

THIRD DIVISION
May 15, 2013

No. 1-09-3430

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. 89 CR 7496
)	
DANIEL MAKIEL,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justices Hyman and Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* Order denying defendant's *pro se* motion for "re-sentence and correct mittimus" affirmed; request to recharacterize that motion as a section 2-1401 petition and remand it for further review denied where there is no basis to do so.

¶ 2 Defendant, Daniel Makiel, appeals from an order of the circuit court denying his untimely *pro se* motion for "re-sentence and correct mittimus." On appeal, defendant contends that we should remand his motion for resentencing for proceedings under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) which, he maintains, is designed to correct errors where there is no other remedy.

¶ 3 This court previously affirmed the judgment entered on defendant's 1991 jury convictions of first degree murder and armed robbery, and the corresponding consecutive sentences of natural life and 60 years' imprisonment, which the trial court ordered to be served consecutively to the 40-year sentence imposed on his attempted murder conviction in Indiana. *People v. Makiel*, No. 1-97-2140 (1998) (unpublished order under Supreme Court Rule 23). This court also affirmed the denial of defendant's subsequent post-conviction petition after an evidentiary hearing, and the denial of his further request for leave to file a successive post-conviction petition. *People v. Makiel*, Nos. 1-08-0921, 1-10-0718 (2011) (unpublished orders under Supreme Court Rule 23).

¶ 4 On May 20, 2009, defendant filed a *pro se* motion for "re-sentence and correct mittimus," requesting a new sentencing hearing and the correction of his mittimus to reflect a change in the sentencing credit afforded him. He maintained that he should be resentenced because his prior Indiana conviction for attempted murder, which the court had relied on as an aggravating factor in sentencing him in this case to natural life, had been reversed in 2000. He explained that he later pleaded guilty to a "Class C Battery on the Indiana case," and that his 40-year sentence was reduced to eight years. He maintained that without the aggravating factor of the Indiana conviction his sentencing range should be 20 to 60 years, and accordingly, requested resentencing without consideration of that aggravating factor. Defendant also indicated that he was unsure of which statute applied to his resentencing request, and that section 5-3 of the Unified Code of Corrections (730 ILCS 5/5-5-3 (West 2010)) should authorize the circuit court to grant his request.

¶ 5 Defendant further alleged that because his Illinois sentence was ordered to run consecutive to the Indiana prison sentence he was already serving at the time, the dismissal of the Indiana charge resulted in actual time served towards his Illinois sentence for which he had not been given credit. Accordingly, he requested that his mittimus be corrected to reflect credit for time served toward his Illinois sentence.

¶ 6 On the same date, defendant filed a *pro se* section 2-1401 motion for relief from judgment or to vacate void judgment alleging, in relevant part, that his 60-year extended term sentence for armed robbery was illegal. Defendant maintained that the extended-term statute requires a previous felony conviction in Illinois, and his conviction was from Indiana, and was later reversed. He thus requested, *inter alia*, that the court vacate the extended portion of the armed robbery sentence and reduce it to 30 years' imprisonment.

¶ 7 On October 16, 2009, the circuit court dismissed defendant's *pro se* section 2-1401 motion as untimely¹, and also denied his *pro se* motion for "re-sentence and correct mittimus." In doing so, the court noted that the matters alleged occurred more than 10 years ago and were unsupported by any law.

¶ 8 On appeal from that judgment, defendant requests this court to recharacterize his resentencing motion as a section 2-1401 motion and remand his cause for further proceedings in the circuit court. He does not argue that he can meet the time requirements of section 2-1401, which he cannot as he knew of the Indiana reversal 10 years before he filed the petition, and does not claim that the consideration of an improper aggravating factor renders his sentence void. Rather, he argues that section 2-1401 is used by courts to right otherwise unresolvable wrongs and is therefore the proper vehicle for his resentencing allegation.

¶ 9 In response, the State points out that defendant is not requesting this court to review the correctness of the denial of his resentencing motion, but, instead, is seeking a purely equitable remand to the circuit court for further proceedings under section 2-1401, relief which this court is without any authority to bestow. The State maintains that since defendant has not presented any

¹Although defendant's notice of appeal encompasses the court's denial of his section 2-1401 petition attacking his extended-term armed robbery sentence, he raises no argument as to that judgment on appeal. Instead, he confines his argument to the denial of his motion for resentencing on the murder conviction.

justiciable case or controversy for this court to adjudicate, his appeal must be dismissed. In the alternative, the State maintains that this court should affirm the denial of his motion for resentencing because the circuit court did not have jurisdiction to hear defendant's motion for resentencing which was filed 18 years after the circuit court's direct authority to vacate or modify the final judgment ended.

¶ 10 On May 16, 2012, this court entered an unpublished order dismissing defendants' appeal for lack of jurisdiction after finding that defendant's notice of appeal was untimely filed. *People v. Makiel*, 2012 IL App (1st) 093430-U, ¶17. The supreme court subsequently issued a supervisory order directing us to vacate that judgment and consider the appeal on its merits, and we do so here.

¶ 11 We observe that defendant was sentenced on April 10, 1991, and on May 9, 2009, filed his motion for resentencing and a corrected mittimus to reflect additional sentencing credit in light of the reversal of his prior Indiana attempted murder conviction. At that point in time, the trial court had clearly lost jurisdiction to alter the sentence or consider the merits of defendant's petition, and we, in turn, would be without jurisdiction to consider the merits of defendant's appeal from it. *People v. Flowers*, 208 Ill. 2d 291, 303, 307 (2003).

¶ 12 Defendant, nevertheless, contends that in the pursuit of justice, this court can recharacterize an untimely post-trial motion as a section 2-1401 petition and remand it as such for further review, citing *People v. Lawton*, 212 Ill. 2d 285 (2004). In *Lawton*, the supreme court held that one of the guiding principles of section 2-1401 relief is that it invokes the equitable powers of the circuit court to prevent enforcement of a judgment when doing so would be unfair, unjust and unconscionable. *Lawton*, 212 Ill. 2d at 297. The court further explained that the statute should be construed liberally when necessary to achieve justice. *Lawton*, 212 Ill. 2d at 298.

¶ 13 Since *Lawton*, however, the supreme court decided *People v. Vincent*, 226 Ill. 2d 1, 15 (2007), where it was faced with determining whether the dismissal of a section 2-1401 petition

without an evidentiary hearing would be reviewed *de novo* or for an abuse of discretion. The supreme court rejected the abuse of discretion standard, stating that it was "the result of an erroneous belief that a section 2-1401 petition invokes the equitable powers of the court, as justice and fairness require." [Internal quotes omitted.] The court explained that section 2-1401 is a statutory remedy subject to the application of the civil rules of procedure and precedent rather than a remedy entrusted to the trial court's discretion. Based on the supreme court's statements in *Vincent*, it appears that even if we were to remand, defendant would have to meet the statutory requirements of section 2-1401 in order to obtain relief instead of simply asserting the existence of an "otherwise unresolvable wrong." *Vincent*, 226 Ill. 2d at 15.

¶ 14 More significantly, defendant has provided no solid basis for his contention that we have the authority to direct the circuit court to recharacterize the nature of defendant's *pro se* pleading, especially where defendant does not argue that the circuit court committed any error in failing to do so. It is true that a circuit court may recharacterize a *pro se* pleading where defendant is raising a viable claim but using an incorrect legal theory. See *People v. Shellstrom*, 216 Ill. 2d 45, 51 (2005); *People ex rel. Palmer v. Twomey*, 53 Ill. 2d 479, 484 (1973). However, defendant has not cited any case holding that the trial court committed error by failing to *sua sponte* recharacterize a *pro se* pleading.

¶ 15 Instead, defendant cites *People v. Cheeks*, 318 Ill. App. 3d 919 (2001), to support his claim for recharacterization. We find defendant's reliance on this Third District case misplaced. *Cheeks* was based on the supreme court's dissent in *People v. Brown*, 169 Ill. 2d 94 (1995), and was decided prior to *Vincent*.

¶ 16 In *Brown*, defendant filed a *pro se* post-conviction petition, alleging that his convictions were based on false testimony, and the circuit court summarily dismissed it. *Brown*, 169 Ill. 2d at 95-96. The supreme court affirmed that dismissal, finding that in the absence of an allegation that the State

knowingly used false testimony, defendant failed to present a constitutional perjury claim cognizable under the Post-conviction Hearing Act. *Brown*, 169 Ill. 2d at 106. The supreme court then noted that its ruling did not leave defendants who claim that their convictions are based on perjured testimony without a remedy as they may seek relief under section 2-1401 of the Code. *Brown*, 169 Ill. 2d at 107. Defendant further claimed that if the court found that the appropriate remedy for his claim was through a petition under section 2-1401, then "equity" required the trial court to treat his motion under that section. *Brown*, 169 Ill. 2d at 108. The supreme court, however, found that defendant had waived this argument because he raised it for the first time in his reply brief. *Brown*, 169 Ill. 2d at 108.

¶ 17 The dissent in *Brown* found that defendant had raised a constitutional issue in his post-conviction petition, and, at a minimum, the circuit court should have treated the petition as having been brought under section 2-1401 of the Code. *Brown*, 169 Ill. 2d at 108-09. The dissent further stated that the decision of the circuit and appellate courts should have been reversed and the case remanded for a hearing on defendant's petition. *Brown*, 169 Ill. 2d at 109.

¶ 18 In *Cheeks*, defendant filed a *pro se* post-conviction petition in which he alleged that the primary basis for his home invasion conviction was the false testimony of the complaining witness, but did not assert the State's knowing use of perjured testimony. *Cheeks*, 318 Ill. App. 3d at 920. The circuit court dismissed the petition as patently without merit, noting that it did not raise a constitutional claim upon which post-conviction relief could be granted. *Cheeks*, 318 Ill. App. 3d at 921. On appeal, defendant claimed that the court should have considered his post-conviction petition as raising a perjury claim under section 2-1401 of the Code. *Cheeks*, 318 Ill. App. 3d at 921. The reviewing court noted the necessity of asserting the State's knowing use of perjured testimony to invoke post-conviction relief (*Brown*, 169 Ill. 2d at 106), but further, that defendant may pursue this claim in a section 2-1401 petition without asserting the State's knowing use of perjured

testimony (*Cheeks*, 318 Ill. App. 3d at 921, citing *Brown*, 169 Ill. 2d at 107). The court in *Cheeks* then observed that defendant did not have the waiver problem in *Brown*, and, citing the dissent in *Brown*, 169 Ill. 2d at 109, remanded the cause for further consideration of defendant's claim under section 2-1401 even though his petition was drafted in terms of ineffective assistance of counsel. *Cheeks*, 318 Ill. App. 3d at 921-22. In doing so, the court stated that it would be inappropriate to deny defendant an opportunity to pursue the applicable remedy merely because he did not understand the law well enough to bring his claim under the Code instead of the Act. *Cheeks*, 318 Ill. App. 3d at 922.

¶ 19 We observe, initially, that *Cheeks* relied on the dissent in *Brown* to remand the cause to the circuit court. The dissent has no precedential value. *People v. Smythe*, 352 Ill. App. 3d 1056, 1061 (2004). Correspondingly, we find defendant's reliance on *Cheeks*, which rested on the *Brown* dissent to recharacterize and remand defendant's motion under section 2-1401, unpersuasive. In addition, since *Cheeks* was decided, the supreme court has held that an issue must be raised in a post-conviction petition for it to be considered on appeal (*People v. Jones*, 211 Ill. 2d 140, 146 (2004)), and that an issue may not be raised for the first time on appeal (*People v. Jones*, 213 Ill. 2d 498, 507-08 (2004)).

¶ 20 Furthermore, it appears that *Cheeks*, in rectifying the situation before it, was acting in the pursuit of equitable justice. Since *Cheeks* was decided, however, our supreme court issued its decision in *Vincent* holding that section 2-1401 petitions are subject to the usual rules of civil procedure and labeled as "erroneous" the belief that a section 2-1401 petition invokes the equitable powers of the court. *Vincent*, 226 Ill. 2d at 15. Accordingly, we find *Cheeks* unpersuasive.

¶ 21 In reaching this conclusion we have also considered *People v. Raczkowski*, 359 Ill. App. 3d 494 (2005) and *People v. McNett*, 361 Ill. App. 3d 444 (2004), cited by defendant in his reply brief, and find them factually inapposite. In *Raczkowski*, defendant filed a freestanding motion to vacate

a void and unconstitutional judgment 13 years after pleading guilty. This court recognized that a judgment can be challenged as void at any time, and considered the matter as a denial of a petition for relief from judgment under section 2-1401 of the Code. *Raczkowski*, 359 Ill. App. 3d at 495, n.1, citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 101-02 (2002). In *McNett*, defendant also filed a freestanding motion to vacate a void plea agreement, and the Second District noted, that where the issue raised is purely one of voidness, the petition may be considered either as a post-conviction petition or a petition under section 2-1401 of the Code, and can be reclassified as such for review on appeal. *McNett*, 361 Ill. App. 3d at 446-47.

¶ 22 Here, unlike *Raczkowski*, and *McNett*, defendant did not file a freestanding motion challenging a void judgment, but a motion for “re-sentence and correct mittimus.” Defendant has failed to provide us with persuasive authority supporting his request for a remand with directions to recharacterize his pleading as a section 2-1401 petition. In reaching this conclusion, we note that the issue of recharacterization comes up most frequently in connection with the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)), which allows only one post-conviction petition and imposes significant procedural hurdles to filing successive petitions. We are aware of nothing in section 2-1401 that prohibits defendant from filing a section 2-1401 petition in the circuit court requesting the relief he seeks here.

¶ 23 Accordingly, we affirm the order of the circuit court of Cook County.

¶ 24 Affirmed.