No. 1-08-0640

SECOND DIVISION
March 15, 2011

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook CountY
	)	
v.	)	No. 86 CR 7572
	)	
LARRY BELL,	)	Honorable
	)	Lawrence Terrell,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.

Justices Connors and Harris concurred in the judgment.

ORDER

HELD: Appeal dismissed where this court lacks jurisdiction to consider defendant's appeal on its merits where the circuit court lacked jurisdiction to enter the order from which defendant has appealed.

BACKGROUND

In 1987, defendant was convicted of the aggravated criminal sexual assault and aggravated kidnaping of a ten-year-old girl and was sentenced to 60 years' imprisonment with a 30 year sentence to run consecutively. Defendant appealed, raising numerous errors, including sentencing errors. After two remands by this court, defendant was resentenced to concurrent 60-year terms on three counts of aggravated criminal sexual assault to run consecutively with a 15-year aggravated kidnaping sentence. *People v. Bell*, 217 Ill. App. 3d 985 (1991); *People v. Bell*, No. 1-92-0718 (May 14, 1993) (unpublished order pursuant to Rule 23).

Defendant filed a postconviction petition in 1992 wherein he argued: (1) the *Miranda* issue he raised on direct appeal; (2) defense counsel was ineffective; (3) judicial bias; and (4) his extended-term sentence violated due process. The petition was summarily dismissed in the circuit court. Defendant appealed but appellate counsel moved to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1990). This court granted counsel's motion and affirmed the summary dismissal of defendant's petition. See *People v. Bell*, No. 93-0717 (1st Dist. June 30, 1993) (unpublished order pursuant to Rule 23).

In December 1994, defendant filed a motion requesting the court to enter an order to preserve some of the physical evidence in his case. There is some dispute as to whether this motion was ever ruled on. The court file does not contain any evidence of a ruling, nor does the record here, but the parties have agreed that the computerized docket of the Clerk of the Circuit Court of Cook County shows that on January 13, 1995, "SPECIAL ORDER 86CR 0757201 MOT TO PRESERVE EVIDENCE ALL WED

On January 12, 1998, defendant filed a motion to allow DNA testing under section 116-3 of the Code of Criminal Procedure of 1963. 725 ILCS 5/116-3 (West 2000). In his motion, defendant claimed that identity was at issue in his trial and that none of the physical evidence collected was subject to DNA testing because DNA technology was not available at the time of trial. The State filed an objection to defendant’s motion arguing that identity was not an issue in defendant’s trial and therefore defendant’s motion should be denied. Counsel was appointed for defendant and the case was continued to July 10, 1998.

On July 10, 1998, an assistant public defender (APD) who was familiar with defendant’s case but not assigned to work on it, stepped up in court. The State argued against allowing defendant’s motion for DNA testing but the APD did not participate in the argument. The court denied the motion after finding that identity did not “seem to be an issue.” Later that day the case was recalled. The court informed the APD who appeared on defendant’s behalf that defendant’s motion for DNA testing had been denied and informed counsel that the court would entertain a motion to reconsider.

Defense counsel filed a motion for the court to reconsider its denial of defendant’s motion for DNA testing on August 7, 1998. An amended motion was filed August 17, 1998, wherein it was argued that identity was an issue at trial. The State filed a written motion in opposition. On September 30, 1998, the court informed the State that all the physical evidence from defendant’s case had been destroyed and that the public defender had withdrawn as defense counsel. The court noted that

defendant had a pro se motion to preserve evidence but the motion lacked a file or time stamp and so the court was not sure if it had been filed. The case was continued to determine whether any evidence still existed.

On the next court date, October 9, 1998, the State tendered to the court a letter from the Forest Park police department that stated that all evidence from defendant's case had been destroyed. The court then denied defendant's motion to preserve physical evidence.

On January 9, 1999, defendant appeared in court *pro se* and was given an opportunity to argue the motion to reconsider the denial of his request for DNA testing, as counsel who filed it had withdrawn from defendant's case. Rather than argue that he was entitled to DNA testing, defendant argued that the evidence from his case was destroyed in bad faith because the State had been put on "notice of Defendant's intention to prove his innocence through DNA testing through several attempts made to appeal, namely the filing of post conviction writ of habeas corpus and Motion to Preserve the Physical Evidence, which I was informed by appointed counsel was never filed by the Clerk of the Circuit." The State responded and informed the court that there were "two motions to respond to. One is the motion to allow–one is the Motion to Preserve Physical Evidence, and the other is the Defendant's Motion to Allow DNA Testing." The State argued that defendant was not entitled to DNA testing under 116-3 because identity was not an issue at trial as defendant admitted to being with the victim on the night in question. Furthermore, the State argued that defendant filed his motion to preserve physical evidence on September 30, 1998, eleven years after his

conviction, and it was untimely. The State further argued that the court that even if the motion to preserve the physical evidence was properly before the court , defendant would not be entitled to DNA testing under 116-3 because he failed to meet his burden of showing that identity was an issue in his case. The court agreed, stating "[i]f there was evidence to test, I'm telling you in the record that you have not established the prima facie case that the standard of law required you to establish before an Court can consider ordering DNA testing." The court then denied defendant's motion to reconsider his request for DNA testing under 116-3. Defendant indicated that he wished to appeal.

The record does not contain a copy of the notice of appeal filed by defendant subsequent to the denial of his motion to reconsider. There is a notice of appeal in the records signed by defendant on October 21, 1998, shortly after the original denial of his motion for DNA testing, but it is not file stamped. The record also contains three letters that defendant mailed to the Clerk of the Circuit Court, between August 1999 and September 1999, wherein he stated that he filed a notice of appeal on February 3, 1999 and requested information on the status of his appeal. On February 18, 2000, this court entered an order dismissing defendant's appeal for want of prosecution. The mandate was delivered to the Clerk of the Circuit Court on April 13, 2000, but he mandate was subsequently recalled on May 8, 2000. The mandate was re-issued on August 2, 2000.

On August 26, 2000, defendant filed a *pro se* motion under 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000), challenging the constitutionality of

his sentence under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). On February 16, 2001, the court indicated that defendant had a "post-conviction petition" pending and the only issue was whether *Apprendi* applied retroactively to postconviction petitions. Defendant's case was continued many times over the next seven years and no one seemed to know why it was on the docket. On July 20, 2001, when the case was called the State indicated that it had prepared a motion to dismiss but after looking at the "Clerk's computer" wasn't sure it was a "live case" because the post-conviction petition was filed in 1992. After going through the court file, the parties agreed to a continuance because the circuit court believed that this court had remanded the case back to the circuit court for the entry of a "DWP" order. The case next appeared on the call on October 5, 2001. Again, there was confusion as to why the case was on the docket so the case was continued again for the State to order a transcript. On October 26, 2001, the State sought leave to file a motion to dismiss defendant's *Apprendi* claim and defense counsel acknowledged receipt of the motion.

After a multitude of continuances requested by defense counsel for status purposes, to investigate, to determine the "procedural posture of the case", to figure "out the sequence" of some of the issues, to do "complicated research", and to "work on the investigation" the case appeared on the docket on February 15, 2008, seven and one-half years after defendant filed his 2-1401 petition. On that day, without defendant being present in court, defense counsel told the court that "this is a DNA-testing case" and "[t]here's also a 2-1401 petition that petitioner filed pro se." Defense counsel indicated that he "looked into" the DNA motion first and that "since the DNA motion and

arguments about the legal standards are somewhat moot given the destruction of evidence, Judge, there is nothing further really that we can say with respect to the DNA petition." As to the DNA argument, counsel stated that he will "stand on the petition as written." The State responded that defendant's motion for DNA testing should be denied because "the evidence has been destroyed" and therefore the issue is moot. The court then denied the motion to allow DNA testing. Later the court denied defendant's 2-1401 petition, noting that *Apprendi* does not apply retroactively to defendant's case.

On March 5, 2008, defendant filed a notice of appeal. According to the notice, the judgment appealed from is the "Dismissal of 116-3 Motion and 2-1401 Motion" dated February 15, 2008.

ANALYSIS

Defendant argues that he is entitled to an evidentiary hearing on whether the destruction of potentially exculpatory evidence in his case violated his right to due process of law. The State argues that the trial court lacked jurisdiction to consider defendant's 116-3 motion in 2008, because the motion had previously been dismissed, reconsidered, dismissed again and appealed.

At the forefront, we must consider whether we have jurisdiction to consider the merits of defendant's claim. *People v. Lewis*, 234 Ill.2d 32, 37 (2009). "The timely filing of a notice of appeal is both jurisdictional and mandatory." *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009). Here, defendant's notice of appeal indicates that he is appealing from the denial of his 2-1401 petition and the

denial of his 116-3 motion, although defendant does not raise any issue pertaining to the dismissal of his 2-1401 petition. Generally, this court has jurisdiction to hear an appeal from a section 116-3 which either denies or allows a request for DNA analysis. *People v. Savory*, 197 Ill. 2d 203, 210 (2001). An order of the trial court which denies a 116-3 motion is a final order and thus appealable. *Savory*, 197 Ill. 2d at 210-11.

According to Supreme Court Rule 606 (b), a defendant has 30 days from the date of disposal of a posttrial motion to file an appeal. 210 Ill.2d R. 606(b). In this case, the circuit court denied defendant's 116-3 motion on July 10, 1998 and denied defendant's motion to reconsider on January 9, 1999. Therefore, the circuit court lost jurisdiction over the motion 30 days later, on February 7, 1999. Defendant did appeal the dismissal and this court dismissed his appeal for want of prosecution in August 2000. Consequently, the circuit court lacked jurisdiction to consider defendant's 116-3 motion again in 2008.

However, defendant argues the circuit court was revested of jurisdiction on February 15, 2008. Revestment is a "narrow doctrine" which is an exception to the proposition of law that the circuit court cannot amend, modify, or vacate a judgment 30 days after it is entered. *People v. Kaeding*, 98 Ill. 2d 237, 241 (1983). "Revestment applies when the parties (1) actively participate without objection (2) in further proceeding that are inconsistent with the merits of the prior judgment." *People v. Minniti*, 373 Ill. App. 3d 55, 65 (2007). "Conduct which is inconsistent with the dismissal order is any which can be reasonably construed as an indication that the parties do not view the order as final and binding." *Gentile v. Hansen*, 131 Ill. App. 3d 250, 255

(1984).

On February 15, 2008, on a status date for determination on defendant's 2-1401, defense counsel mistakenly informed the court, despite making numerous requests for continuances over a near 8-year period to determine the procedural posture of the case, that "this is a DNA-testing case." The court relied on this improper statement and reviewed defendant's 116-3 motion for DNA testing. When the court asked defense counsel for argument, counsel stated that he was standing on the petition as written because the "motion and arguments about the legal standards are somewhat moot given the destruction of evidence, * * * there is nothing further really that we can say with respect to the DNA petition." The State answered that the evidence had been destroyed and requested that the court deny the request for DNA testing because the request is moot. The court denied the motion to allow DNA testing. Defendant argues that because the parties participated in the disposal of the motion, the circuit court was revested with jurisdiction under the revestment doctrine.

Based on the record before us, we note, and the parties do not disagree, that defendant did not file a second 116-3 motion subsequent to the denial of his motion to reconsider in 1999. Therefore, the 116-3 motion that was considered by the court in February 2008, was the same motion that had been ruled upon in 1998 and 1999, and dismissed for want of prosecution on appeal in 2000. *cf. People v. Bailey*, 386 Ill. App. 3d 68, 72 (2008). Clearly, defense counsel was mistaken when it informed the court that there was a "DNA" motion pending. Based on that erroneous representation, the court improvidently ruled on the motion. Had the correct procedural posture of the

116-3 motion been determined, we are certain that the parties would not have attempted to re-litigate it. See *Gentile*, 131 Ill. App. 3d at 255. Given the "narrow" scope of the doctrine of revestment, we cannot find any reason to allow an error to serve as an opportunity to revest jurisdiction on an 8-year-old motion that has already been adjudicated and appealed.

As the circuit court lost jurisdiction over defendant's 116-3 motion 30 days after the court denied defendant's motion to reconsider in January 1999, and the court was not revested with jurisdiction in 2008, the circuit court had no jurisdiction to rule on defendant's 116-3 motion in 2008. Consequently, we are precluded from considering defendant's appeal on the merits and must dismiss it. *Village of Glenview v. Buschelman*, 269 Ill. App. 3d 35, 42 (1998); see also *People v. Flowers*, 208 Ill.2d 291 (2003).

Appeal dismissed.