2018 IL App (4th) 150743-UB

NO. 4-15-0743

FILED
November 28, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JOHN A. LOFTON,	)	No. 01CF826
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Harris and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's due process rights were violated when the circuit court granted the State's motion to dismiss defendant's petition without giving defendant an opportunity to respond, but the error was harmless.

¶ 2 In May 2015, defendant, John A. Lofton, filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2014)). On June 5, 2015, the Champaign County circuit court gave the State 30 days to respond to defendant's petition. On July 20, 2015, the State filed a motion to dismiss defendant's section 2-1401 petition. Two days later, the court entered a written order dismissing defendant's petition. On August 10, 2015, defendant filed a document entitled "Supplemental Pleadings" and a motion to reconsider, noting, *inter alia*, he never got a chance to respond to the State's motion to dismiss. The court denied defendant's motion to reconsider.

¶ 3 Defendant appealed and asserted (1) his due process rights were violated because

the circuit court dismissed his section 2-1401 petition without giving him an opportunity to respond, (2) the court dismissed his petition before it was ripe for adjudication, and (3) the circuit clerk improperly imposed numerous fines and fees against him. In April 2018, this court affirmed the circuit court's dismissal of defendant's May 2015 section 2-1401 petition but vacated five of defendant's fines because they were imposed by the circuit clerk. Defendant filed a petition for leave to appeal to the Illinois Supreme Court. In September 2018, the supreme court denied defendant's petition; however, in the exercise of its supervisory authority, it directed this court to vacate our judgment and, in light of *People v. Vara*, 2018 IL 121823, consider whether this court has jurisdiction to address and vacate the clerk-imposed fines in this matter. *People v. Lofton*, No. 123580 (Ill. Sept. 26, 2018) (nonprecedential supervisory order on denial of petition for leave to appeal). Accordingly, we vacated our original judgment, and we again affirm the circuit court's dismissal of the section 2-1401 petition but do not vacate the clerk-imposed fines.

¶ 4 I. BACKGROUND

¶ 5 In May 2001, the State charged defendant by information with one count of unlawful possession of cannabis with the intent to deliver (720 ILCS 550/5(g) (West 2000)), alleging that, on May 10, 2001, defendant knowingly and unlawfully possessed with the intent to deliver more than 5000 grams of a substance containing cannabis. In January 2002, the State added a second count, charging defendant with unlawful possession with the intent to deliver more than 2000 grams but not more than 5000 grams of a substance containing cannabis (720 ILCS 550/5(f) (West 2000)). The parties had entered into a plea agreement, under which defendant would plead guilty to the second count and the State would request dismissal of the first count and recommend a sentence of 24 years. At the January 2002 plea hearing, defendant

initially pleaded guilty to the second count. After the circuit court heard the factual basis, defendant indicated he no longer wanted to plead guilty. After talking with his attorney and wife, defendant persisted in not pleading guilty. At the State's request, the court dismissed the second count.

¶ 6 The parties later entered into a second plea agreement, under which defendant would plead guilty to a reinstated second count of unlawful possession of cannabis with the intent to deliver and the State would seek dismissal of the first count and recommend a sentence of 30 years' imprisonment. The State refiled its original second count; and at an October 2005 plea hearing, the circuit court accepted defendant's plea to count II, dismissed count I, and sentenced defendant to 30 years in prison as a Class X offender (730 ILCS 5/5-5-3(c)(8) (West 2000)). Defendant did not file a direct appeal.

¶ 7 On November 7, 2006, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2006)), alleging a freestanding claim of actual innocence and a denial of his right to effective assistance of counsel. On November 13, 2006, the circuit court found the petition frivolous and patently without merit and denied defendant's postconviction petition. On November 20, 2006, defendant filed a second *pro se* postconviction petition, raising claims similar to the first petition. Eight days later, the circuit court dismissed defendant's second postconviction petition, finding it was identical to the first postconviction petition that had already been denied. Defendant appealed both judgments in the same late notice of appeal. This court affirmed the circuit court. *People v. Lofton*, No. 4-06-1107 (Dec. 31, 2007) (unpublished order under Illinois Supreme Court Rule 23).

¶ 8 In February 2009, defendant filed a third *pro se* postconviction petition,

contending he was never admonished during his guilty-plea hearing as to the term of mandatory supervised release applicable to his sentence. The circuit court dismissed the petition pursuant to section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2008)). Defendant appealed, and the office of the State Appellate Defender (OSAD) was appointed to represent him. On appeal, this court granted OSAD's motion to withdraw as counsel and affirmed the circuit court's judgment. *People v. Lofton*, No. 4-09-0213 (Dec. 24, 2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 9 In April 2012, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Procedure Code (735 ILCS 5/2-1401 (West 2012)). Defendant argued the judgment was void because the circuit court failed to comply with Illinois Supreme Court Rule 402(d)(2) (eff. July 1, 1997) in failing to warn him that if he failed to accept an initial plea agreement for a 24-year sentence, he would later face a 30-year sentence. Defendant also argued his counsel was ineffective for failing to present a defense. In June 2012, the State filed a response to defendant's petition and argued it should be dismissed because it was untimely filed, the claims did not support a finding of a void judgment, and the claims were forfeited or barred by the doctrine of *res judicata*. The circuit court dismissed the petition, finding it frivolous and patently without merit. Defendant filed a motion to reconsider, and the court held its ruling would stand. On appeal, this court granted OSAD's motion to withdraw as counsel and affirmed the circuit court's judgment. *People v. Lofton*, No. 4-12-0675 (Oct. 1, 2013) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 10 On May 26, 2015, defendant filed a second petition for relief from judgment pursuant to section 2-1401 of the Procedure Code (735 ILCS 5/2-1401 (West 2014)), which is the basis of this appeal. In his second section 2-1401 petition, defendant asserts the circuit court

abused its discretion by allowing him to withdraw his guilty plea at the January 2002 plea hearing and all subsequent judgments were void. On June 5, 2015, the circuit court gave the State 30 days to respond. On July 20, 2015, the State filed a motion to dismiss under section 2-619.1 of the Procedure Code (735 ILCS 5/2-619.1 (West 2014)) defendant's second 2-1401 petition, asserting (1) defendant's claim was substantially insufficient in law, (2) his petition was not timely filed, (3) defendant's claim was barred by *res judicata*, and (4) defendant failed to plead due diligence. Two days later, the circuit court entered a written order agreeing with the State's contentions and dismissing defendant's section 2-1401 petition.

¶ 11 On August 10, 2015, defendant filed a motion to reconsider, asserting (1) the State defaulted because its motion to dismiss was not filed within 30 days and (2) he never received an opportunity to respond to defendant's motion. He also filed a document entitled "Supplemental Pleadings," in which he sought to supplement his section 2-1401 petition with a claim of vindictive prosecution. In an August 18, 2015, docket entry, the circuit court denied defendant's motion to reconsider. The court did not expressly address defendant's "Supplemental Pleadings" document but implicitly denied defendant an opportunity to supplement in denying his motion to reconsider.

¶ 12 On August 31, 2015, defendant filed a notice of appeal, which failed to list the name of the order appealed from. On September 9, 2015, defendant filed a timely amended notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015). See Ill. S. Ct. R. 303(b)(5) (eff. Jan. 1, 2015) (allowing for the amendment of the notice of appeal within the original 30-day period for filing the notice of appeal). Accordingly, we have jurisdiction of defendant's appeal from the July 22, 2015, dismissal of his May 2015 section 2-1401 petition.

¶ 13 II. ANALYSIS

¶ 14 A. Due Process

¶ 15 Defendant first asserts his due process rights were violated when the circuit court granted the State's motion to dismiss without giving him an opportunity to respond. The State concedes defendant's due process rights were violated but contends any error was harmless.

¶ 16 1. *Due Process Violation*

¶ 17 In *People v. Bradley*, 2017 IL App (4th) 150527, ¶ 19, 85 N.E.3d 591, this court held due process prohibits a circuit court "from granting an opposing party's motion to dismiss a section 2-1401 petition without allowing the petitioner notice and a meaningful opportunity to respond." There, two days after the State filed its motion to dismiss the defendant's section 2-1401 petition, the circuit court considered the State's motion and dismissed the defendant's petition based on the State's arguments. *Bradley*, 2017 IL App (4th) 150527, ¶ 19. The record contained no indication the defendant was given a meaningful opportunity to respond to the State's motion. *Bradley*, 2017 IL App (4th) 150527, ¶ 19. This court concluded the defendant's due process rights were violated. *Bradley*, 2017 IL App (4th) 150527, ¶ 19.

¶ 18 We continue to find a circuit court's failure to give a defendant a meaningful opportunity to respond to the State's motion to dismiss a section 2-1401 petition is a procedural due process violation. The *Bradley* decision explained why a due process violation had occurred but did not specifically address why our supreme court's decision in *People v. Vincent*, 226 Ill.2d 1, 14, 871 N.E.2d 17, 26 (2007), which examined the propriety of *sua sponte* dismissals of meritless section 2-1401 petitions, did not apply to an *ex parte* granting of a motion to dismiss. We take the opportunity to do so now.

¶ 19 *Vincent*'s holding only authorizes dismissals of section 2-1401 petitions when no

responsive pleading has been filed. The *Vincent* court held a circuit court may properly dismiss a section 2-1401 petition *sua sponte* without (1) a responsive pleading, (2) notice of the impending ruling, and (3) the opportunity to address the court before the ruling. *Vincent*, 226 Ill. 2d at 14, 871 N.E.2d at 26. In contrast, in cases like this one, the court has dismissed the section 2-1401 petition after it received a responsive pleading, considered that pleading, and cited the pleading in its dismissal order. This distinction is meaningful. In the case of *sua sponte* dismissals without responsive pleadings, the circuit court judges the complaint on its face, viewing the factual allegations as admitted, which results in no unfairness to the petitioner. The integrity of the proceedings is undermined, however, if the State responds with either an answer or a motion to dismiss not brought solely under section 2-615 of the Procedure Code (735 ILCS 5/2-615 (West 2014)), and the opposing party is not provided the opportunity to respond. In such cases, the State has either disputed the facts alleged in the complaint or introduced an affirmative matter outside the face of the complaint. Such contentions clearly warrant an opportunity to respond. As to section 2-615 motions to dismiss, while the State is admitting the allegations are true as with a *sua sponte* dismissal, the State is providing the court with a reason for why those allegations do not state a cause of action, to which the plaintiff is entitled to an opportunity to explain to the court why the State's reasoning is incorrect or seek leave to amend the complaint.

¶ 20 Moreover, we note *Vincent*'s abrogation of *People v. Gaines*, 335 Ill. App. 3d 292, 780 N.E.2d 822 (2002), which this court cited as a basis for finding a due process violation in *Bradley*, 2017 IL App (4th) 150527, ¶ 18, did not extend to the Second District's decision the section 2-1401 petitioner was entitled to due process after the State filed a responsive pleading. In *Vincent*, our supreme court listed *Gaines* as an example of a decision in which the appellate

court barred *sua sponte* dispositions of section 2-1401 petitions. See *Vincent*, 226 Ill. 2d at 6, 871 N.E.2d at 21. In just one sentence, *Vincent* reports the *Gaines* court so held upon "reasoning that a petitioner must be given notice and the opportunity to respond (in the absence of any responsive pleading) before the trial court may rule." *Vincent*, 226 Ill. 2d at 6, 871 N.E.2d at 21. We are troubled by this summary of *Gaines* as the facts in *Gaines* show a responsive pleading was filed. See *Gaines*, 335 Ill. App. 3d at 296, 780 N.E.2d at 825. In fact, the *Gaines* court, after rejecting the State's argument the summary-dismissal procedures applied to section 2-1401 petitions, stated the summary dismissal would nevertheless have been inappropriate because a responsive pleading had been filed and the court considered it. See *Gaines*, 335 Ill. App. 3d at 296, 780 N.E.2d at 825 (citing *People v. Gaultney*, 174 Ill. 2d 410, 419-20, 675 N.E.2d 102, 107 (1996)). Thus, there was no "absence of any responsive pleading[,]" as *Vincent* indicates. See *Vincent*, 226 Ill. 2d at 6, 871 N.E.2d at 21. The single sentence in *Vincent* also demonstrates the *Vincent* court addressed only that part of *Gaines* that rejected the State's request to treat the section 2-1401 petition as a postconviction petition and affirm the "summary dismissal." The *Vincent* court did not address, much less reject, the part of *Gaines* that considered the fairness of the procedure that followed a responsive pleading.

¶ 21 Moreover, *Vincent*'s rationale does not authorize the dismissal of section 2-1401 petitions, which are "essentially complaints[.]" *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23. *Vincent* emphasized section 2-1401 petitions are governed by the rules of civil procedure. *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23. Complaints may be dismissed absent a responsive pleading. See *Vincent*, 226 Ill. 2d at 10, 871 N.E.2d at 24 (citing *Mitchell v. Norman James Construction Co.*, 291 Ill. App. 3d 927, 932, 684 N.E.2d 872, 877 (1997)). It is well established, however, due process does not allow a court to grant a motion to dismiss a complaint without

allowing the opposing party notice and a meaningful opportunity to be heard. See, *e.g.*, *Berg v. Mid-America Industrial, Inc.*, 293 Ill. App. 3d 731, 735, 688 N.E.2d 699, 702 (1997) ("It would be unjust, unfair, and inequitable to allow the dismissal order to stand because, from the foregoing litany of events, it is unclear that plaintiffs received proper notice of the [hearing in which the trial court granted the motion to dismiss.]"); *Alper Services, Inc. v. Wilson*, 85 Ill. App. 3d 908, 911, 407 N.E.2d 677, 680 (1980) ("[P]laintiffs *** were not adequately forewarned that they would be asked to defend against a motion to dismiss 'and were not given an' adequate opportunity to do so."). It follows the same is true for section 2-1401 petitions, which are also governed by the rules of civil procedure.

¶ 22 In this case, the facts are identical to those in *Bradley*, as the circuit court also dismissed defendant's section 2-1401 petition two days after the State's motion to dismiss was filed and the record contains no indication defendant had an opportunity to respond before the dismissal. Thus, we agree with the parties and find defendant's due process rights were violated.

¶ 23 2. *Harmless Error*

¶ 24 As to harmless error, in *Bradley*, the State argued this court should not remand the case because the circuit "court's 'procedural error' was not prejudicial." *Bradley*, 2017 IL App (4th) 150527, ¶ 20. We disagreed, finding the circuit court's failure to give the "defendant an opportunity to respond to the State's motion to dismiss was inherently prejudicial and undermined the integrity of the proceedings." *Bradley*, 2017 IL App (4th) 150527, ¶ 21 (citing *People v. Coleman*, 358 Ill. App. 3d 1063, 1071, 835 N.E.2d 387, 393 (2005) ("At times, 'it is important to stand on the side of due process, even at the cost of some inefficiency.' ")) In *Bradley*, 2017 IL App (4th) 150527, ¶¶ 3-4, the defendant was appealing the dismissal of his only section 2-1401 petition after this court had affirmed his direct appeal and the summary

dismissal of his postconviction petition.

¶ 25 Here, defendant is appealing the dismissal of his *second* section 2-1401 petition after he had filed a direct appeal and *three* postconviction petitions. In *People v. Donley*, 2015 IL App (4th) 130223, ¶ 40, 29 N.E.3d 683, this court addressed successive section 2-1401 petitions and multiple collateral attacks in considering the applicability of the holding in *People v. Laugharn*, 233 Ill. 2d 318, 323, 909 N.E.2d 892, 805 (2009), that a *sua sponte* dismissal of a section 2-1401petition before the expiration of the 30-day period in which the State can answer or plead is premature. The *Donley* court rejected the defendant's argument the supreme court's decision in *Laugharn* prohibits a circuit court from immediately considering a successive section 2-1401 petition when the petition "(1) does not comport with the requirements outlined in section 2-1401 of the [Procedure] Code or (2) raises claims the court has previously considered and rejected or could have been raised in the initial section 2-1401 pleading." *Donley*, 2015 IL App (4th) 130223, ¶ 42. In doing so, this court acknowledged a party was not limited jurisdictionally to one section 2-1401 petition but found successive section 2-1401 petitions unnecessarily frustrate the policy of bringing finality to circuit court proceedings. *Donley*, 2015 IL App (4th) 130223, ¶ 40. In support of that conclusion, this court cited the Seventh Circuit's decision in *Empress Casino Joliet Corp. v. Blagojevich*, 638 F.3d 519, 538 (7th Cir. 2011). There, the Seventh Circuit cited approvingly the observation of the court in *Village of Glenview v. Buschelman*, 296 Ill. App. 3d 35, 39, 693 N.E.2d 1242, 1245 (1998), that the Illinois Supreme Court's decisions in *Deckard v. Joiner*, 44 Ill. 2d 412, 418-19, 255 N.E.2d 900, 903-04 (1970), and its progeny have steadily held repeated section 2-1401 petitions are prohibited because they " 'unnecessarily frustrate the policy of bringing finality to court proceedings.' " *Empress Casino Joliet Corp.*, 638 F.3d at 538. The court further noted "[t]he reason for this rule is obvious: It

cuts down on the waste of judicial resources by preventing litigants from plying courts with the same losing arguments again and again." *Empress Casino Joliet Corp.*, 638 F.3d at 538.

¶ 26 In this case, defendant's second section 2-1401 petition meets both situations noted in *Donley* for not applying *Laugharn*. See *Donley*, 2015 IL App (4th) 130223, ¶ 42. In his petition, defendant sought to challenge his withdrawal of his guilty plea at a hearing in January 2002. Thus, it is clear from the face of his second section 2-1401 petition defendant could have raised this issue well before July 2015. Moreover, the supplemental pleading defendant filed was related to his ultimate guilty plea in October 2005, which also could have been raised long before the July 2015 petition at issue. As to his claim of a void judgment, our supreme court has held only fundamental defects such as a lack of personal jurisdiction or lack of subject-matter jurisdiction warrant declaring a judgment void. *People v. Castleberry*, 2015 IL 116916, ¶ 15, 43 N.E.3d 932. Defendant does not raise any jurisdictional claims in either his second section 2-1401 petition or his supplemental pleading. Thus, his second section 2-1401 petition is untimlely and does not comport with the requirements of section 2-1401. Accordingly, the concerns raised in *Donley* about successive section 2-1401 petitions apply to the facts of this case.

¶ 27 Enough judicial resources have already been wasted on another meritless collateral pleading filed by defendant. Unlike in *Bradley*, this is not a situation where it is important to stand on the side of due process. Thus, we find the error was harmless. However, our finding of harmless error does not condone the circuit court's procedure in this case. Two days are insufficient for a defendant to respond to a State's motion to dismiss. The court's failure to give defendant an opportunity to be heard on the State's motion to dismiss is particularly frustrating since defendant raised the lack of an opportunity to respond in his motion

to reconsider. The due process violation in this case could have been easily avoided. Last, we note defendant's ripeness argument is addressed by our finding of a due process violation, as the court should not have ruled on the motion to dismiss until defendant had an opportunity to respond.

¶ 28 B. Fines and Fees

¶ 29 Defendant next asserts the circuit court improperly imposed several fines, and the State agrees. However, after our original judgment, the supreme court handed down its decision in *Vara*, 2018 IL 121823, ¶ 23, which held the appellate court lacks jurisdiction to review a circuit clerk's recording of mandatory fines that were not included in the circuit court's final judgment. Thus, this court lacks jurisdiction to address defendant's challenge to his fines under *Vara*.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the Champaign County circuit court's July 22, 2015, dismissal of defendant's May 2015 section 2-1401 petition. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed.