2018 IL App (1st) 163167-U

No. 1-16-3167

THIRD DIVISION
June 20, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. RODNEY LOVE, Petitioner-Appellant.	))))))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. No. 02 CR 27150 HONORABLE ANGELA MUNARI PETRONE, JUDGE PRESIDING.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment

ORDER

¶ 1 *Held*: The dismissal of petitioner's request for relief from judgment under section 2-1401 of the Code of Civil Procedure is affirmed, where the record does not support his claim that the indictment on which his conviction was based had been *nol-prossed*.

¶ 2 Petitioner, Rodney Love, appeals from the dismissal of his petitions for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2–1401 *et*

seq. (West 2010)). Petitioner contends that the circuit court of Cook County erred in dismissing his petitions because the indictment for murder on which his conviction was based had been *nol-prossed* by the State at the time of his arraignment and was not reinstated prior to trial. For the reasons set forth below, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Petitioner was arrested for the August 28, 2002, shooting death of Lyphus Pouncy and was subsequently charged with first degree murder in a six-count indictment designated as case number 02 CR 27150. No weapons or controlled substance charges were included in that indictment. On November 13, 2002, petitioner appeared for arraignment on the murder indictment and also on multiple counts of aggravated unlawful use of a weapon, unlawful use of a weapon by a felon, and possession of a controlled substance, which were alleged in a separate charging instrument originally designated as case number 02 CR 27151.

¶ 5 At the arraignment hearing, the clerk called two cases: "02 CR 27150 and 02 CR 27371." The court stated "[t]his matter is here for arraignment, 2000 27150. I will tender a copy of the indictment charging [petitioner] with several counts of first degree murder." Defense counsel acknowledged receipt and waived formal reading of the murder charges on petitioner's behalf. Thereafter, the court tendered a copy of a document charging petitioner with "several counts of unlawful use of a weapon by a felon and also aggravated unlawful use of a weapon." The court also referred to that case as "2000 27150." Defense counsel acknowledged receipt and waived formal reading of the weapons charges. At that point in the proceedings, the prosecutor interjected: "Could I put something – on that case, motion State nolle. That was superseded by

271." The court inquired "[s]o 50 is nolled?" The prosecutor responded that was "[c]orrect," and the court then stated "27371, I will tender a copy of that indictment where, again, he is charged with numerous counts of aggravated unlawful use of a weapon, possession of a controlled substance, unlawful use of a weapon by a felon." Defense counsel acknowledged receipt, waived formal reading, and entered a plea of not guilty to each charge. The prosecutor then informed the court that the State had filed its motion and answer to discovery and had tendered all discovery in case number "02 CR 27371, that is the aggravated UUW case." He then stated that in "27570, no discovery has been – the murder case, no discovery has been tendered, and we will tender the discovery we have. It's an ongoing case." Defense counsel stated "25017 I will acknowledge receipt, seek leave to file my appearance and acknowledge receipt of the weapon[s] case." At the conclusion of the arraignment hearing, the murder case was continued by agreement to December 18, 2002.

¶ 6 During the next three years, the parties engaged in discovery and pretrial proceedings on the charge of first degree murder. In November 2005, petitioner was tried before a jury and found guilty on two counts of the indictment. The circuit court merged the two convictions, ordered a presentence investigation report, and subsequently sentenced petitioner to serve a prison term of 30 years for murder as well as a mandatory consecutive term of 25 years based on his discharge of the firearm that caused the victim's death.

¶ 7 Petitioner's conviction was affirmed on direct appeal. *People v. Love*, 377 Ill. App. 3d 306 (2007). He subsequently filed a postconviction petition and a supplemental postconviction petition, which were summarily dismissed by the circuit court. Petitioner appealed, and this court

reversed and remanded for second-stage proceedings. *People v. Love,* No. 1-09-0478 (2011) (unpublished order under Supreme Court Rule 23). The postconviction petitions were ultimately dismissed on the State's motion, and this court affirmed. *People v. Love*, No. 1-13-3104 (2015) (unpublished order under Supreme Court Rule 23).

¶ 8 On June 9, 2010, petitioner filed a *pro se* petition for relief from judgment under section 2-1401(f) of the Code (735 ILCS 5/2-1401(f) (West 2010)), asserting that his conviction for first degree murder was void for lack of jurisdiction because he was not lawfully charged with that offense. The circuit court *sua sponte* denied defendant's section 2-1401 petition before the expiration of the 30-day period for the State to respond. On appeal, this court granted the parties' agreed motion for summary disposition requesting that the cause be remanded for further proceedings consistent with *People v. Laugharn*, 233 Ill. 2d 318 (2009). *People v. Love,* No. 1-10-2353 (2011) (dispositional order).

¶ 9 On August 8, 2011, petitioner filed a supplemental petition under section 2-1401(f), which also asserted that his conviction was void for lack of jurisdiction.[1] In February 2014, petitioner filed a motion requesting that his petitions be returned to the circuit court's call for further proceedings pursuant to this court's mandate. That motion was denied, and petitioner appealed. This court again granted the parties' agreed motion for summary disposition and remanded the case to the circuit court with directions that the section 2-1401 petition be returned to the circuit court's call and considered on the merits. *People v. Love,* No. 1-14-2825 (2015) (dispositional order).

[1] The supplemental petition also bears a file-stamped date of July 28, 2011. However, there is no indication that any action was taken on the petition between that date and August 8, 2011.

¶ 10 On remand, the State moved for dismissal, asserting that the petitions were untimely because they were not filed within the two-year limitations period specified in section 2-1401 and that they improperly asserted errors of law not cognizable under that provision. On August 31, 2016, the circuit court granted the State's motion and dismissed the petitions as untimely and as barred by *res judicata*. Petitioner has appealed.

¶ 11 ANALYSIS

¶ 12 Section 2–1401 provides a comprehensive statutory procedure under which a party may challenge a final order or judgment in civil and criminal proceedings. *People v. Thompson*, 2015 IL 118151, ¶ 28. In general, a section 2-1401 petition must be filed within two years after the challenged judgment. 735 ILCS 5/2-1401(c) (West 2010); *Thompson*, *supra* ¶ 28. However, an exception to the two-year time limitation has been recognized by the Illinois Supreme Court where the petition attacks a final judgment on the ground that it is void. *Thompson*, *supra* ¶ 29 (citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002)). "A voidness challenge based on a lack of personal or subject matter jurisdiction is not subject to forfeiture or other procedural restraints because a judgment entered by a court without jurisdiction 'may be challenged in perpetuity.' " *Thompson*, *supra* ¶ 31 (quoting *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 38). We review *de novo* the dismissal of a section 2-1401 petition on legal grounds. *Thompson*, *supra* ¶ 25 (citing *People v. Vincent*, 226 Ill. 2d 1, 18 (2007)).

¶ 13 Although the section 2-1401 petitions at issue here were filed more than five years after the conviction for murder was entered, the two-year deadline set forth in section 2-1401 did not apply because the petitions were premised on claims that the conviction was void for lack of

jurisdiction. See *Thompson, supra* ¶¶ 29, 31. Accordingly, the circuit court's determination that the petitions were untimely was incorrect and did not provide a valid basis for their dismissal. In addition, dismissal of the section 2-1401 petitions was not justified on the ground that they were barred by *res judicata*, where neither the initial nor the supplemental postconviction petition alleged a lack of subject matter jurisdiction.

¶ 14 Yet this court reviews the judgment of the circuit court, rather than its reasoning, and can sustain the judgment on any grounds established by the record regardless of whether the circuit court relied on those grounds and regardless of whether that court's analysis was correct. *People v. Ringland*, 2015 IL App (3d) 130523, ¶ 33; see also *People v. Miles*, 2017 IL App (1st) 132719, ¶ 22 (holding that a reviewing court may affirm the dismissal of a section 2-1401 petition on any basis in the record). We therefore consider whether the circuit court's judgment can be sustained based on the record presented.

¶ 15 Petitioner challenges the dismissal of his section 2-1401 petitions, arguing that the circuit court lacked subject matter jurisdiction because the murder indictment had been *nol-prossed* prior to trial. In the alternative, petitioner contends that there is a conflict between the report of proceedings and the common law record and, therefore, this court should conclude the report of proceedings controls or should remand the case for a hearing under Supreme Court Rule 329 (eff. July 1, 2017) to verify the action taken with regard to the murder indictment.

¶ 16 The State responds that petitioner is not entitled to relief under section 2-1401 because the record does not establish that the indictment for murder had been *nol-prossed*, nor does it present any conflict that necessitates resolution by the circuit court.

¶ 17 It is established that "[t]he common law record, including the docket sheet, 'imports verity and is presumed correct.' " *People v. Fike*, 117 Ill. 2d 49, 56 (1987) (quoting *People v. Williams*, 27 Ill. 2d 327, 329 (1963)). "However, where the common law record is contradicted by matters in the report of proceedings, a reviewing court must look at the record as a whole to resolve the inconsistencies." *Id.*; see also *People v. Durr*, 215 Ill. 2d 283, 306 (2005).

¶ 18 Here, the common law record includes petitioner's certified statement of conviction, which documents the action taken on November 13, 2002, with regard to the murder indictment designated as case number 02 CR 27150. That certified statement reflects that the public defender was appointed to represent petitioner; petitioner was arraigned, entered a plea of not guilty, and received the admonishment as to trial *in absentia*; and the case was continued by agreement to December 18, 2002. That information is consistent with the docket sheet entry for the date of petitioner's arraignment on the murder charge. Nothing in the common law record indicates that the circuit court entered a *nolle prosequi* on the indictment for murder or that the State ever requested entry of such an order.

¶ 19 Petitioner acknowledges that his claim that the murder charge was *nol-prossed* finds no support in the common law record. He relies, instead, on a portion of the report of proceedings for the arraignment hearing during which the circuit court used a two-digit reference to a partial case number to inquire "[s]o 50 is nolled?" and the prosecutor responded that was "[c]orrect." According to petitioner this exchange contradicts the common law record and unambiguously reflects the prosecutor requested that the murder indictment be *nol-prossed* and that the circuit court granted the State's request. We disagree.

¶ 20 Petitioner's argument centers on two isolated comments, taken out of context, and essentially ignores the remainder of the arraignment proceedings. As set forth above, when petitioner appeared on November 13, 2002, the clerk announced the two cases that were before the court: 02 CR 27150 and 02 CR 27371. With regard to the indictment for murder, the circuit court identified that case as number "2000 27150." However, the court then used the same number to refer to the second case, involving weapons and controlled substance charges. In requesting entry of a *nolle prosequi* "on that case," the prosecutor indicated it had been "superseded by 271" and responded in the affirmative to the court's inquiry "[s]o 50 is nolled?" The court then tendered to defense counsel the new indictment in case number "27371," charging petitioner with the weapons and controlled substance offenses. Thereafter, the prosecutor informed the court that the State had tendered all discovery in case number "02 CR 27371, that is the aggravated UUW case." He then stated that in "27570, *** the murder case *** we will tender the discovery we have. It's an ongoing case." Defense counsel responded "25017 I will acknowledge receipt, seek leave to file my appearance and acknowledge receipt of the weapon[s] case." At the conclusion of the arraignment hearing, the murder case was continued by agreement to December 18, 2002.

¶ 21 When the report of proceedings is considered in its entirety, it is clear that the State did not move for entry of a *nolle prosequi* on the murder charge. Rather, the State's motion pertained to the charging instrument in the second case, alleging that petitioner had committed various weapons and controlled substance offenses. This conclusion is consistent with the certified statement of conviction and the docket entry for November 13, 2002. Moreover, the presentence

investigation report contained in the record includes FBI arrest records for petitioner, which reflect that case number "2002CR271510," charging weapons and controlled substance offenses, was superseded and disposed by entry of a *nolle prosequi* on November 13, 2002.

¶ 22 Petitioner maintains, however, that the murder charge was *nol-prossed* and that the State should be bound by the actions of its "agent." We note that the references to inaccurate or nonexistent case numbers began with the circuit court's initial reference to the murder prosecution as case number "2000 27150." No such case was pending against petitioner. Indeed, he could not have been charged with murder under that case number, given that the murder prosecution was based on a shooting committed in August 2002 and charged by indictment in November 2002. The court compounded the problem by using the same number to identify the case charging petitioner with weapons and controlled substance offenses. The discrepancies in the cases' numerical designations then progressed with similar misstatements by both defense counsel and the prosecutor. All told, there were no fewer than five misstatements with regard to the identification numbers of the two cases before the court on November 13, 2002. Given the multiple inaccuracies in the identification of the relevant case numbers, we conclude that the circuit court's two-digit reference to a partial case number cannot serve as a reliable basis for determining which case was *nol-prossed*.

¶ 23 Rather, the only reliable references to the cases pending against petitioner are those in which the court and the prosecutor identify the nature of the charges. Those comments clearly indicate that the prosecution for murder was "an ongoing case," and that the initial charging

instrument for the weapons and controlled substance offenses was *nol-prossed* because it was superseded by another charging instrument for the same offenses.

¶ 24 We also find unpersuasive petitioner's assertion that the prosecution for murder proceeded because the court and the parties were "unaware" that the indictment had been *nol-prossed*. It is undisputed that the murder case was continued by agreement moments after the entry of the *nolle prosequi* and just before the prosecutor stated that murder prosecution was "an ongoing case." Neither petitioner nor his attorney expressed any confusion or sought clarification as to which case was being *nol-prossed* and which would proceed. Thus, the only reasonable conclusion is that both parties and the court understood the State was proceeding with the prosecution for murder in case number 02 CR 27150 and with the prosecution for the weapons offenses in case number 02 CR 27371, after the original charging instrument in 02 CR 27151 had been superseded and *nol-prossed*.

¶ 25 When the record is considered as a whole, it is clear that the charges of aggravated unlawful use of a weapon, unlawful use of a weapon by a felon, and possession of a controlled substance were *nol-prossed* because they were superseded by the indictment in case number 02 CR 27371. This is consistent with the certified statement of conviction, the docket entry for the arraignment hearing, and the information contained in the presentence investigation report. In addition, the certified statement of disposition in case number 02 CR 27151 affirmatively shows that the weapons and controlled substance charges alleged in that case were *nol-prossed* on

November 13, 2002, because the charging instrument was superseded by the indictment designated as case number 02 CR 27371.[2]

¶ 26 Because the report of proceedings for the arraignment hearing does not establish that the charge of murder was *nol-prossed*, it does not create an actual conflict with the common law record. Therefore, petitioner's reliance on cases holding that the report of proceedings should take precedence is misplaced. See *People v. Martinez*, 361 Ill. App. 3d 424, 427 (2005) (recognizing that it is only where a conflict exits between the report of proceedings and the common law record that a reviewing court may give precedence to the report of proceedings); see also *People v. Tackett*, 130 Ill. App. 3d 347, 353 (1985) (noting that a reviewing court may determine to rely on either the common law record or the report of proceedings, depending on whether one of those sources has an internal inconsistency). For the same reason, there is no merit to petitioner's alternative argument that the cause should be remanded for a hearing under Supreme Court Rule 329. Such a hearing is unnecessary given that there is no actual controversy as to what transpired at the arraignment hearing.

¶ 27 In sum, we conclude that the record does not support petitioner's assertion that the circuit court lacked jurisdiction because the indictment for murder had been *nol-prossed* prior to trial. Accordingly, we find no merit in petitioner's claim that the circuit court erred in dismissing the section 2-1401 petitions which were premised on lack of jurisdiction.

¶ 28 For all of the foregoing reasons, the judgment of the circuit court is affirmed.

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[2] Although this document is not included in the record on appeal, it was attached as an appendix to the State's brief, and this court can take judicial notice of it. Public documents that are included in the records of other courts may be the subject of judicial notice because they "fall within the category of readily verifiable facts which are capable of 'instant and unquestionable demonstration.'" *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159 (1976) (quoting 9 Wigmore, Evidence sec. 2571, at 548 (3d ed. 1940)).

¶ 29 Affirmed.