

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).

FIRST DIVISION
FILED: February 25, 2013

Nos. 1-11-2144 and 1-11-2145, consolidated

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. 07 CR 2133701
)	
MARK WHITLING,)	
)	
Defendant-Appellant.)	
)	Honorable
(Richard Beuke, petitioner-appellee v. Brendan)	Maura Slattery-Boyle,
Schiller, respondent-appellant.))	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

- ¶ 1 Held: Circuit court improperly granted a 2-1401 petition from an order that was not a final order or judgment.
- ¶ 2 This appeal arises out of a dispute between two attorneys who represented the defendant, Mark Whitling, in his criminal case; both laid claim to part or all of the proceeds of the defendant's bail bond to satisfy their fees for representing him. The appellant, attorney Brendan Schiller, appeals from the circuit court's order directing him to disgorge the bail proceeds to the court so that they could be transferred to the appellee, attorney Richard Beuke. That order was issued as part of an order granting Beuke's petition, filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), to vacate a prior order granting the funds to Schiller. On appeal,

Nos. 1-11-2144 and 1-11-2145, cons.

Schiller argues that the circuit court's decision to grant Beuke's 2-1401 petition was erroneous, because (1) Beuke lacked standing to bring the petition; (2) Beuke's petition did not present a meritorious claim; (3) Beuke did not act diligently in presenting the petition; (4) section 2-1401 protects his claim to the bond proceeds; (5) the decision forces the defendant to accept Beuke as counsel; (6) the decision could adversely affect the defendant's sentencing credit and thus constitutes an impermissible double-punishment; and (7) the court should have ordered Schiller to disgorge less than the full amount of the bond proceeds. For the reasons that follow, we reach none of these arguments. Instead, for procedural reasons, we reverse the judgment of the circuit court and remand the case for further proceedings.

¶ 3 The defendant was charged with possession of a controlled substance with intent to deliver and, in October 2007, he was allowed to post \$50,000 bail advanced by his mother, Cynthia Pector-Burkenheim. At the start of his case, the defendant was represented by Beuke, a retained attorney. However, in May 2009, the defendant filed a pro se motion asking that Beuke be removed from the case and seeking time to retain new counsel. In June 2009, attorney Joel Brown entered an appearance on the defendant's behalf. At a June pretrial hearing at which Brown and Beuke appeared, Beuke noted that Brown had indicated an intent to ask that the \$50,000 bond be exonerated, and Beuke indicated his objection "since [the defendant] [had] signed the money over to" Beuke.

¶ 4 In August 2009, the defendant appeared in open court and stated that he intended to discharge Beuke in favor of Brown, or another attorney. Because the defendant was unsure as to whom he wanted to hire as his new attorney, the court told him to complete his hiring process, then submit an affidavit. The court explained that, upon receiving the affidavit, it would excuse the defendant's prior counsel from the case.

¶ 5 At a September 8, 2009, hearing, the defendant indicated that he needed more time to determine whom to hire as his new attorney. Later in September, Schiller appeared on the defendant's behalf and filed a "petition to exonerate bond and to return proceeds to attorney Brendan

Nos. 1-11-2144 and 1-11-2145, cons.

Schiller." Schiller attached to his filing a copy of a retainer agreement in which the defendant agreed to assign him the bond proceeds. At a hearing, the circuit court was informed that Schiller was the defendant's new attorney, and the court noted that it had "let Mr. Beuke withdraw on this." In October 2009, the circuit court entered an order granting Schiller's request to exonerate the bond.

¶ 6 In December 2009, Beuke filed a "petition to order [Schiller] to relinquish a portion of defendant's bond proceeds" to Beuke for services rendered. In the filing, Beuke claimed just over \$30,000 in legal fees, and he represented that the defendant had signed a document promising to pay Beuke out of any bond proceeds. Beuke also averred that he had never been informed that Schiller was substituted as the defendant's counsel. Beuke attached to his filing a document, bearing the defendant's signature, indicating the defendant's agreement to assign any bond refund to pay Beuke's legal fees.

¶ 7 In July 2010, the circuit court entered an order recharacterizing Beuke's petition as one filed pursuant to section 2-1401 of the Code, and granting that petition on the ground that Schiller had obtained the bond proceeds by fraud. Schiller filed a motion to reconsider the ruling, and, in the meantime, the defendant's criminal case progressed with Schiller as his attorney.

¶ 8 According to a procedural narrative included in the court order from which Schiller now appeals, the July 2010 order was later vacated, and, in April 2011, Beuke filed a 2-1401 petition asking the court to vacate its October 2009 order granting Schiller's request that the defendant's bond be released. (A purported copy of that document appears in the appendix to Schiller's brief. However, that copy contains no stamp indicating its filing, and the parties do not cite the motion's location in the record on appeal.) On July 18, 2011, the circuit court entered an order granting Beuke's 2-1401 petition and ordering Schiller to repay the \$50,000 bond amount to the clerk of the court. That same day, Schiller filed a notice of appeal stating his intent to appeal the court's July 18, 2011, order.

¶ 9 In their briefs on appeal, the parties devote their briefs to their dispute as to whether, on the merits, the circuit court properly granted Beuke's section 2-1401 petition. However, we conclude

Nos. 1-11-2144 and 1-11-2145, cons.

that an impassable procedural obstacle prevents us from reaching those arguments. By its very terms—indeed, by its very first words—section 2-1401 provides “[r]elief from final orders and judgments.” 735 ILCS 5/2-1401(a) (West 2010). A final order or judgment is one that fixes absolutely and finally the rights of the parties in the lawsuit, so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment. *In re M.M.*, 337 Ill. App. 3d 764, 771, 786 N.E.2d 654 (2003). In a criminal case, the final order is entered when a sentence is imposed for a conviction. *People v. Vasquez*, 339 Ill. App. 3d 546, 551, 791 N.E.2d 33 (2003). Here, the order Beuke sought to have vacated via section 2-1401 was an order relating to the disposition of the defendant's bond. That order did not absolutely and finally fix the rights of the defendant, and so it was not a final order or judgment. Thus, it was not the proper subject of a section 2-1401 motion, and Beuke's 2-1401 motion should not have been granted.

¶ 10 In so ruling, we recognize that Beuke characterized his filing as a 2-1401 petition only upon the suggestion of the circuit court, which initially recharacterized his motion as a 2-1401 petition. However, we have no authority to reverse the mistake with our own recharacterization. Standing as it is, the circuit court's order granting Beuke's petition represents a final order disposing of the new cause of action commenced by the 2-1401 petition. See *People v. Johnson*, 2012 IL App (1st) 111378, ¶11 (a section 2-1401 petition starts a new cause of action). That final order is the only final order that appears in the record, which contains no final disposition of the defendant's criminal case. Accordingly, if we were to recast the 2-1401 petition as a motion in the defendant's case, then we would be left with no final order to trigger our jurisdiction. For that reason, we are bound to consider Beuke's petition only under section 2-1401. Because the petition was improper under that section, we must reverse the circuit court's judgment and remand the cause for further proceedings.

¶ 11 Based on the above discussion, we reverse the circuit court's order granting Beuke's 2-1401 petition, and we remand the cause for further proceedings.

¶ 12 Reversed and remanded.