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2014 IL App (3d) 121005-U

Order filed May 12, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 21st Judicial Circuit,
	)	Iroquois County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-1005
v.	)	Circuit No. 06-CF-138
	)	
CHRISTOPHER BAILEY,	)	Honorable
	)	Gordon L. Lustfeldt,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE LYTTON delivered the judgment of the court.  
Justices Carter and O'Brien concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The trial court properly dismissed *sua sponte* defendant's section 2-1401 petition.
- ¶ 2 Following a bench trial, defendant, Christopher Bailey, was found to be a sexually dangerous person (725 ILCS 205/1.01, 3 (West 2006)) and was committed to the Department of Corrections (DOC). On direct appeal, this court affirmed the order of commitment. *People v. Bailey*, 405 Ill. App. 3d 154 (2010). Thereafter, defendant filed a petition for relief from judgment (735 ILCS 5/2-1401 (West 2010)), which the trial court dismissed *sua sponte*.

Defendant appeals, arguing that the trial court's *sua sponte* dismissal of his petition was error. We affirm.

¶ 3

### FACTS

¶ 4

On October 5, 2006, defendant was charged by indictment with aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)). On November 15, 2006, while the criminal charge was pending, the State filed a petition to declare defendant a sexually dangerous person pursuant to the Sexually Dangerous Persons Act (725 ILCS 205/0.01 *et seq.* (West 2006)). Thereafter, on March 27, 2007, the State filed a reduced charge of criminal sexual abuse (720 ILCS 5/12-15(a)(2) (West 2006)), which defendant pled guilty to in exchange for dismissal of the greater charge. Defendant was subsequently allowed to withdraw his guilty plea.

¶ 5

On May 28, 2008, following a bench trial on the State's sexually dangerous person petition, defendant was found to be a sexually dangerous person and was committed to the DOC for an indefinite period for treatment. Defendant's motion for new trial was denied on January 5, 2009, and he appealed.

¶ 6

On direct appeal, defendant argued that: (1) the State failed to prove beyond a reasonable doubt that he was a sexually dangerous person; and (2) the trial court committed reversible error when it allowed the State to proceed on both the underlying criminal charge and the sexually dangerous person petition at the same time. This court affirmed the trial court's order of commitment. *Bailey*, 405 Ill. App. 3d 154.

¶ 7

On March 8, 2011, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), which he was later allowed to withdraw. Defendant then refiled a new *pro se* section 2-1401 petition on July 18, 2012, which is the subject of this appeal. In the petition, defendant argued that: (1) the State's sexually dangerous person petition failed to state sufficient facts to support itself as a

matter of law and trial counsel failed to bring this to the court's attention; and (2) trial counsel rendered ineffective assistance by failing to interview potential witnesses and explore certain defense theories throughout the proceedings. Defendant's claims were based on matters of record, except for the potential witnesses counsel failed to investigate, which defendant did not identify or provide supporting affidavits for. The State did not file a responsive pleading.

¶ 8 On September 21, 2012, the trial court entered a written order *sua sponte* dismissing defendant's section 2-1401 petition as untimely and for failure to state a cause of action. In the order, the court noted that defendant's claims related to errors of law and ineffectiveness of trial counsel, which could not be raised in a section 2-1401 petition. Defendant's motion to reconsider was denied, and he appeals.

¶ 9 ANALYSIS

¶ 10 Defendant argues that the trial court erred in *sua sponte* dismissing his section 2-1401 petition as both untimely and for failing to state a cause of action.

¶ 11 We review the dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1 (2007). Section 2-1401 establishes a comprehensive, statutory procedure that allows for vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401 (West 2012). Relief under section 2-1401 is predicated upon proof that a defense or claim would have precluded the entry of the judgment in the original action and the petitioner was diligent in both discovering the defense or claim and in filing the petition. *Vincent*, 226 Ill. 2d 1. Generally, to obtain relief under this section, a defendant must file a petition within two years after the entry of the order or judgment being challenged. 735 ILCS 5/2-1401(c) (West 2012).

¶ 12 Defendant first argues, and the State concedes, that the trial court erred when it *sua sponte* dismissed defendant's petition as untimely. Defendant admits that his petition was filed beyond the two-year statutory limitation period (735 ILCS 5/2-1401(c) (West 2012)), but argues

that his petition could not be dismissed on this basis because the State failed to assert the time limitation as an affirmative defense. We agree. A trial court may dismiss a section 2-1401 petition, on its own motion, on any basis except for timeliness. See *People v. Malloy*, 374 Ill. App. 3d 820 (2007). Since the State did not file any pleadings in response to defendant's motion, we hold that the trial court erred in dismissing defendant's petition on the basis of timeliness.

¶ 13 Although the trial court erred in dismissing defendant's petition as untimely, a trial court may *sua sponte* dismiss a section 2-1401 petition when defendant's claims are without merit. See *Vincent*, 226 Ill. 2d 1. As such, we will review defendant's second claim of error.

¶ 14 Defendant argues that his petition should not have been dismissed because he stated a claim upon which relief could be granted. In his petition, defendant argued that trial counsel was ineffective and the sexually dangerous person petition failed to state sufficient facts to support itself as a matter of law. The trial court dismissed the petition, noting that defendant's claims of ineffective assistance could not be raised in a section 2-1401 petition. Although we disagree with the trial court's conclusion, we find the dismissal of defendant's petition proper.

¶ 15 A defendant subject to involuntary commitment under the Sexually Dangerous Persons Act may raise his counsel's ineffectiveness on direct appeal. *People v. Lawton*, 212 Ill. 2d 285 (2004). Such defendants may also utilize section 2-1401 to assert claims of counsel's ineffectiveness. *Id.* A section 2-1401 petition is not, however, designed to provide a substitute for a direct appeal. *People v. Haynes*, 192 Ill. 2d 437 (2000).

¶ 16 Here, although defendant may assert his trial counsel's ineffectiveness in a section 2-1401 petition, he has forfeited this argument by failing to raise it on direct appeal or assert appellate counsel's ineffectiveness for failing to raise the same. See *People v. Morfin*, 2012 IL App (1st) 103568 (finding that claims that could have been raised on direct appeal, but were not, are deemed forfeited). Since defendant was represented by new counsel on appeal, there was no

conflict for appellate counsel to argue trial counsel's ineffectiveness on appeal. See *Lawton*, 212 Ill. 2d 285. Defendant briefly mentions on appeal that he should not be at fault for appellate counsel's failure to raise trial counsel's ineffectiveness, noting that the trial record supported these claims on appeal. However, defendant's failure to assert this issue in his section 2-1401 petition results in forfeiture of the issue on appeal. See *People v. Gray*, 2013 IL App (1st) 112572 (finding that a defendant may forfeit an issue on appeal by failing to raise it in his section 2-1401 petition). Even disregarding forfeiture, defendant's allegation that trial counsel was ineffective for failing to interview potential witnesses must fail because he did not identify the potential witnesses or provide an affidavit regarding their proposed testimony. See 735 ILCS 5/2-1401(b) (2010) (providing that a petition must be supported by affidavit or other appropriate showing as to matters not of record).

¶ 17 Furthermore, defendant's argument regarding the insufficiency of the sexually dangerous person petition is similarly forfeited. Not only did defendant fail to specify how the petition was deficient, but he also failed to raise this issue on direct appeal or argue appellate counsel's ineffectiveness in failing to raise the sufficiency of the petition on direct appeal. Thus, we conclude that the issue has been forfeited because it was not properly preserved for our review. Accordingly, we conclude that defendant's petition for relief from judgment was properly dismissed *sua sponte*.

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Iroquois County is affirmed.

¶ 20 Affirmed.