2017 IL App (2d) 161049-U
No. 2-16-1049
Order filed December 5, 2017

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANDRE L. JACKSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 13-CF-1358 Honorable Mark L. Levitt, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly denied defendant's section 2-1401 petition, as his claim that a subsequent event (his extradition) invalidated the judgment was not cognizable under section 2-1401; (2) on defendant's appeal from the denial of his section 2-1401 petition, we lacked jurisdiction to review a separate judgment in the underlying case: the judgment was not specified in defendant's notice of appeal, and, although defendant implied that the judgment was void, our jurisdiction of the section 2-1401 action did not give us jurisdiction of the underlying case and thus did not allow us to vacate any judgment entered therein.

¶ 2 Defendant, Andre L. Jackson, appeals, seeking reversal of the trial court's denial of his petition for relief under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)); the petition sought vacatur of his sentence of probation *nunc pro tunc* to the

date on which he was extradited from Illinois to Wisconsin. We hold that the petition did not state a claim for relief under section 2-1401, and we therefore affirm the court's denial of the petition. Defendant also asks us to vacate or modify a civil judgment for fees from which he did not appeal. We lack jurisdiction to review that judgment and thus necessarily let it stand.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on a count of burglary (entry with intent to commit forgery) (720 ILCS 5/19-1(a) (West 2012)) and five counts of forgery (creating forged currency, altering a document (currency), delivering forged currency, and possession of forged currency with intent to deliver) (720 ILCS 5/17-3(a)(1), (a)(2), (a)(3) (West 2012)). He entered a negotiated plea to one count of burglary and, on October 11, 2013, the court sentenced him to 36 months' probation.

¶ 5 On March 21, 2014, defendant filed a motion seeking to enforce the terms of his sentence. He claimed that the Lake County jail was improperly detaining him based on four Wisconsin warrants. Citing *People ex rel. O'Connor v. Bensinger*, 48 Ill. 2d 440 (1971), he asserted that the warrants by themselves had no effect on his probation. Citing *People ex rel. Barrett v. Bartley*, 383 Ill. 437, 446 (1943), he asserted that, by extraditing him, the State had relinquished the jurisdiction it needed to keep him on probation. Further related proceedings followed, and, on June 20, 2014, the court entered an order stating, *inter alia*, that defendant's sentence was "*stayed*." (Emphasis in original.)

¶ 6 On September 17, 2015, the State moved to revoke defendant's probation on the basis that he had violated its terms by failing to return to Illinois upon his release from a Wisconsin prison. An amended petition alleged that he had also failed to pay court costs, probation service fees, and restitution and had failed to perform his required public service. Defendant, again

citing *Bensinger* and *Bartley*, moved under sections 2-619(a)(1) and 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(1), (a)(9) (West 2016)) to dismiss the State's petition. He asserted that, by extraditing him unconditionally, Illinois had given up jurisdiction over him. He contended that, under the terms of the Uniform Criminal Extradition Act (725 ILCS 225/1 *et seq*. (West 2014)), his extradition would have been consistent with the trial court's retaining jurisdiction of him only if the State had required Wisconsin to return him immediately after his conviction, which the State had not done. The State responded to the motion on its merits, arguing, among other things, that *Bartley* had been legislatively abrogated. The court denied the motion, ruling that the law did not mandate the result for which defendant argued. However, it also made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that no just reason existed to delay appeal. The ensuing appeal is currently pending.

¶ 7 Defendant next filed the petition under section 2-1401 that is at issue in this appeal; he made much the same claim as he had made in his motion to dismiss. He asserted that, because he had been extradited on a governor's warrant and the State had failed to require Wisconsin to return him immediately after trying him, the court had lost jurisdiction of him. He asked the court to vacate his probation order *nunc pro tunc* to October 29, 2014, which he alleged was the date of his extradition.

¶ 8 In response, the State argued, *inter alia*, that defendant's claim was not cognizable under section 2-1401. It asserted that a court may grant section 2-1401 relief only if the petition alleges facts that, if known to the court when the judgment was entered, would have precluded entry of the judgment, and that defendant's extradition was not such a fact. It therefore contended that defendant's claim rested upon an error of law. This, it maintained, was a fatal flaw. It did not argue that the petition was untimely.

¶ 9 On November 29, 2016, the court ruled that it had already addressed defendant's extradition-based loss-of-jurisdiction argument when it denied his section 2-619 motion. It entered an order that (1) denied defendant's section 2-1401 petition, (2) terminated his probation "unsatisfactorily," and (3) entered a civil judgment of $2,112.62 against him based on his unpaid fines, fees, and restitution. Defendant filed a timely notice of appeal in which he sought review of the "November 29, 2016 Denial of [his section] 2-1401 petition."

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant asks us to "rule that the trial court erred in denying the 2-1401 Petition" and to "specifically hold that the probation order was terminated on October 29, 2014." He further asks us to "vacate the civil judgment that entered on November 29, 2016, [because] the case was not properly before the trial court at that time" or, alternatively, "reduce the judgment *** by $571.67 in light of the fact that the probation ended on October 29, 2014." He contends that the matters he raises on appeal are all ones of law, so that our review is *de novo*.

¶ 12 The State responds (1) that the court properly based its denial of the petition on defendant's prior litigation of the identical issue in his section 2-619 motion, (2) that the petition was untimely, and (3) that defendant was incorrect about the law of extradition. It asserts that we should review the denial under an abuse-of-discretion standard. Finally, it argues that the civil judgment was separate from the section 2-1401 petition's denial and that we therefore have no basis to review it.

¶ 13 We hold that defendant failed to state a claim for relief under section 2-1401 in any of its facets, and we therefore affirm the court's denial of the petition. In doing so, we reject the bases for affirmance urged by the State. However, we agree with the State that we cannot review the civil judgment.

¶ 14 The parties disagree whether the applicable standard of review is *de novo* or abuse of discretion. We agree with defendant; our review must be *de novo*. The choice between the *de novo* standard and the abuse-of-discretion standard depends on the nature of the claim in the petition. If the petitioner's entitlement to relief turned on an issue of law, review is *de novo*; if it turned on whether facts raised in the petition, if known to the court when judgment was entered, would have prevented the court from entering that judgment, review is for an abuse of discretion.[1] Compare *People v. Vincent*, 226 Ill. 2d 1, 16-18 (2007) (mandating *de novo* review of the dismissal of a section 2-1401 petition where the issue was whether the petition was defective as a matter of law), with *Warren County Soil & Water Conservation District v. Walters*, 2015 IL 117783, ¶ 52 (acknowledging *Vincent*, but applying the abuse-of-discretion standard to the review of a ruling on "a traditional fact-dependent challenge to a final judgment"). Here, the issues were purely ones of law, so *Vincent* mandates *de novo* review.

¶ 15 We do not agree with the State's seeming implication that the litigation of the extradition-based issue in the proceedings on defendant's motion to dismiss created some form of legal bar to his raising the same issue in his section 2-1401 petition. To the extent that the State suggests that some unnamed preclusion doctrine legally barred defendant from relitigating the effect of the extradition on his probation, it has failed to support that claim by argument and citation to relevant authority, and it has thus forfeited the claim. See Ill. S. Ct. R. 341(h)(7), (i) (eff. Jan. 1, 2016) (requiring both appellants and appellees to support their claims with arguments and citations to appropriate authority); *People v. Olsson*, 2016 IL App (2d) 150874, ¶ 22 (noting that

[1] Entitlement to section 2-1401 relief can also turn on a *question* of fact, thus requiring the court to act as a finder of fact; in such cases, review is under the manifest-weight-of-the-evidence standard. *In re M.B.*, 235 Ill. App. 3d 352, 379 (1992).

claims not properly supported are forfeited). Further, no preclusion doctrine is obviously applicable here, so we doubt that the State could have supported such an assertion.

¶ 16 The State argues that the petition was untimely, but the State itself is untimely in raising that defense. To be sure, section 2-1401 has what amounts to a statute of limitations in section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2016)); that section limits the time for filing most petitions to two years. However, that limitations period is an affirmative defense that a party can forfeit; a party may not raise an affirmative defense for the first time on appeal. See *People v. Berrios*, 387 Ill. App. 3d 1061, 1063 (2009) (section 2-1401(c) is an affirmative defense that the State must raise); see also, *e.g.*, *In re Marriage of Heinrich*, 2014 IL App (2d) 121333, ¶ 44 (a party cannot raise an affirmative defense for the first time on appeal). The potential untimeliness of the petition is thus not a proper alternative basis for affirmance.

¶ 17 Although we do not accept the State's proposed rationales for affirmance, we nevertheless agree that the trial court did not err in denying defendant's petition. We note that the trial court appears to have denied the petition because it disagreed with the assertions of substantive law on which defendant relied. However, we may affirm its ruling on any basis supported by the record. *E.g.*, *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005). We hold that defendant failed to state a claim on which relief could be granted under section 2-1401.

¶ 18 Section 2-1401—section 2-1401(b-5) (735 ILCS 2-1401(b-5) (West 2016)) aside—sets out no standards for the availability of relief. It merely provides that, although "[w]rits of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished," the relief that was "heretofore obtainable" under those abolished forms of action remains available in actions under the section. 735 ILCS 5/2-1401(a) (West 2016). Recent authority regularly recognizes two common forms of viable section 2-1401 petition and less

frequently recognizes a third. *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 15. The first form, exemplified by *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986), "serves to bring before the court *** facts not appearing of record which, if known to the court at the time judgment was entered, would have prevented its rendition. [Citations.]" (Internal quotation marks omitted.) *Pajor*, 2012 IL App (2d) 110899, ¶ 13. The second form, such as is described in *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95 (2002), allows a petitioner to vacate a judgment as void—a circumstance that arises only if the court lacked jurisdiction to enter the judgment. The third form, described in *Collins v. Collins*, 14 Ill. 2d 178 (1958), allows a petitioner to vacate a judgment based on errors of law apparent on the face of the record.

¶ 19 As these descriptions show, all three forms of currently viable section 2-1401 petition require that the petitioner show that some condition that existed *when the court entered the judgment* would have or could have prevented the court from entering it. That condition can be either an error of law, as in the *Sarkissian* and *Collins* forms, or a previously unknown fact, as in the *Airoom* form, but it is always something that obtained when the court entered the judgment. Defendant's claim is not of that sort. He does not suggest that anything was wrong with his sentencing order *when the court entered it*, but merely suggests that the order's effect terminated upon his extradition. Thus, the petition failed to state a claim on which relief could be granted, and the court did not err in denying it.

¶ 20 Defendant also asks us to review the civil judgment for $2,112.62. That judgment was not a part of the trial court's ruling on the petition, so we must address whether it is within the scope of our jurisdiction in this appeal. We conclude that it is not. Defendant's notice of appeal was explicitly limited to the "November 29, 2016 Denial of [his section] 2-1401 petition." The general rule is that " 'a notice of appeal confers jurisdiction on a court of review to consider only

the judgments or part thereof specified in the notice of appeal.' " *Affiliated Health Group, Ltd. v. Devon Bank*, 2016 IL App (1st) 152685, ¶ 27 (quoting *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979)). Thus, defendant's notice of appeal explicitly excluded the civil judgment.

¶ 21 We recognize that a defendant can challenge a void judgment or order for the first time on appeal. *E.g.*, *People v. Hall*, 2014 IL App (1st) 122868, ¶ 8. We further recognize that defendant, by alleging that the court lacked jurisdiction over him, effectively asserted that the civil judgment was void. See, *e.g.*, *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 27 (a judgment is void if and only if the court that entered it lacked jurisdiction). However, our jurisdiction in the appeal of the order disposing of a section 2-1401 proceeding does not give us jurisdiction to review orders in the underlying proceeding. An appellate court's jurisdiction to review a ruling in a collateral action—including a ruling like the denial of a section 2-1401 petition—is separate from that court's jurisdiction to review any rulings in the underlying proceeding. *People v. Partee*, 125 Ill. 2d 24, 35-36 (1988); see also *People v. Walker*, 395 Ill. App. 3d 860, 867 (2009) (that the appellate court has taken jurisdiction in a direct appeal has no effect on the trial court's jurisdiction to make rulings in a collateral proceeding). Moreover, we do not have jurisdiction to decide whether an order is void merely because a party before us raises a voidness claim; we must have proper jurisdiction to review the order or else any order of ours vacating the void order will itself be void. See *People v. Flowers*, 208 Ill. 2d 291, 308 (2003). Thus, despite defendant's implicit claim that the civil judgment was void, we nevertheless lack power to review it.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the denial of defendant's petition; we decline to review the money judgment as outside our jurisdiction.

¶ 24 Affirmed.