NOTICE
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2014 IL App (4th) 121077-U

NO. 4-12-1077

FILED
January 31, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
	)	Champaign County
v.	)	No. 02CF690
	)	
BRANDON FRANKLIN,	)	Honorable
	)	Jeffrey B. Ford,
Defendant-Appellant	)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: Although the circuit court erred when it dismissed defendant's motion to vacate void judgment before the State was properly served, we find the error did not constitute reversible error because defendant's motion, which alleged his sentencing judgment was void, was without merit and no set of facts could be presented to change that result. The court's lack of personal jurisdiction over the State had no effect on defendant's claim of voidness.

¶ 2 Defendant, Brandon Franklin, appeals the circuit court's *sua sponte* dismissal of his petition for relief from judgment, claiming the dismissal was premature because the State had not been properly served. We agree the court's dismissal was premature, but due to the substance of defendant's voidness claim, we find the error did not constitute reversible error.

¶ 3 I. BACKGROUND

¶ 4 In July 2002, defendant, Brandon Franklin, pleaded guilty in an open plea agreement to one count of controlled substance trafficking, a Class X felony, for knowingly

bringing more than 15 grams but less than 100 grams of a substance containing cocaine into Illinois with the intent to deliver (720 ILCS 570/401.1(a) (West 2000)). At the plea hearing, the trial court admonished defendant he would be eligible to receive a sentence of not less than 12 years or more than 60 years. The court also admonished defendant that a three-year term of mandatory supervised release would be imposed. The court sentenced defendant to 30 years in prison. Through counsel, defendant filed a timely motion to reconsider his sentence. He claimed a prior conviction from a foreign state, which appeared on his presentence investigation report, thought to be for drug trafficking, a felony, was actually a misdemeanor conviction for possession of drugs. On November 22, 2002, the court reduced defendant's sentence to 24 years in prison.

¶ 5 Defendant filed a *pro se* "motion for reduction of sentence," requesting the trial court reduce his 24-year sentence. The court conducted a hearing, in which counsel for defendant appeared but defendant himself did not. The court denied defendant's motion. When defendant learned of the dismissal, he filed a late notice of appeal. This court entered a summary order, reversing the court's order of dismissal for counsel's failure to file a certificate in compliance with Supreme Court Rule 604(d) (eff. July 1, 2006). See *People v. Franklin*, No. 4-03-242 (Jan. 26, 2004) (unpublished summary order under Illinois Supreme Court Rule 23(c)(2)). On remand, the court appointed the public defender to "review this matter and prepare a 604(d) motion."

¶ 6 On April 19, 2004, counsel filed a motion to reconsider sentence, and on June 11, 2004, he filed a Rule 604(d) certificate. After a hearing, the trial court denied defendant's petition and he appealed, challenging the amount of sentencing credit he received. This court agreed and awarded defendant an additional two days of sentencing credit, but reduced the

amount of monetary credit. See *People v. Franklin*, No. 4-04-0654 (Aug. 4, 2005) (unpublished order under Supreme Court Rule 23).

¶ 7 While that appeal was pending, on December 1, 2004, defendant filed a *pro se* postconviction petition, challenging his 24-year sentence, claiming the sentence constituted cruel and unusual punishment and violated the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). The circuit court, the Honorable Thomas J. Difanis presiding, summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed. The office of the State Appellate Defender (OSAD) was appointed to represent defendant on appeal. OSAD filed a motion to withdraw from representation, claiming no colorable argument could be made on appeal. This court agreed with OSAD, granted the motion to withdraw, and affirmed the circuit court's judgment of dismissal. *People v. Franklin*, No. 4-05-0012 (Nov. 2, 2005) (unpublished order under Supreme Court Rule 23).

¶ 8 On October 4, 2012, defendant filed the motion subject to this appeal. He filed a *pro se* motion "to attack void judgment," wherein he claimed the addition of a three-year term of mandatory supervised release violated his constitutional rights of due process by, in effect, making his 24-year sentence, a 27-year sentence without his knowledge or consent. Defendant did not indicate under which statutory section he was proceeding.

¶ 9 On November 5, 2012, the circuit court, the Honorable Jeffrey B. Ford presiding, enter an order *sua sponte* dismissing defendant's motion. The court noted it was proceeding "as if this motion [was filed] pursuant to section 2-1401" of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), as a petition for relief from judgment. As such, defendant was not entitled to counsel, and therefore his request for counsel was denied. The court also noted 30 days had passed and "the State ha[d] not responded," so the court ruled without the State's input

as follows. Defendant's sentence was entered as a result of an open plea agreement, that is, there had been no agreement as to the sentence to be imposed, except the State agreed not to recommend "discretionary doubling." Because there was no agreement as to sentencing, citing *People v. Whitfield*, 217 Ill. 2d 177 (2005), the court found defendant's 24-year sentence, even with the addition of the three-year mandatory-supervised-release term, fell "well below the 60-year maximum" and therefore, defendant's sentence was not void. The court held defendant's petition meritless and denied the same. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Defendant claims the circuit court erred in *sua sponte* dismissing his petition when the State had not been properly served. Defendant mailed his petition, as set forth in his proof of service attached to the petition, to the Circuit Clerk of Champaign County and to the Champaign County State's Attorney. However, according to Supreme Court Rule 105 (eff. Jan. 1, 1989) service cannot be effected by regular mail for section 2-1401 petitions. Defendant relies on the Second District's decision in *People v. Prado*, 2012 IL App (2nd) 110767 and this court's decision in *Powell v. Llewellyn*, 2012 IL App (4th) 110168 in support of his claim the case must be remanded for further proceedings. In the alternative, defendant requests this court modify the court's dismissal to reflect a dismissal without prejudice. See *People v. Nitz*, 2012 IL App (2nd) 091165.

¶ 12 The State claims the cases relied upon by defendant are distinguishable. We agree. In *Prado*, the defendant filed a petition for relief from judgment under section 2-1401. *Prado*, 2012 IL App (2nd) 110767, ¶ 3. However, his petition was not properly served on the State, as it was sent by regular mail. *Prado*, 2012 IL App (2nd) 110767, ¶ 3. Rule 105 requires section 2-1401 petitions be served either by summons, certified or registered mail, or by

publication. See Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989); see also Ill. S. Ct. R. 106 (eff. Aug. 1, 1985) (the same service methods mentioned in Rule 105 shall apply to section 2-1401 petitions). Because the State had not been properly served (and had not waived an objection to the defective service), the circuit court prematurely dismissed the petition *sua sponte*. The court vacated the dismissal and remanded for further proceedings. *Prado*, 2012 IL App (2nd) 110767, ¶ 14.

¶ 13 Here, unlike *Prado*, defendant did not bring his petition under section 2-1401. Rather, the circuit court characterized it as such. Only with a section 2-1401 petition, as opposed to a successive postconviction petition, was defendant required to serve the State in accordance with Rule 105. Therefore, we find *Prado* does not address the caveat presented here, *i.e.*, whether defendant was required to serve the State in accordance with procedures related to section 2-1401 petitions and Rule 105 when it was the court, not defendant, who characterized the petition as filed under section 2-1401.

¶ 14 *Lewellyn* is likewise distinguishable. There, the plaintiff filed a complaint for injunctive relief against correctional officers alleging medical neglect. The correctional officers were never served with the plaintiff's complaint, but the circuit court entered an order denying the plaintiff relief within 30 days of the filing of the petition because the plaintiff failed to adequately describe what relief he was requesting. *Lewellyn*, 2012 IL App (4th) 110168, ¶ 6. This court, relying on our supreme court's decision in *People v. Laugharn*, 233 Ill. 2d 318 (2009), determined the circuit court's judgment was premature, as the complaint was not ripe for adjudication. This court vacated the circuit court's judgment and remanded for further proceedings. At that time, the plaintiff could have the defendants properly served or, after a reasonable period of time, the court could dismiss the case for want of prosecution. *Lewellyn*, 2012 IL App (4th) 110168, ¶ 14.

¶ 15 One difference between *Lewellyn* and the case *sub judice* is in *Lewellyn*, the plaintiff voluntarily chose the vehicle in which he proceeded, and therefore was presumably aware of the required procedures accompanying that particular vehicle. Another factor that distinguishes *Lewellyn* from the case before us is that the plaintiff's complaint raised issues of fact and did not challenge the voidness of the underlying judgment. The *Laugharn* and *Lewellyn* cases both presented claims that *could have* survived dismissal had they been allowed to proceed beyond the time for service of summons and a response from the other party. In *Lewellyn*, the plaintiff alleged facts that, if substantiated, could have been the bases for some type of relief. Thus, it was imperative the parties be allowed to run the course of the system without the trial court "short-circuit[ing]" the process. See *Laugharn*, 233 Ill. 2d at 323.

¶ 16 Likewise, in *Laugharn*, the circuit court dismissed as untimely the plaintiff's section 2-1401 petition before the State could respond. Laugharn had alleged in her petition that certain evidence had been withheld from her trial. Section 2-1401 restricts the time for filing a petition to two years from the date of the judgment with certain exceptions. See 735 ILCS 5/2-1401 (West 2008); *People v. Anderson*, 352 Ill. App. 3d 934, 936 (2004). Laugharn's petition was filed eight years after her judgment of conviction. However, by dismissing her petition prematurely, the trial court deprived her of the opportunity to present an acceptable explanation of the delay.

¶ 17 In other words, the trial courts in *Laugharn* and *Lewellyn* both dismissed the petitions when it was *not* clear that no set of facts could ever be proved that would allow the petitions to proceed. Thus, the reviewing courts ultimately found those dismissals were premature. See *Laugharn*, 233 Ill. 2d at 323-24; *Lewellyn*, 2012 IL App (4th) 110168, ¶ 11.

¶ 18 Here, unlike the circuit courts in *Laugharn* and *Lewellyn*, the circuit court did not prematurely dismiss a potentially valid claim. Rather, it was clear to the court that, as a matter of law, defendant could *never* establish a meritorious argument that his sentencing judgment was void due to the imposition of the three-year mandatory-supervised-release term, especially when he was admonished of the term before he pleaded guilty. Proper service upon the State would not change this result.

¶ 19 The Second District's analysis in *People v. Helgesen*, 347 Ill. App. 3d 672, 676 (2004), is in line with our decision. Although proper service of process was not an issue in *Helgesen*, the reviewing court's *dicta* parallels our analysis here. The issue in *Helgesen* centered on compliance with procedural requirements, rather than on the substantive voidness claim presented in the defendant's petition. In *Helgesen*, the defendant filed a *pro se* "motion to vacate a void judgment." The circuit court construed the motion as one filed pursuant to the Post-Conviction Hearing Act (Act) because it was filed seven years after the defendant was sentenced. *Helgesen*, 347 Ill. App. 3d at 674. After doing so, the court summarily dismissed the petition in a written order, finding the defendant had failed to allege any fundamental unfairness so as to allow the filing of a successive postconviction petition. *Helgesen*, 347 Ill. App. 3d at 674. The court had already appointed counsel to represent the defendant, so, as an alternative argument, the defendant claimed the court was prohibited from entering a first-stage dismissal. *Helgesen*, 347 Ill. App. 3d at 675. The defendant's primary argument was the court erred in construing his petition under the Act instead of as a section 2-1401 petition. *Helgesen*, 347 Ill. App. 3d at 675.

¶ 20 The reviewing court determined the circuit court did not err in recharacterizing the defendant's petition as a posconviction petition, as the court had two equally valid options available: one under the Act and one under section 2-1401. *Helgesen*, 347 Ill. App. 3d at 676.

The defendant argued, though, it was unfair for the court to require him to comply with the procedural requirements of the Act, when he did not seek to invoke it. *Helgesen*, 347 Ill. App. 3d at 676. Relying on *People v. Thompson*, 209 Ill. 2d 19, 27 (2004), in which our supreme court determined that a voidness claim "does not depend [on the Act] for its viability[,]" the Second District held as follows: "Consequently, even if the petition violates the technical requirements of the Act, the trial court must consider the voidness claim on its merits." *Helgesen*, 347 Ill. App. 3d at 676. See *Thompson*, 209 Ill. 2d at 27 (a trial court must review a voidness claim in a postconviction petition even if it is based on a violation not otherwise cognizable under the Act).

¶ 21 The *Helgesen* court stated: "If, as here, a 'motion to vacate void judgment' raises only a voidness claim, the court may address its merits under the [Post-Conviction Hearing] Act. However, if it raises additional claims that are cognizable only under section 2-1401, for example, the motion, in substance, is a section 2-1401 petition." *Helgesen*, 347 Ill. App. 3d at 677-78. Regardless of the noncompliance with procedural requirements, a court should address a voidness claim on its merits. *Helgesen*, 347 Ill. App. 3d at 678. The court noted the circuit court's "application of the Act involved some procedural irregularities. However, none of them [was] a basis for reversal." *Helgesen*, 347 Ill. App. 3d at 678.

¶ 22 A void order can be challenged in either a postconviction petition or a section 2-1401 petition. *Thompson*, 209 Ill. 2d at 28-29. Because in this case, it was unclear under which vehicle defendant was proceeding, the circuit court acted within its discretion in recharacterizing the petition as one filed pursuant to section 2-1401. See 735 ILCS 5/2-1401 (West 2010). We also find the court's failure to require service of process upon the State before entering its order of dismissal, though improper, does not rise to the level of reversible error within the particular

confines of this case. The court correctly determined the challenged judgment was not void as a matter of law as claimed by defendant; and further, no circumstances related to the State's appearance in the matter could alter that determination. Thus, because proper service or input from the State was not necessary or would not effect that determination, the court did not commit reversible error by *sua sponte* summarily dismissing the petition, whether characterized as a postconviction petition or a section 2-1401 petition. Either vehicle provided this court with subject matter jurisdiction.

¶ 23 Our decision here should not be construed in any way to undermine the importance of following all applicable procedures related to the vehicle used. We conclude that, under the particular facts of this case, the circuit court's characterization of the petition as a section 2-1401 petition, rather than as a postconviction petition, is of no consequence, as was defendant's failure to properly serve the State with the petition. Indeed, had the court chosen to recharacterize the petition as one filed under the Act, service upon the State would not have been an issue.

¶ 24 Illinois law is clear that a mandatory supervised-release term is an included term of sentencing "as though written therein," in addition to the term of imprisonment, and is not an extension of, but is part of, the original sentence by operation of law. 730 ILCS 5/5-8-1(d) (West 2000); *People v. Lee*, 2012 IL App (4th) 110403, ¶ 32. The mandatory supervised release term is imposed by the trial court, not the Illinois Department of Corrections, as required by the statute. See 730 ILCS 5/5-8-1(d) (West 2000). In this case, the trial court clearly admonished defendant at the time he entered his guilty plea, that a three-year term of mandatory supervised release would be added to the imposed prison term. The fact the court did not mention the mandatory-supervised-release term when it modified defendant's sentence does not make the sentencing

judgment void. *Lee*, 2012 IL App (4th) 110403, ¶ 21 (the fact the defendant was not admonished of the imposition of a mandatory supervised-release term at the time of sentencing is without merit when he was properly admonished before he entered his plea).

¶ 25 We conclude the circuit court did not err when it characterized defendant's *pro se* motion to vacate void judgment as a section 2-1401 petition in order to obtain subject matter jurisdiction over the claim. Further, the court did not commit reversible error when it dismissed defendant's petition on the merits when it determined defendant's sentencing judgment, and in particular, the imposition of the three-year term of mandatory supervised release, was not void as a matter of law. Defendant's failure to properly serve the State with a copy of his petition does not affect this court's decision to affirm the circuit court's order of dismissal or denial.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 28 Affirmed.