2012 IL App (1st) 101839-U

THIRD DIVISION
March 28, 2012

No. 1-10-1839

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. 04 C6 61100
	)	
LAMAR KIRKWOOD,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Neville concurred in the judgment.

O R D E R

Held: Trial court did not recharacterize section 2-1401 petition as a post-conviction petition and therefore properly dismissed that section 2-1401 petition. Twenty-six year prison term imposed upon defendant pursuant to a negotiated plea affirmed. Trial court's failure to make a finding on the record of defendant's criminal history, where defendant waived his right to a pre-sentence investigation report, was only voidable and therefore was waived where defendant raised it for the first time in the reviewing court on collateral appeal. Defendant's fees and fines modified as directed.

¶ 1 Defendant Lamar Kirkwood entered into a negotiated guilty plea to the attempted murder of Teshena Bess and was sentenced to 26 years in prison, to be followed by 3 years of mandatory

supervised release. Defendant subsequently filed a section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)) which he contends on appeal was recharacterized by the trial court as a postconviction petition (725 ILCS 5/122-1 (West 2008)) and therefore erroneously summarily dismissed. Alternatively, defendant contends that he is entitled to resentencing because the trial court permitted him to waive a pre-sentence investigation without making a finding on the record of defendant's criminal history. Defendant also challenges certain fees and fines entered against him.

¶ 2 Defendant entered into a negotiated guilty plea on February 28, 2007. The stipulated factual basis for defendant's plea established that on September 18, 2004, defendant lured Teshena Bess into driving him to the hospital on the pretext that his father had suffered a heart attack. When defendant asked Bess if they could get back together and Bess said no, defendant stabbed Bess 26 times in the chest, back and face, including her right eye, while she was still in her car. Bess was ultimately able to escape by driving away when defendant got out of the car. She obtained the aid of a Blue Island police officer, who had her transported by ambulance to the hospital.

¶ 3 At the guilty plea hearing defendant waived his right to a pre-sentence investigation. The trial court then sentenced him without placing on the record a statement of defendant's criminal history. Defendant did not move to vacate his guilty plea nor did he file a direct appeal. But on February 4, 2009, defendant filed a *pro se* "petition for relief from judgment" citing section 2-1401. In that petition defendant alleged that he had received ineffective assistance of counsel, that his public defender failed to inform the trial court that defendant was insane at the time of the crime, and that the trial court never took into consideration defendant's potential for rehabilitation.

¶ 4 The trial court referred to the petition both as a "1401 petition" and a post-conviction petition, gave the State a copy "for purposes of initiating the post-conviction proceedings" and

continued the matter for status. At the status hearing the court appointed the Public Defender to represent defendant "on the post-conviction or 1401 Petition." The matter was again continued. After several continuances the public defender stated that he would be filing a 651(c) certificate (Ill. S. Ct. R. 651(c) (eff. Sept. 1, 1984) on the next court date. The matter was again continued. At the next hearing the public defender had not yet filed a Rule 651(c) petition nor had he yet amended the petition. But he stated that defendant wished to have the matter heard as a post-conviction petition. The trial court replied that it was "not changing it over" and the matter would stand as a section 2-1401 petition. The public defender stated that he would "stand" on defendant's petition and the court then denied the petition. This appeal ensued.

¶ 5 We first consider defendant's contention that the trial court erred in summarily dismissing defendant's petition because the trial court's actions recharacterized defendant's section 2-1401 petition as a post-conviction petition. We are guided in our consideration of this issue by *People v. Stoffel*, 239 Ill. 2d 314 (2010). There the court held that once a trial court[1] had treated a section 2-1401 petition as a post-conviction petition ("recharacterizing" it as such) and that petition had survived summary dismissal, the court could not deny defense counsel the opportunity to amend that petition and instead again treat it as a section 2-1401 petition without providing a reasonable basis for doing so. *Stoffel*, 239 Ill. 2d at 329. In *Stoffel* the defendant filed what he characterized as a petition pursuant to section 2-1401. Following at least one continuance the trial court appointed counsel for the defendant, and counsel indicated that he would be treating the matter as a post-conviction petition. Defense counsel ultimately filed two supplements to the petition as well as two Rule 651(c) petitions indicating compliance with requirements which a defense counsel must meet, such as reviewing the petition with the defendant. The State subsequently filed a motion to strike defendant's supplements, contending

[1]Three different judges heard proceedings in *Stoffel*. We refer to them collectively as the trial court.

that because defendant had termed his petition one filed under section 2-1401, defense counsel could not supplement a post-conviction petition which was never filed. *Stoffel*, 239 Ill. 2d at 320-21. The court took the matter under advisement and then issued an order stating that it would grant the State's motion to summarily dismiss the petition as a section 2-1401 petition and that the defendant could not transform a section 2-1401 petition into a post-conviction petition by captioning his supplemental pleadings as post-conviction petitions. *Stoffel*, 239 Ill. 2d at 320. Our Supreme Court disagreed with this reasoning, finding that once a trial court has independently reviewed a section 2-1401 petition and determined to treat it as a post-conviction petition, appointing counsel and ordering counsel to file a Rule 651(c) certificate, it has advanced the matter to the second stage of post-conviction procedure. *Stoffel*, 239 Ill. 2d at 327. The trial court could not then again treat the matter as a section 2-1401 petition without presenting a reasonable basis for doing so after having recharacterized it as a post-conviction petition. *Stoffel*, 239 Ill. 2d at 329.

¶ 6 In this case the court was presented with a petition by defendant that was filed as a section 2-1401 petition. The trial court appointed counsel to represent defendant, but that is an action which the trial court may also take in the case of a section 2-1401 petition. See *People v. Muniz*, 386 Ill. App. 3d 890, 892 (2008). Although defense counsel stated his intention to file a Rule 651(c) certificate, he never did so, and the trial court did not instruct him to do so. Also, counsel did not file any supplemental petitions. These facts distinguish this case from *Stoffel*, and we find insufficient evidence here that the trial court recharacterized this petition as a post-conviction petition, an action which it was not required to take. *People v. Shelstrom*, 216 Ill. 2d 45, 53 (2005); 725 ILCS 5/122-1(d) (West 2008). It also follows that the case had not advanced to the second stage of post-conviction proceedings when the trial court dismissed it. Defendant raised constitutional issues which were not appropriate for a section 2-1401 petition, which in criminal cases is intended to address factual errors unknown to the trial court or defendant which,

if known, would have precluded judgment against the defendant. *People v. Gillespie*, 407 Ill. App. 3d 113, 135 (2010). Accordingly, we find no basis for error in this dismissal.

¶ 7 Defendant also contends that the trial court erred in accepting his waiver of a pre-sentence investigation and sentencing defendant based on a negotiated guilty plea without stating defendant's criminal history on the record. We find this case to be on point with *People v. Sims*, 378 Ill. App. 3d 643 (2007). In *Sims*, as in this case, the defendant entered into a negotiated guilty plea and waived his right to a pre-sentence investigation report, but the trial court then failed to state on the record the defendant's criminal history. The defense argued on appeal that this failure to comply with this statutory requirement (730 ILCS 5/5-3-1 (West 2008)) rendered the judgment void and required remand for a new sentencing hearing. *Sims*, 378 Ill. App. 3d at 646. With one justice dissenting, the *Sims* court held that because the trial court had jurisdiction over both the subject matter of the cause and the defendant, the sentences imposed were merely voidable and not void. *Sims*, 378 Ill. App. 3d at 648; see *People v. Davis*, 156 Ill. 2d 149, 156 (1993). Because the section 2-1401 petition filed by the defendant was not timely, the court affirmed the defendant's sentences. In this case the State contends that defendant has waived this issue because he failed to raise it in his section 2-1401 petition or in a direct appeal. The defense replies that we must still vacate defendant's attempted murder sentence because the trial court's order was void where it accepted defendant's waiver of a pre-sentence investigation report without stating on the record defendant's criminal history. Like the *Sims* court, we find that the order imposing this sentence on defendant was merely voidable and rather than void, as the trial court had jurisdiction over the subject matter and defendant. Also, the sentence given was within the permissible statutory range. See *People v. Wade*, 116 Ill. 2d 1, 6 (1987)) (a court is without jurisdiction to impose a sentence which is lesser or greater than that permitted by statute and such a sentence is void). Accordingly, we find that defendant has waived this issue where he is raising it for the first time in this appeal and we affirm the sentence imposed upon defendant.

¶ 8 Defendant then contends, and the State concedes, that he should not have been assessed the $200 fee for DNA testing and analysis (730 ILCS 5/5-4-3(j) (West 2008)), as he is currently registered in the DNA data bank pursuant to a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). The State also concedes, as defendant contends, that he should not have been liable for a $5 court system fee, as that fee can only be assessed for violations of certain sections of the Illinois Vehicle Code (625 ILCS 5/1-100 et seq.) (West 2008)) or similar provisions in county or municipal ordinances (55 ILCS 5/5-1101(a) (West 2008)). Accordingly we vacate those two fees.

¶ 9 Finally, defendant contends, and the State concedes, that he was eligible for a reduction of $5 dollars per day of pre-sentencing custody for $15 in fines he received. 725 ILCS 5/110-14 (West 2008). These fines were a $5 youth diversion/peer court assessment (55 ILCS 5/5-1101(e) (West 2008), found to be a fine in *People v. Graves*, 235 Ill. 2d 244, 255 (2009)), and a $10 mental health court fee (55 ILCS 5/5-1101(d-5) (West 2008), also found to be a fine in *Graves*, 235 Ill. 2d at 255). Defendant spent 895 days in pre-sentencing custody for a credit of $4,475 against any fines and so was entitled to have these fines reduced by $15 and therefore vacated.

¶ 10 For the reasons set forth in this order, we affirm the trial court's order dismissing defendant's section 2-1401 petition. We vacate defendant's $200 DNA testing fee and his $5 court system fee. We also vacate his $5 youth diversion/peer court fine and his $10 mental health court fine.

¶ 11 Judgment affirmed; fees and fines modified as directed.