2015 IL App (5th) 130420-U

NO. 5-13-0420

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Perry County. |
| | ) | |
| v. | ) | No. 00-CF-25 |
| | ) | |
| SHANNON C. REYNOLDS, | ) | Honorable |
| | ) | James W. Campanella, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held*: The circuit court properly dismissed the defendant's petition for relief from judgment, and any argument to the contrary would have no merit, and therefore appointed appellate counsel's motion to withdraw is granted; this cause is remanded to the circuit court for the imposition of an additional penalty of $12, but in all other respects the judgment dismissing the defendant's petition is affirmed.

¶ 2 The defendant Shannon C. Reynolds appeals from the circuit court's order granting the State's motion to dismiss his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). The defendant's court-appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit. Accordingly, OSAD has filed a motion to

withdraw as counsel, along with a supporting memorandum of law, in accordance with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The defendant, in turn, has filed a *pro se* document objecting to OSAD's motion and arguing that the circuit court erred in dismissing his petition. This court has examined OSAD's motion and memorandum, the defendant's response thereto, and the entire record on appeal, and has not found any potential grounds for appeal. For the reasons set forth below, this court grants OSAD's motion to withdraw. This court remands the cause to the circuit court with directions that the court enter an amended judgment of conviction reflecting a statutorily mandated additional penalty of $12, but in all other respects the judgment dismissing the defendant's section 2-1401 petition is affirmed.

¶ 3 BACKGROUND

¶ 4 *The Defendant's Conviction and Direct Appeals*

¶ 5 The defendant was charged with three felony counts, *viz.*: (I) aggravated criminal sexual assault in violation of section 12-14(a)(3) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-14(a)(3) (West 2000)), (II) aggravated criminal sexual assault in violation of section 12-14(a)(2) of the Criminal Code (720 ILCS 5/12-14(a)(2) (West 2000)), and (III) criminal sexual assault in violation of section 12-13(a)(1) of the Criminal Code (720 ILCS 5/12-13(a)(1) (West 2000)). Counts I and II were Class X felonies; count III was a Class 1 felony. All three crimes were alleged to have been committed in Perry County, Illinois, on March 6, 2000. The defendant was arrested on these charges on that same date, and he remained in custody throughout the proceedings that resulted in his conviction.

¶ 6 In March 2001, the defendant waived his right to a trial by jury, after admonishments by the court.

¶ 7 On April 30, 2001, the defendant, defense counsel, and an assistant Attorney General appeared in court. The assistant Attorney General informed the court that the parties had reached a plea agreement under which the defendant would plead guilty to count I, the other two counts would be dismissed, and the court would hold a sentencing hearing at a later date and could sentence the defendant to imprisonment for any term from 6 years to 30 years. The court admonished the defendant that under the terms of the agreement, he would be pleading guilty to a Class X felony, a nonprobationable offense punishable by imprisonment for a minimum of 6 years and a maximum of 30 years, and that he would serve 85% of the prison sentence, to be followed by a 3-year term of mandatory supervised release. The court also stated that the defendant could be fined up to $25,000, but added that the court probably would not impose a fine. The State said that it would request a $100 sexual-assault fine. The court admonished the defendant about his right to a trial and his rights at trial. The assistant Attorney General provided a factual basis for the plea, describing how the defendant pursued and overpowered the victim, a woman, and then forced his penis into her vagina, while threatening to kill her. Pursuant to the parties' agreement, the defendant pleaded guilty to aggravated criminal sexual assault as charged in count I, while counts II and III were dismissed. The court ordered the preparation of a presentence investigation report and scheduled a sentencing hearing.

¶ 8 On June 19, 2001, after a hearing in aggravation and mitigation, the court pronounced a sentence of imprisonment for 25 years and a sexual-assault fine of $100. Also on June 19, 2001, the court entered a written judgment reflecting this prison sentence and fine. The written judgment also ordered the defendant to provide a blood sample for DNA analysis and to undergo medical testing to determine whether he had any sexually transmitted disease. The written judgment also awarded presentencing custody credit of "471 days with day for day credit for time served for a total of 942 days as of this date, June 19, 2001." Simultaneously, the court issued a mittimus reflecting the 25-year prison sentence and 942 days of presentencing custody credit. (The court's reason for granting 942 days of presentencing custody credit is unclear; this credit is double the credit to which the defendant was actually entitled, 471 days.)

¶ 9 The next day, June 20, 2001, the court entered a written amended judgment. The amended judgment was identical to the original judgment except that it added that the costs of DNA analysis and medical testing for disease were waived.

¶ 10 On July 17, 2001, the defendant, by counsel, filed a motion to reconsider sentence. He averred that his 25-year sentence was excessive and that the court failed to give due consideration to various facts and circumstances militating in favor of a more lenient prison sentence. On October 15, 2001, the court held a hearing on the motion and took the matter under advisement. On October 19, 2001, the court entered a written order denying the motion to reconsider sentence.

¶ 11 The defendant filed *pro se* a timely notice of appeal from the judgment of conviction. The circuit court appointed OSAD to represent the defendant in the direct

appeal. In this court, the defendant filed a motion for summary relief, seeking reversal of the order denying his motion to reconsider sentence and a remand for further proceedings because defense counsel had failed to file a certificate of compliance with Supreme Court Rule 604(d) (188 Ill. 2d R. 604(d)). The State confessed error. This court granted the defendant's motion for summary relief. *People v. Reynolds*, No. 5-01-0889 (May 10, 2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 12 On remand, the circuit court appointed counsel to represent the defendant. The defendant filed by counsel a new motion to reconsider sentence, claiming that the sentence was excessive. Counsel filed a certificate of compliance with Rule 604(d). After a hearing, the circuit court denied the new motion. The defendant perfected an appeal, and the circuit court appointed OSAD to represent the defendant.

¶ 13 In this court, the defendant contended that (1) the sentencing court's recollection that the defendant did not accept responsibility for the crime or express remorse was inaccurate, and (2) the 25-year sentence was excessive in light of his potential for rehabilitation, his lack of prior criminal misconduct, his work history, his youth and family situation, and the lack of significant physical harm to the victim. The defendant asked this court to reduce his sentence to one nearer the statutory minimum of six years. After recounting the facts of the defendant's crime, examining the sentencing court's remarks, and carefully considering the defendant's arguments on appeal, this court affirmed the sentence. *People v. Reynolds*, No. 5-02-0715 (Sept. 30, 2003) (unpublished order pursuant to Supreme Court Rule 23).

¶ 14 *The Defendant's Postconviction Petition, Its Dismissal, and the Unsuccessful Appeal From Its Dismissal*

¶ 15 In September 2009, the defendant filed *pro se* a petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)). He asserted that the lateness of filing was not due to his culpable negligence. He claimed a violation of his right to the due process of law in that he had not received the benefit of his plea bargain with the State. Specifically, he claimed that the bargain included a presentence incarceration credit of 942 days and an assurance that he would be able to serve his 3-year term of mandatory supervised release while simultaneously serving his 25-year prison term, but neither of these two benefits was possible under Illinois statutes and therefore he was being deprived of those benefits. For relief, the defendant asked that the court reduce his term of imprisonment to 20 years, 8 months, and 9 days, or in the alternative allow him to withdraw his plea of guilty.

¶ 16 On September 25, 2009, the circuit court entered a written order finding the defendant's petition frivolous and patently without merit and summarily dismissing it. Also in that order, the court announced that it was issuing an amended mittimus that omitted the "unenforceable language of day-for-day credit previously and erroneously placed" in the original mittimus. Simultaneously, the court issued the amended mittimus, which was identical to the original 2001 mittimus except that it awarded a presentencing custody credit of 471 days. (As indicated above, a credit of 471 days appears to be correct.) The defendant perfected an appeal from the summary-dismissal order, and the circuit court appointed OSAD to represent the defendant in that appeal.

¶ 17 In this court, OSAD filed a motion to withdraw as counsel pursuant to *Finley*, arguing that the appeal lacked merit. This court discussed the defendant's postconviction claims, agreed with OSAD that the appeal lacked merit, granted the *Finley* motion, and affirmed the circuit court's dismissal of the postconviction petition. This court noted, *inter alia*, that the defendant had entered an open plea of guilty, with no promise or agreement as to sentencing or sentencing credit, and therefore there was no basis for any claim that any aspect of his sentence was contrary to the terms of his plea bargain. *People v. Reynolds*, No. 5-09-0555 (Feb. 7, 2011) (unpublished order pursuant to Supreme Court Rule 23).

¶ 18 *The Defendant's Section 2-1401 Petition:*

*Subject of the Instant Appeal*

¶ 19 On June 14, 2013, the defendant filed *pro se* a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). He claimed that (1) the amended mittimus issued on September 25, 2009, is void because the circuit court had lost subject matter jurisdiction over the case 30 days after entering the final judgment in June 2001, and because the court "exceeded its power to act in issuing the [amended mittimus]"; (2) the judgment entered on June 22, 2001,[1] is void because the sentence "does not conform with mandatory statutory guidelines" in that it does not include a mandatory Crime Victims Assistance Fund fine (725 ILCS 240/10

[1]The defendant must be referring to the judgment and the amended judgment entered on June 19, 2001, and June 20, 2001, respectively.

(West 2012)), and (3) the plea of guilty was "invalid and void" because the circuit court "misrepresented the sentence to be imposed" in that "[p]rior to accepting [the defendant's] plea of guilty the Court failed to admonish [the defendant] that he would be subject to a mandatory fine under 725 ILCS 240/10, failed to admonish [the defendant] that fine pursuant to 730 ILCS 5/5-9-1.7 was mandatory, and improperly informed [the defendant] he would receive day-for-day credit for each day spent in the county jail that was not attainable by law."

¶ 20 The State filed a motion to dismiss the section 2-1401 petition. The State argued, *inter alia*, that contrary to the defendant's assertions, none of the orders or judgments entered in the case was void, and since the defendant's petition was filed beyond the two-year limitations period of section 2-1401(c) of the Code of Civil Procedure (735 ILCS 5/2-1401(c) (West 2012)), the petition should be dismissed for untimeliness.

¶ 21 On July 31, 2013, the circuit court entered a written order expressing its full agreement with the arguments presented in the State's motion to dismiss. The court did not explicitly grant the motion to dismiss, but the intention to do so is clear from the order.

¶ 22 On August 26, 2013, the defendant filed *pro se* a notice of appeal from the dismissal order, thus perfecting this appeal. The circuit court appointed OSAD to represent the defendant. As previously mentioned, OSAD has filed a *Finley* motion to withdraw as counsel, and the defendant has filed a response thereto.

¶ 23 ANALYSIS

¶ 24 The defendant appeals from the circuit court's dismissal of his section 2-1401 petition. The dismissal of a section 2-1401 petition without an evidentiary hearing is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14-15 (2007). This court may affirm on any basis supported by the record, regardless of the reasoning or the grounds relied upon by the circuit court. *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008).

¶ 25 Section 2-1401 allows for relief from final orders and judgments more than 30 days after their entry. 735 ILCS 5/2-1401(a) (West 2012). Although a petition brought pursuant to the statute is usually characterized as a civil remedy, its remedial powers extend to criminal cases. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). In general, a defendant must file his section 2-1401 petition within two years after entry of the judgment from which he seeks relief. 735 ILCS 5/2-1401(c) (West 2012). The two-year period is a statute of limitations, not a jurisdictional prerequisite. *People v. Malloy*, 374 Ill. App. 3d 820, 823 (2007). If the State properly asserts the limitations period as an affirmative defense, the circuit court may dismiss the petition on the basis of untimeliness. *Id.* "Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years." 735 ILCS 5/2-1401(c) (West 2012).

¶ 26 An exception to the two-year limitations period is made for a petition that attacks an order or judgment as void. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). Section 2-1401(f) explicitly allows for a petition attacking an order or judgment as void. See 735 ILCS 5/2-1401(f) (West 2012). "Petitions brought on

voidness grounds need not be brought within the two-year time limitation." *Sarkissian*, 201 Ill. 2d at 104. Indeed, a void judgment may be attacked at any time, whether directly or collaterally. *People v. Davis*, 156 Ill. 2d 149, 155 (1993). Where a petition is filed beyond the two-year limitations period, but the petitioner claims that the limitations period is inapplicable because the challenged order or judgment is void, a court must first consider whether the challenged order or judgment is in fact void. *People v. Balle*, 379 Ill. App. 3d 146, 151 (2008).

¶ 27 Here, the defendant filed his section 2-1401 petition several years after the two-year limitations period had expired. Therefore, the circuit court's dismissal of the petition was clearly correct unless a challenged order or judgment is in fact void.

¶ 28 A void judgment is one entered by a court that lacks jurisdiction over the parties, lacks jurisdiction over the subject matter, or lacks the authority to make or enter the particular order or judgment involved. *People v. Wade*, 116 Ill. 2d 1, 5 (1987). A void judgment must be distinguished from a voidable judgment, which is a judgment "entered erroneously by a court having jurisdiction and is not subject to collateral attack." *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993).

¶ 29 "Generally, once a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired. Accordingly, a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law or both." *Davis*, 156 Ill. 2d at 156. "However, a judgment or decree may be void where a court has exceeded its jurisdiction." *Id.* For example, a sentence, or portion thereof, that exceeds the statutory maximum is void from its inception and is subject to challenge at any time,

even if the sentence was imposed as part of a negotiated plea. *People v. Brown*, 225 Ill. 2d 188, 203 (2007). However, the sentence, or portion thereof, is void only to the extent that it exceeds that which the statute permits; the legally authorized portion remains valid. *Brown*, 225 Ill. 2d at 205.

¶ 30 Without question, the circuit court acquired jurisdiction over the parties (the State and the defendant) and over the subject matter (crimes committed in Illinois). In his section 2-1401 petition, the defendant claimed that: (1) the amended mittimus issued on September 25, 2009, is void because the court had lost its subject matter jurisdiction due to the passage of time, and the circuit court exceeded its authority in entering this order; (2) the judgment of conviction entered in June 2001 is void because the sentence did not include a mandatory penalty under section 10 of the Violent Crime Victims Assistance Act (730 ILCS 240/10 (West 2000)); and (3) his guilty plea is void because the circuit court failed to admonish him that he would be subject to a mandatory penalty under section 10 of the Violent Crime Victims Assistance Act (725 ILCS 240/10 (West 2000)) and a mandatory sexual-assault fine under section 5-9-1.7 of the Unified Code of Corrections (730 ILCS 5/5-9-1.7 (West 2000)), and erroneously admonished him as to the amount of presentencing custody credit he would receive. This court will address these three claims in reverse order, which allows for a chronological discussion of the various orders or judgments that the defendant challenges.

¶ 31 The defendant's third claim is that his guilty plea is void due to various improper admonishments by the court. Improper admonishment certainly may result in a guilty plea that is not intelligently and understandingly made, contrary to due process. See, *e.g.*,

*People v. Fred*, 17 Ill. App. 3d 730 (1974) (judgment reversed, cause remanded with directions to permit the defendant to plead anew, where court misadvised the defendant as to the minimum sentence he faced, and therefore guilty plea was not intelligent and understanding). However, an improper admonishment does not render a judgment void. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 42 (2011). See also, *e.g.*, *People v. Jones*, 213 Ill. 2d 498, 509 (2004) (the error of an improper admonishment does not divest the circuit court of its jurisdiction such that the conviction and sentence become void); *People v. Hubbard*, 2012 IL App (2d) 101158 (for purposes of section 2-1401 petition, judgment of conviction, entered after a plea of guilty, is not void even if court made mistake of law in explaining sentencing range and mistake of fact in determining that plea was voluntary). In his section 2-1401 petition, and in his written response to OSAD's *Finley* motion, the defendant cited the decision in *People v. White*, 2011 IL 109616, wherein our Illinois Supreme Court stated that "because defendant was not properly admonished, the entire plea agreement is void as well." *White*, 2011 IL 109616, ¶ 21. However, "[i]t appears the court [in *White*] was referring to the particular fact scenario before it; there is no indication that the supreme court intended to overrule or set aside its clear and repeated statements that improper admonishments do not render a plea agreement or the resulting judgment void." *People v. Donelson*, 2011 IL App (1st) 092594, ¶ 15 n.1, *aff'd*, 2013 IL 113603. Any improper admonishment of the defendant did not render the judgment of conviction void.

¶ 32 The defendant's second claim is that the judgment of conviction is void because the sentence did not include the mandatory penalty under section 10 of the Violent Crime

Victims Assistance Act (730 ILCS 240/10 (West 2000)). The court certainly should have imposed this penalty; under the terms of the statute, the penalty was mandatory for anyone convicted of a felony. However, the court's error does not render the entire judgment of conviction void. As mentioned above, a sentence, or any portion of a sentence, is void only to the extent that it exceeds that which the statute permits. *Brown*, 225 Ill. 2d at 205. Failure to impose the mandatory penalty under the Violent Crime Victims Assistance Act did not render the entire judgment of conviction void.

¶ 33 Finally, the defendant's first claim–that the amended mittimus issued on September 25, 2009, is void due to a lack of subject matter jurisdiction, and that the circuit court exceeded its authority in entering it–is also without merit. As OSAD points out in its memorandum of law, this first claim ignores the fact that the defendant had filed a postconviction petition, an act that vested the circuit court with subject matter jurisdiction to amend the original mittimus. As OSAD also has noted, the amended mittimus merely corrected the amount of presentencing custody credit the defendant had accrued and was entitled to receive. The amended mittimus specified that the defendant was to receive credit for 471 days of presentence custody; the original mittimus had inexplicably doubled the credit to 942 days. A defendant is only entitled to credit "for *the number of days spent in custody* as a result of the offense for which the sentence was imposed." (Emphasis added.) 730 ILCS 5/5-4.5-100(b) (West 2012). Even after the circuit court has otherwise lost jurisdiction, it retains jurisdiction to correct nonsubstantial matters of judicial inadvertence or mistakes, such as the amendment of a mittimus so as to reflect the correct sentencing credit. See *Baker v. Department of Corrections*, 106 Ill.

2d 100, 106 (1985). The circuit court properly amended the mittimus so as to reflect the correct amount of presentencing custody credit.

¶ 34 Contrary to the defendant's claims, the challenged orders or judgments are not void. Therefore, the voidness exception to the two-year statutory limitations period does not apply, and his petition was properly dismissed as untimely.

¶ 35 As previously indicated, the defendant was correct in stating that he should have been, but was not, fined under section 10(b) of the Violent Crime Victims Assistance Act (725 ILCS 240/10(b) (West 2000)). At the time of his crime, section 10(b) required that a convicted felon pay "an additional penalty of $4 for each $40, or fraction thereof, of fine imposed." As previously noted, the court imposed a sexual-assault fine of $100. Therefore, the court should have imposed an additional penalty of $12 under section 10(b). Although the court, at the plea hearing, admonished the defendant that he could be fined up to $25,000, the court at sentencing did not impose this statutorily required additional penalty. The sentence is void to the extent that it did not include the additional penalty, and this court has an independent duty to correct the problem. See *People v. Thompson*, 209 Ill. 2d 19, 27 (2004); *People v. Montiel*, 365 Ill. App. 3d 601, 606 (2006). Therefore, this cause to the circuit court of Perry County for issuance of an amended judgment of conviction and sentence reflecting the $12 additional penalty under section 10(b) of the Violent Crime Victims Assistance Act. Otherwise, the judgment dismissing the section 2-1401 petition is affirmed.

¶ 36 Affirmed and remanded with directions.