. *Berggren v. Hill*, 401 Ill. App. 3d 475, 479 (2010). A motion filed pursuant to section 2-619 of the Code alleges some affirmative matter that defeats the plaintiff's claims. *Id.* Specifically, a motion to dismiss filed pursuant to section 2-619(a)(4) of the Code alleges that a plaintiff's claims are barred by a prior judgment. 735 ILCS 5/2-619(a)(4) (West 2010).

¶ 10 *Habeas corpus* relief is a narrow remedy that is available in limited circumstances. *Faircloth v. Sternes*, 367 Ill. App. 3d 123, 125 (2006). "The sole remedy or relief authorized by a writ of *habeas corpus* is the prisoner's immediate release from custody." *Id.* The remedy is available only if (1) the circuit court lacked jurisdiction to enter judgment or (2) some postconviction occurrence entitles an inmate to immediate release from custody. *People v. Gosier*, 205 Ill. 2d 198, 205 (2001). Where the original judgment of conviction is not void, a prisoner's maximum term has not expired, and nothing else has occurred to warrant a prisoner's immediate discharge, *habeas corpus* is not appropriate. *Faircloth*, 367 Ill. App. 3d at 126. Plaintiff's prayer for relief does not reflect a proper *habeas corpus* prayer for relief because he asks this court to vacate his sentence and remand the case for resentencing, rather than to release him. Nevertheless, we will address plaintiff's claims.

¶ 11 Here, plaintiff argues that subsequent decisions regarding the First District's treatment of his direct appeal constitute a postconviction occurrence that demands his immediate release from custody. Plaintiff cites *People v. Andrews*, 364 Ill. App. 3d 253 (2006), *People v. Harvey*, 366 Ill. App. 3d 119 (2006), and *People v. Hampton*, 363 Ill. App. 3d 293 (2005). We note that the supreme court vacated the portion of *Hampton* which is relevant to plaintiff's argument, and thus we will not consider *Hampton* in this analysis. With respect to *Harvey* and *Andrews*, while disagreeing about certain aspects of a disproportionate penalty analysis, neither *Harvey* nor *Andrews* express disagreement with plaintiff's overall sentence as a habitual criminal. Further, neither case is factually on point with plaintiff's case. In neither case was the defendant adjudged a habitual criminal. Thus, we do not find that these cases constitute a postconviction occurrence that would require plaintiff's immediate release from prison. Plaintiff's sentence, natural-life imprisonment, has not expired. As plaintiff makes no claim that the circuit court lacked jurisdiction to enter judgment and we find no support for that exception within the record, plaintiff's *habeas* petition was properly dismissed pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), because plaintiff has failed to state a cause of action.

¶ 12 Defendant's motion filed pursuant to section 2-619(a)(4) of the Code was also a proper avenue for dismissal. *Res judicata* bars the relitigation of any issue that was previously decided. *People v. Luczak*, 374 Ill. App. 3d 172, 177 (2007). Plaintiff made the same argument in both his direct appeal (see *Cummings*, 351 Ill. App. 3d 343) and his postconviction appeal (see *Cummings*, 375 Ill. App. 3d 513). His claims were dismissed in both instances. Plaintiff argues that fundamental fairness serves as a bar to *res judicata* in this situation. He argues that the decisions in *Harvey* and *Andrews* represent a change in the law that negates the *res judicata* bar. We disagree. To reiterate the First District's prior holding in plaintiff's postconviction appeal, "[O]ur supreme court has not issued a decision

since the affirmance of [plaintiff's] conviction and sentence on direct appeal that either recognized the validity of [plaintiff's] argument or indicated that [plaintiff's] direct appeal was wrongly decided." *Cummings*, 375 Ill. App. 3d at 519. The same can be said about plaintiff's postconviction appeal—the supreme court has not issued any decision that recognized the validity of plaintiff's argument or indicated that plaintiff's direct appeal was wrongly decided. Thus, plaintiff's claims are barred by *res judicata* and dismissal was also proper pursuant to section 2-619(a)(4) of the Code. 735 ILCS 5/2-619(a)(4) (West 2010).

¶ 13 While the circuit court did not specify under which section of the Code it was granting defendant's motion, we find that dismissal was proper on either ground.

¶ 14 **CONCLUSION**

¶ 15 For the foregoing reasons, the judgment of the circuit court of Randolph County is affirmed.

¶ 16 Affirmed.