2015 IL App (1st) 132660-U

SECOND DIVISION
September 29, 2015

No. 1-13-2660

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. 93 CR 26694
	)	
BRIAN JONES,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The circuit court erred in assessing a $90 fee for a frivolous filing because, when he filed his petition, defendant's contention as to his mandatory supervised release period was arguably meritorious.

¶ 2 Defendant Brian Jones appeals the circuit court's assessment of a $90 fee under section 22-105 of the Code of Civil Procedure (735 ILCS 5/22-105 (West 2010)) for filing a frivolous petition for relief from judgment. In Jones's 2012 petition, he argued his right to due process was violated when the Illinois Department of Corrections imposed a term of mandatory supervised

release (MSR) to be served after his prison term, which MSR had not be ordered by the trial court. On appeal, Jones contends that although his position was later rejected in *People v. McChriston*, 2014 IL 115310, the $90 fee should be vacated because when he brought his petition, he had an arguable legal basis. We agree and order the fee be vacated.

¶ 3 Background

¶ 4 This appeal involves Jones's second petition filed under section 2-1401. (Since Jones lost his direct appeal, he has filed a number of petitions under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 1996)) seeking relief from judgment under section 2-1401 (735 ILCS 5/2-1401 (West 2002)). In December 2012, Jones filed a *pro se* petition for relief from judgment pursuant to section 2-1401(f) (735 ILCS 5/2-1401(f) (West 2010)). Jones argued for the first time that the three-year MSR period to follow his prison sentence violated his right to due process because the trial court had not ordered the MSR term at sentencing. Jones asserted the DOC could not add the MSR period to his sentence if it was not ordered by the court, and he asked that his MSR period be vacated or that three years be deducted from his prison term.

¶ 5 Jones cited and attached to his filing the case of *United States ex rel. Carroll v. Hathaway*, No. 10 C 3862, slip op. at 10 (N.D. Ill. Jan. 19, 2012). In *Carroll*, the petitioner filed a writ of *habeas corpus* after unsuccessfully seeking relief in Illinois state court and renewed his contention that the DOC had added an unauthorized term of MSR to his 28-year prison sentence. *Id*., slip op. at 1-2. The federal district court held the DOC could not require an inmate to serve an MSR term mandated by state law if the term had not been ordered by the sentencing judge. *Id*., slip op. at 9. The court found persuasive the reasoning in *Earley v. Murray*, 451 F.3d 71 (2d

Cir. 2006), which addressed an "almost identical question under New York law." *Carroll*, slip op. at 10.

¶ 6 Jones appeared *pro se* at a hearing on his petition on August 2, 2013. The trial court dismissed the petition, stating the MSR period attached to Jones's sentence by operation of law. The court stated that while it must follow decisions of the United States Supreme Court, not so with decisions of federal district or appellate courts. That day, Jones filed a notice of appeal from that ruling.

¶ 7 On August 5, 2013, the trial court entered an order assessing fees against Jones for a frivolous filing under section 22-105. The court found Jones's filing lacked an arguable basis in law or in fact, the allegations and other factual contentions did not have evidentiary support, and the filing was presented to hinder, cause delay, and increase the cost of litigation. The court ordered Jones to pay a $90 fee for filing the petition and pay $15 in mailing fees.

¶ 8 Analysis

¶ 9 On appeal, Jones contends the circuit court erred in imposing the $90 fee for filing a frivolous petition. Jones acknowledges his precise legal position was rejected in 2014 by the Illinois Supreme Court in *McChriston*, but he asserts an arguable legal basis for his due process argument existed when he filed his petition in December 2012 and presented it to the court in August 2013.

¶ 10 Section 22-105 allows the trial court to assess fees after making a specific finding that a pleading, motion, or other filing is frivolous. 735 ILCS 5/22-105 (West 2010). To be “frivolous” under Section 22-105(b), the filing must lack "an arguable basis either in law or in fact" or "the

claims, defenses, and other legal contentions therein are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." 735 ILCS 5/22-105(b)(1), (3) (West 2010). See, *e.g.*, *People v. Shotts*, 2015 IL App (4th) 130695, ¶¶ 71-75 (fee under section 22-105 warranted when successive post-conviction petitioner merely repeated claims previously considered and rejected as frivolous).

¶ 11 Jones claimed an MSR term could not be added to his sentence if it was not ordered by the trial court, relying *Carroll*. But, the court in *Carroll* had reversed its opinion on reconsideration by the time defendant filed his petition. *Carroll v. Hathaway*, No. 10 C 3862, slip op. at 2 (N.D. Ill. Sept. 5, 2012) (observing that MSR term was required by state law). Still, additional precedent existed at the time under which Jones could argue that his MSR term was void.

¶ 12 On appeal, Jones directs us to *Earley* and *People v. Munoz*, 2011 IL App (3d) 100193, which also was cited in the original opinion in *Carroll*. In *Munoz*, the defendant's DOC records listed an indeterminate MSR term of three years to life, a period that comported with the relevant statute but differed from the erroneous two-year MSR term in the trial court's written sentencing order. *Id*. at ¶¶ 10-12. This court held the DOC lacked the power to decide on the term of MSR to be served and remanded to the trial court to impose an MSR term in the range provided by statute, stating the power to impose an MSR term was part of the trial court's "exclusive authority to sentence a defendant." *Id*. at ¶¶ 10-14.

¶ 13 Jones also notes the holdings in *People v. Kerns*, 2012 IL App (3d) 100375, and in *People v. Rhinehart*, 406 Ill. App. 3d 272, 280-81 (2010), *affirmed in part and vacated in part*, 2012 IL 111719, that the authority to impose a sentence and a MSR period rests with the trial court, not the DOC. When the supreme court in *Rhinehart* reversed the appellate court's determination, the supreme court addressed whether the trial court was required to set a MSR period for those defendants convicted of sex offenses where the relevant statute allowed a MSR period of three years to natural life. *Rhinehart*, 2012 IL 111719, ¶ 2. The supreme court concluded that the appellate court erred in vacating the defendant's MSR term because the MSR period of a defendant convicted of a sex offense could be indeterminate. *Id*. ¶¶ 29-30.

¶ 14 *McChriston* addressed the precise issue involved here—whether a defendant's right to due process was violated by imposing a MSR term not mentioned by the sentencing court or included in the sentencing order. The supreme court held that a defendant's MSR term was automatically imposed by statute as part of the defendant's sentence and was not imposed by the DOC. *McChriston*, 2014 IL 115310, ¶ 23. The court in *McChriston* expressly overruled *Kerns*. But, until *McChriston*, decided in 2014, this court had issued differing decisions as to the effect of an MSR term not ordered by the court.

¶ 15 The State does not address the legal precedent that existed at the time of Jones's argument. Rather, the State contends the Jones's 2012 petition was frivolous under section 22-105 because Jones could have raised his MSR argument earlier, either in his 2007 successive post-conviction petition or his 2010 petition for relief from judgment. The State further asserts that Jones's claim is barred by *res judicata*. We do not find these arguments persuasive.

¶ 16 The State's assertion that *res judicata* bars Jones's claim conflicts with the State's argument that Jones could have raised this argument previously but did not. *Res judicata* precludes consideration of an issue that was previously raised and decided on appeal. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). The State cannot logically contend both that the MSR argument has been previously decided and that Jones should have raised his MSR argument earlier but is precluded from doing so now due to waiver. Furthermore, as to waiver, Jones brought the petition under section 2-1401(f), which allows relief from a void order or judgment. See 735 ILCS 5/2-1401(f) (West 2010). A claim that a judgment is void is not subject to waiver and can be raised at any time, either directly or collaterally. *People v. Davis*, 2015 IL App (1st) 121867, ¶ 5, citing *People v. Thompson*, 209 Ill. 2d 19, 27 (2004).

¶ 17 The MSR issue raised in Jones's 2012 petition was not frivolous under section 22-105 because Jones's argument was based on existing legal precedent. The ability to argue that the trial court must order Jones to serve an MSR period was not forestalled until the supreme court squarely addressed and decided the issue in *McChriston*. Jones's petition also was not frivolous based on *res judicata* or waiver, as the State contends.

¶ 18 Accordingly, we order the $90 fee imposed by the circuit court to be vacated.

¶ 19 Judgment affirmed; fee vacated.