

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).

FILED

August 23, 2016
Carla Bender
4th District Appellate
Court, IL

2016 IL App (4th) 130994-U

NO. 4-13-0994

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Vermilion County |
| JUAN REYES, |) | No. 05CF467 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Michael D. Clary, |
| |) | Judge Presiding. |

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant had already appealed the denial of his motion for leave to file a successive postconviction petition, and while that appeal was pending, the trial court lacked jurisdiction to entertain his subsequent section 2-1401 petition challenging that same ruling.

¶ 2 Defendant, Juan Reyes, appeals the denial of his petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)). The office of the State Appellate Defender (appellate defender) moves for permission to withdraw from representing him in this appeal because it can think of no reasonable argument to make in support of this appeal. We grant the appellate defender's motion, and we dismiss this appeal, because the trial court lacked jurisdiction to issue the order from which defendant appeals. Hence, the order is "void and of no effect." *Ragan v. Fourco Glass Co.*, 47 Ill. App. 3d 1, 7 (1977); see *Bachewicz v. American National Bank & Trust Co. of Chicago*, 135 Ill. App. 3d 294, 298 (1985). A nullity cannot be appealed.

¶ 3

I. BACKGROUND

¶ 4 Defendant is serving three consecutive terms of life imprisonment, plus another 30-year term of imprisonment, for first degree murder (720 ILCS 5/9-1(a)(1) (West 2002)), attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2002)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2002)), home invasion (720 ILCS 5/12-11(a)(1), (a)(2) (West 2002)), and aggravating factors (730 ILCS 5/5-8-1(a)(1)(d)(ii), (a)(1)(d)(iii) (West 2002)).

¶ 5 On January 17, 2013, he filed a motion for leave to file a successive postconviction petition. See 725 ILCS 5/122-1(f) (West 2012). One of the claims in his proposed successive petition was that the indictments for home invasion failed to allege he had entered the home "without authority" and, consequently, his convictions were "void."

¶ 6 On March 25, 2013, the trial court denied the petition for leave to file a successive postconviction petition. On April 5, 2013, defendant filed a *pro se* notice of appeal. We docketed the appeal as *People v. Reyes*, No. 4-13-0279.

¶ 7 On June 18, 2013, defendant filed a petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)), in which he requested the trial court to "vacate its order denying [him] leave to file a successive petition for [postconviction] relief." He repeated an argument he had made in his petition for leave to file a successive petition for postconviction relief, namely, that the omission of the phrase "without authority" in the counts of the indictment alleging home invasion made his convictions and sentences "void."

¶ 8 On July 16, 2013, the appellate defender moved for permission to file a late notice of appeal from the denial of leave to file a successive postconviction petition. The appellate defender explained that, in the *pro se* notice of appeal, defendant erroneously stated he was

appealing from his original convictions instead of from the denial of his motion for leave to file a successive petition. The new notice of appeal, drafted by the appellate defender, corrected that error. On July 23, 2013, we granted the appellate defender's motion to file the late notice of appeal. The Vermilion County circuit clerk file-stamped the late notice of appeal July 25, 2013.

¶ 9 On October 22, 2013, the trial court, on its own motion, dismissed the section 2-1401 petition for want of prosecution in that defendant had failed to exercise reasonable diligence in obtaining legally effective service on the State. See Ill. S. Ct. R. 103(b) (eff. July 1, 2007); Ill. S. Ct. R. 106 (eff. Aug. 1, 1985); Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). Paradoxically, however, the court declared the unserved petition to be "also ripe for adjudication," and the court proceeded to an evaluation of its merits. Finding that defendant had failed to show "diligence in presenting this matter to the court in the original action so that any error could have been properly addressed," the court concluded he had "waived" his claim. The court noted, in any event, that defendant "was on notice before trial as to the wording of the charge of [h]ome [i]nvasion against him and the jurors were properly instructed as [to] the issues of [h]ome [i]nvasion." Because defendant "had notice of the charge and the jury was properly instructed before deliberating on the verdict," "no prejudice accrued to the [d]efendant." Thus, on October 22, 2013, the court denied the section 2-1401 petition on its merits. Defendant appealed on November 6, 2013. This is the appeal we address now.

¶ 10 On February 26, 2016, in case No. 4-13-0279, we affirmed the denial of leave to file a successive postconviction petition. *People v. Reyes*, 2016 IL App (4th) 130279-U, ¶ 3.

¶ 11 II. ANALYSIS

¶ 12 "The proper filing of a notice of appeal causes the jurisdiction of the appellate court to attach and deprives the trial court of jurisdiction to modify its judgment or to rule on

matters of substance which are the subject of appeal." *Bachewicz*, 135 Ill. App. 3d at 297. "Once an appeal has been perfected, jurisdiction over the matter vests in the appellate court; the circuit court may maintain jurisdiction to further supervise or enforce the appealed order, but it cannot maintain jurisdiction to substantively alter or to vacate the order." *Rosecky v. Illinois Department of Public Aid*, 157 Ill. App. 3d 608, 613 (1987).

¶ 13 On July 25, 2013, when, by permission of the appellate court, a late notice of appeal in case No. 4-13-0279 was filed with the circuit clerk, the appellate court acquired jurisdiction over the denial of defendant's motion to file a successive postconviction petition, and the trial court was divested of jurisdiction to vacate that denial, as the section 2-1401 petition requested the trial court to do. See *id.* Thus, the order that defendant appeals, the order of October 22, 2013, is "a nullity"—which is to say there is no final and appealable order. *Bachewicz*, 135 Ill. App. 3d at 298.

¶ 14 Because the trial court itself did not perceive its lack of jurisdiction, we will not require defendant—this time—to show cause why he should not be held to be in contempt of court. See Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994). If, however, defendant values his right of access to this court, we warn him not to abuse that right, such as by filing duplicative appeals like this one. For serial abusers of the appellate process, there is such a thing as a pre-filing injunction coupled with monetary penalties. See *Support Systems International, Inc. v. Mack*, 45 F.3d 185, 186 (7th Cir. 1995) ("[We] direct the clerks *** to return unfiled any papers that the litigant attempts to file, unless and until he pays in full the sanctions that have been imposed against him."). If defendant has any other appeals pending, we admonish him to reevaluate them and make sure they are reasonably arguable under the law.

¶ 15

III. CONCLUSION

¶ 16 For the foregoing reasons, we dismiss this appeal (see *Bachewicz*, 135 Ill. App. 3d at 301), and we assess \$50 in costs against defendant (see 55 ILCS 5/4-2002(a) (West 2014)).

¶ 17 Appeal dismissed.