2015 IL App (5th) 140343-U

NO. 5-14-0343

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 01-CF-2298
	)	
RICKY A. HOTZ,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Where the defendant failed to establish the right to relief from the judgment, the circuit court properly granted the State's motion to dismiss the petition.

¶ 2 The defendant, Ricky A. Hotz, appeals the dismissal of his petition for postjudgment relief. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other document supporting

his appeal. The defendant filed a response. We considered OSAD's motion to withdraw as counsel on appeal and the defendant's response. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Madison County.

¶ 3 BACKGROUND

¶ 4 On September 4, 2001, the defendant was charged by information with the July 7, 2001, murder of Melanie L. Motes. The information contained only one count: first-degree murder. On September 20, 2001, a grand jury returned a six-count indictment against the defendant. The six counts were: (I) first-degree murder, (II) first-degree murder committed during the course of a home invasion, (III) first-degree murder committed in the course of an aggravated criminal sexual assault, (IV) home invasion, (V) aggravated sexual assault, and (VI) aggravated criminal sexual assault committed in the course of a residential burglary. Prior to September 21, 2001, the defendant's attorney discussed the State's evidence with the State's Attorney. In that discussion, the defendant's attorney learned that a DNA test of blood found at the scene matched the defendant's DNA. The State's Attorney also gave the defendant's attorney a copy of the State's evidence against the defendant and indicated that the State intended to seek the death penalty.

¶ 5 On September 21, 2001, at what was originally scheduled to be an arraignment, the defendant pleaded guilty to count II of the indictment. At one point during the hearing the defendant's attorney incorrectly stated that the defendant was pleading to

count II of the information that only included one count. In the court's subsequent discussions with the defendant, it repeatedly referenced the indictment and indicated that the defendant was pleading guilty to count II of the indictment. The negotiated plea was that the defendant would plead guilty to count II (first-degree murder committed in the course of a home invasion) in exchange for a natural-life sentence. The State's concession being that it would not seek the death penalty. The court explained the elements of the crimes of first-degree murder and home invasion to the defendant.

¶ 6 The factual basis given by the State included the following facts. The victim was found dead in the living room of her residence. There appeared to have been a struggle because parts of the room were in disarray and the victim's pajama tops and bottoms were torn. A portion of a phone cord was wrapped around the victim's neck, and her fingers were entwined about the cord. An autopsy concluded that the victim died of ligature strangulation. A DNA analysis of blood found at the scene matched the defendant's DNA. An anal swab contained trace amounts of semen. At an initial interview the defendant admitted knowing the victim and having lived next to her, but he denied ever being in her home. At a subsequent interview, the defendant admitted to choking the victim with a telephone cord during a sexual encounter. The defendant then led the police to a levy in Granite City where he previously disposed of the missing telephone and portion of the telephone cord. A forensic scientist examined the portion of the cord found at the levy and determined it had at one point been a portion of the cord found at the victim's residence.

¶ 7 Upon questioning by the court, the defendant indicated that: he discussed the plea with his attorney; he was not coerced into making the plea; and nobody promised him anything in exchange for his plea, other than the State not seeking the death penalty. At that point the defendant confirmed his desire to plead guilty, and the court accepted his plea. The court then sentenced the defendant to natural life in prison on count II of the indictment and dismissed the remaining counts. The circuit court denied the defendant's motion to withdraw his guilty plea. This court affirmed. *People v. Hotz*, No. 5-02-0241 (Apr. 29, 2003) (unpublished order under Supreme Court Rule 23).

¶ 8 On April 19, 2004, the defendant filed what he styled as a combined postconviction and section 2-1401 petition for relief from judgment. The circuit court denied the petition on June 19, 2006, and this court affirmed the circuit court. *People v. Hotz*, No. 5-06-0401 (Feb. 5, 2008) (unpublished order under Supreme Court Rule 23).

¶ 9 On March 10, 2011, the defendant filed a rambling, 43-page section 2-1401 petition for relief from judgment, expressing displeasure with a number of things that have happened since his arrest. Giving the defendant as much leeway as possible, he developed 10 issues: (1) he argued that because his plea attorney stated that he was pleading guilty to count II of the information, which only included one count, he could not plead guilty to that count; (2) he did not receive an arraignment; (3) there was no Supreme Court Rule 608(a)(2) (eff. Jan. 1, 1998) certificate in the record; (4) there was no probable cause finding; (5) there were no facts supporting the home invasion element; (6) there was no sworn verification for the arrest warrant; (7) he received ineffective assistance of counsel on his motion to withdraw guilty plea because his counsel

proceeded without the benefit of the guilty plea transcripts; (8) the extended-term sentence was not authorized by statute; (9) the State did not dismiss the information or seek leave to proceed on the indictment; and finally (10) the defendant complained generally about the actions taken with regard to his various postconviction and section 2-1401 petitions. On March 28, 2011, before 30 days had passed, the circuit court dismissed the petition *sua sponte* on the basis that it was filed beyond the time for filing, failed to state a basis for relief, and that the issues raised had previously been adjudicated. The dismissal of this petition is the basis for this appeal.

¶ 10 On April 4, 2011, the defendant filed requests to admit on the circuit clerk. On April 14, 2011, the circuit court entered an order indicating that no response was required because the underlying petition had been dismissed.

¶ 11 On April 25, 2011, the defendant filed a motion for a rehearing or reconsideration of the *sua sponte* dismissal of his March 10, 2011, section 2-1401 petition. On May 9, 2011, the circuit court denied the defendant's motion. Also on May 9, 2011, the defendant filed a motion for substitution of judge. The chief judge of the circuit court dismissed the petition, noting that nothing was currently pending before the court.

¶ 12 On June 13, 2011, the defendant filed a petition for leave to file a successive postconviction petition, which the circuit court denied on August 9, 2011.

¶ 13 On August 29, 2011, the defendant filed a *pro se* notice of appeal stating he was appealing orders entered: March 28, 2011; April 14, 2011; May 9, 2011; and August 9, 2011. The appeal was docketed as *People v. Hotz,* No. 5-11-0367. In his brief on appeal, the defendant challenged only the August 9, 2011, denial of leave to file a successive

postconviction petition. On June 10, 2013, this court affirmed the trial court's denial of leave to file a successive postconviction petition because the defendant failed to show cause and prejudice. *People v. Hotz*, No. 5-11-0367 (June 10, 2013) (unpublished order under Supreme Court Rule 23).

¶ 14 On May 21, 2013, the Illinois Supreme Court entered a supervisory order directing this court to allow the defendant to file a late notice of appeal of the March 28, 2011, order dismissing the defendant's section 2-1401 petition. That appeal was docketed as *People v. Hotz*, No. 5-13-0299. On appeal, the defendant argued that the circuit court's March 28, 2011, *sua sponte* dismissal of his March 10, 2011, section 2-1401 petition was improper because the State had not answered and 30 days had not passed. The State filed a confession of error and this court vacated the circuit court's order dismissing the section 2-1401 petition and remanded for further proceedings. *People v. Hotz*, No. 5-13-0299 (Aug. 28, 2013) (unpublished order under Supreme Court Rule 23).

¶ 15 On December 5, 2012, while the defendant's appeal in No. 5-11-0367 was pending, a certificate of impaneling a grand jury in People v. Hotz, No. 01-CF-2298 (the original case), was filed. It is dated July 16, 2012.

¶ 16 On March 5, 2014, the circuit court held a hearing with the defendant and the State's Attorney regarding how the court would proceed on the remand of the case. At that hearing, the State indicated that it desired to file a motion to dismiss. Without objection by the defendant, the circuit court granted that request, and the motion to dismiss was filed the same day. The motion sought the dismissal of the defendant's section 2-1401 petition on the grounds that: (1) the petition was filed beyond the time for

filing; (2) the petition failed to state a basis for relief; and (3) the petition was barred by *res judicata*. Following a hearing, the circuit court granted the State's motion, stating the petition: (1) was not timely filed, (2) failed to state a basis for relief, and (3) was barred by waiver or *res judicata*. The defendant's motion to reconsider was denied. On July 7, 2014, defendant filed a timely notice of appeal.

¶ 17 ANALYSIS

¶ 18 Section 2-1401 provides a mechanism to collaterally attack a "final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007) (citing 735 ILCS 5/2-1401(a) (West 2002)). Section 2-1401 replaced the common law writ system. *Id.* A petition filed under section 2-1401 is to be filed in the "same proceeding in which the order or judgment was entered, but it is not a continuation of the original action." *Id.* (citing 735 ILCS 5/2-1401(b) (West 2002)). The petition is to be supported by "affidavit or other appropriate showing as to matters not of record." *Id.* (citing 735 ILCS 5/2-1401(c) (West 2002)). Relief is obtained "upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Id.* at 7-8 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986)). "[T]he petition must be filed not later than 2 years after the entry of the order or judgment. 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 (West 2010). "Petitions filed beyond the two-year period will not generally be considered." *People v. Gosier*, 205 Ill. 2d 198, 206 (2001) (citing *People v. Caballero*,

179 Ill. 2d 205, 210 (1997)). Nevertheless, attacks on void judgments may be made at any time. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). "Our supreme court has 'consistently held that a judgment is void if and only if the court that entered it lacked jurisdiction.' " *People v. Moran*, 2012 IL App (1st) 111165, ¶ 15 (quoting *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 16). "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." *People v. Davis*, 156 Ill. 2d 149, 156 (1993) (citing 22 C.J.S. *Criminal Law* § 176 (1989)). While section 2-1401 is a civil remedy, it applies to criminal cases as well as to civil cases. *Vincent*, 226 Ill. 2d. at 8 (citing *People v. Sanchez*, 131 Ill. 2d 417, 420 (1989)).

¶ 19 The defendant's guilty plea also bears on his petition. "It is well established that a voluntary guilty plea waives all nonjurisdictional errors or irregularities, including constitutional ones." *People v. Townsell*, 209 Ill. 2d 543, 545 (2004) (citing *People v. Peeples*, 155 Ill. 2d 422, 491 (1993)).

¶ 20 We review the dismissal of defendant's section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d at 14 (citing *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005)).

¶ 21 Since the defendant's section 2-1401 petition was filed well outside the two-year limitation on section 2-1401 petitions, it is only viable if the circuit court lacked jurisdiction. The relevant question is: did the circuit court have jurisdiction?

¶ 22 The defendant's petition argued that the lack of a Rule 608(a)(2) certificate shows that the circuit court did not have jurisdiction to accept his guilty plea and sentence him. He cited to no case law holding that the lack of a Rule 608(a)(2) certificate deprives the court of jurisdiction, and the rule itself has nothing to do with proceedings in the trial court. It is a rule of appellate procedure; it requires the record on appeal to include a certificate of the clerk showing the impaneling of a grand jury if the prosecution was commenced by indictment. Ill. S. Ct. R. 608(a)(2) (eff. Jan. 1, 1998). It does not make any requirement of the circuit court. Undoubtedly the record on appeal informs an appellate court's decision of whether or not a circuit court had jurisdiction in a particular case, but the circuit court's jurisdiction is not dependent upon subsequent compliance with a rule of appellate procedure.

¶ 23 The defendant relied on nearly 100-year-old case law to support his claim that the lack of a Rule 608(a)(2) certificate showed that the grand jury was not properly impaneled and sworn. *E.g.*, *People v. Brautigan*, 310 Ill. 472, 480-81 (1923) (holding that only one grand jury at a time could have jurisdiction to indict); *People v. Gray*, 261 Ill. 140, 141-42 (1913) (holding that a defendant cannot waive the right to be indicted by a sworn grand jury); *People v. Dear*, 286 Ill. 142, 149 (1918) ("It is essential to the validity of a record of a criminal case to show that the grand jury was sworn."). It is important to note that all of these cases predate the Illinois Constitution of 1970. At least since the adoption of the Illinois Constitution of 1970, the jurisdiction of a circuit court "is derived from the state constitution and is not conferred by information or indictment." *People v. Kliner*, 2015 IL App (1st) 122285, ¶ 11 (citing *People v. Hughes*, 2012 IL

112817, ¶ 20; Ill. Const. 1970, art. VI, § 9; *People v. Benitez*, 169 Ill. 2d 245, 256 (1996)). Even if the statutory requirement that a grand jury be sworn (725 ILCS 5/112-2(b) (West 2000)) was a jurisdictional prerequisite, the record indicates that the grand jury was sworn. The indictment states: "On this 20th day of September, 2001, the Grand Jury, chosen, and sworn for the County of Madison, in the name and by the authority of the People of the State of Illinois, charges that: ***." There is no doubt that the grand jury was sworn.

¶ 24 The circuit court had jurisdiction to accept the defendant's plea and impose sentence by virtue of the Illinois Constitution of 1970 and the defendant's appearance before the court. Even if the circuit court's jurisdiction relied on a properly sworn grand jury, the record indicates that the grand jury was properly sworn. As the circuit court had jurisdiction over the defendant at the beginning of the proceedings, it did not lose that jurisdiction through any subsequent error of fact or law which may have occurred. Therefore, with one exception, we need not address the defendant's other claims of error because the circuit court had jurisdiction, and the defendant's claims were brought outside of the two-year statutory limitation on section 2-1401 petitions, and did not implicate the circuit court's jurisdiction.

¶ 25 The one exception is the defendant's claim that the circuit court did not have authority to sentence him to an extended-term sentence because he was not notified in the charging instrument that he could receive an extended-term sentence. "[A] sentence which does not conform to a statutory requirement is void." *People v. Thompson*, 209 Ill. 2d 19, 24 (2004) (citing *People v. Pinkonsly*, 207 Ill. 2d 555, 569 (2003)). And "a void

order may be attacked at any time or in any court, either directly or collaterally. [Citations]." *Id.* at 25.

¶ 26 At the time the defendant killed the victim, he was eligible for the death penalty because the murder was committed in the course of a home invasion. 720 ILCS 5/9-1 (West 2000). Additionally, a defendant who was then eligible for the death penalty could be sentenced to life in prison. 730 ILCS 5/5-8-1 (West 2000). Therefore, the defendant's argument that his sentence was not authorized by law fails.

¶ 27 CONCLUSION

¶ 28 The defendant's sentence was allowed by law, and because the circuit court had jurisdiction over the defendant, his guilty plea and sentence are not void. Therefore, the defendant's allegations of error were required to have been brought within two years of sentencing. They were not, so the judgment of the circuit court of Madison County is affirmed.

¶ 29 Affirmed.