2018 IL App (1st) 152865-U

No. 1-15-2865

Order filed March 15, 2018

Fourth Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 85 C 8448
	)	
DONZELL HARRIS,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: *Sua sponte* dismissal of defendant's petition for relief from judgment was proper.

¶ 2 Following a jury trial, defendant Donzell Harris was convicted of murder and sentenced to natural life imprisonment. His conviction has been affirmed on direct appeal and against various collateral challenges. *People v. Harris*, No. 1-14-2859 (2016); No. 1-14-1017 (2016); No. 1-12-3260 (2014); No. 1-08-2164 (2011); No. 1-08-2904 (2009); No. 1-07-0313 (2008); No. 1-06-1765 (2008); No. 1-05-1765 (2006); No. 1-03-3460 (2005); No. 1-01-2566 (2002); No. 1-

98-4406 (1999); No. 1-92-2468 (1993); No. 1-86-1595 (1988) (unpublished orders under Supreme Court Rule 23). Defendant now appeals *pro se* from an order dismissing *sua sponte* his 2014 petition for relief from a void judgment. 735 ILCS 5/2-1401(f) (West 2014). He contends that his conviction is void for lack of jurisdiction because the indictment did not allege capital murder. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with two counts of murder in the May 1985 shooting death of his wife and was convicted of murder in a jury trial. The State sought the death penalty, and the death penalty hearing was heard by a jury that was unable to reach a unanimous verdict that defendant was eligible for a death sentence. The court found that defendant's offense was exceptionally brutal and heinous and sentenced him to natural life imprisonment. The original mittimus reflected two counts of murder but was corrected to reflect a single count.

¶ 4 On direct appeal, we held that the sentencing jury did not make a final determination regarding defendant's death eligibility and that the life sentence upon the trial court's finding of a brutal and heinous offense was proper. *Harris*, No. 1-86-1595. We affirmed the summary dismissal of one of defendant's postconviction petitions raising an *Apprendi* challenge to his life sentence. *Harris*, No. 1-01-2566. We affirmed the summary dismissal of another postconviction petition claiming that his life sentence was based on elements not charged in the indictment. *Harris*, No. 1-05-1765. We affirmed the dismissal of one of defendant's petitions for relief from judgment claiming that his sentence was based on dual convictions though there was only one victim. *Harris*, No. 1-06-1765.

¶ 5 Defendant filed the instant petition by mail, and the clerk of the circuit court stamped it as received on November 17, 2014, and filed on December 1, 2014. Defendant claimed that he

was improperly convicted of murder on two legal theories though only one person was killed, and that the jury was instructed on both theories but erroneously not provided separate verdict forms for each theory. He claimed that his life sentence is void because the sentencing jury "acquitted of any enhancement beyond the 40-year [*sic*] maximum" so that the court could not sentence him to life imprisonment.

¶ 6 On August 14, 2015, the circuit court denied defendant's petition to vacate judgment.

¶ 7 In his *pro se* appeal, defendant contends that his conviction is void for lack of subject-matter jurisdiction because the indictment did not charge him with capital murder. He contends that he cannot waive or forfeit his voidness challenge.

¶ 8 Section 2-1401 of the Code of Civil Procedure provides that a defendant may seek relief from a judgment against him more than 30 days after the judgment by filing a petition. 735 ILCS 5/2-1401(a) (West 2014). Such petitions may be filed to seek relief from a criminal conviction. *People v. Shinaul*, 2017 IL 120162, ¶ 8. After 30 days from the filing of such a petition, the court may dismiss the petition *sua sponte* if it finds the petition to be legally deficient. *People v. Matthews*, 2016 IL 118114, ¶ 8. Such disposition is proper when it is clear on the petition and record, including prior proceedings, that the defendant is not entitled to relief as a matter of law. *People v. Vincent*, 226 Ill. 2d 1, 9, 12 (2007). Issues litigated to a final judgment on the merits, in an appeal in the same action between the same parties, are barred as *res judicata* in a later section 2-1401 petition. *Stolfo v. KinderCare Learning Centers, Inc.*, 2016 IL App (1st) 142396, ¶¶ 24-30. Our review of the dismissal of a section 2-1401 petition is *de novo*. *Matthews*, ¶ 9.

¶ 9 First degree murder is a single offense. *People v. Smith*, 233 Ill. 2d 1, 16 (2009), citing 720 ILCS 5/9-1(a) (West 2006). At the time of defendant's offense, the murder statute provided

that a person convicted of murder would receive a sentence of death or imprisonment depending on whether certain findings were or were not made. Ill. Rev. Stat. 1985, ch. 38, ¶ 9-1(g), (h).

¶ 10 The *Apprendi* rule is that " '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' " *People v. Johnson*, 2015 IL App (2d) 140388, ¶ 8, quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The *Apprendi* court found that due process requires that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' " *Apprendi*, 530 U.S. at 476, quoting *Jones v. United States*, 526 U.S. 227, 243 n. 6 (1999). However, *Apprendi* does not apply retroactively to convictions that were final before *Apprendi* was decided. *Johnson*, ¶ 8, citing *People v. De La Paz*, 204 Ill. 2d 426 (2003).

¶ 11 Here, defendant's contention on appeal was not alleged in his petition. Looking past his characterization that he was not charged with "capital murder," which as stated above is not a separate offense from first degree murder, he is contending that his conviction and life sentence are void because the indictment did not allege a factor qualifying him for a death sentence or life imprisonment. However, our supreme court has held that the circuit court has subject-matter jurisdiction in all criminal and civil cases and that a sentence contrary to statutory authority is not void so that a challenge thereto is forfeitable. *People v. Castleberry*, 2015 IL 116916, ¶¶ 11-19, citing Ill. Const. 1970, art. VI, § 9. Also, defendant's contention is an *Apprendi* claim despite denying so in his reply brief. However, as stated above, *Apprendi* does not apply to cases that were final before *Apprendi* was decided in 2000, such as this case. Lastly, we affirmed the disposition of defendant's earlier petitions raising *Apprendi* claims so his contention is barred as

res judicata. For these reasons, we reject defendant's contention that his conviction and sentence are void and that he cannot forfeit such a claim. We conclude that the *sua sponte* dismissal of his petition was not erroneous.

¶ 12 Accordingly, the judgment of the circuit court is affirmed.

¶ 13 Affirmed.