2014 IL App (1st) 12-0307-U
No. 1-12-0307
Order filed February 10, 2014

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RONALD HARRIS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 01 CR 23878 (01) Honorable Rickey Jones, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The order of the circuit court denying the defendant's petition for post-judgment relief under section 2-1402 of the Code of Civil Procedure and for appointment of counsel thereon will be affirmed where the petition was without merit, and the mittimus will be corrected to properly reflect the offenses for which the defendant was convicted. The State's cross-appeal is dismissed for lack of jurisdiction.

¶ 2 A jury found the defendant, Ronald Harris, guilty of five counts of aggravated criminal sexual assault, and the court sentenced him to four terms of 25 years' imprisonment and one term of 20 years' imprisonment, to be served consecutively. On direct appeal, this court affirmed the defendant's conviction, vacated his sentences, and remanded the cause to the trial court for re-

sentencing (*People v. Harris*, No. 1-06-1382 (2008) (unpublished order under Supreme Court Rule 23). While the resentencing was pending, the defendant filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS § 5/2-1401(West 2008)), and then filed an amended petition, which was denied by the trial court. The defendant now appeals, arguing 1) that the court erred in failing to appoint counsel to represent him on the petition; and 2) that his mittimus should be corrected to reflect convictions for aggravated criminal sexual assault under section 5/12-14(a)(1) rather than 5/12-14(a)(3) of the Criminal Code of 1961 (720 ILCS 5/12-14(a)(1), 12-14(a)(3) (West 2008)), and to include credit for time served.

¶ 3 The facts underlying the defendant's conviction are outlined fully in our prior order. We set forth the facts and procedural history below that are relevant to the disposition of the issues raised in this appeal. On January 22, 2009, while this case was on remand for re-sentencing, the defendant filed the first of two post conviction petitions under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)). On February 4, 2009, he filed a motion for substitution of judge (SOJ), contending that his trial judge displayed bias against him and could not be impartial during the post-conviction proceedings. The cause was transferred *instanter* on Feb. 10, 2009, to a supervising judge for consideration of the SOJ motion. On May 4, 2009, while the motion was pending, the defendant filed his second post conviction petition under section 122-1.

¶ 4 Also on May 4, 2009, he filed the *pro se* petition for relief from judgment under section 2-1401 (735 ILCS 5/2-1401(West 2008)), which is at issue in this appeal. Attached to the petition was a request for appointment of counsel. In the petition, the defendant asserted that the indictment against him was void, because he was incarcerated without a prompt probable cause hearing and was not indicted within the 30-day period required under section 109-3.1(b) of the

Code of Criminal Procedure (725 ILCS 5/109-3.1(b)(West 2008)). The defendant also claimed that the prosecutor misled the grand jury with perjured testimony. Over two years later in August 2011, the defendant filed an amended section 2-1401 petition and request for appointment of counsel. The amended petition was also directed solely at his indictment, and claimed that the police and prosecution engaged in fraudulent concealment of material facts during the initial investigation and grand jury proceedings; that these concealed facts would have shown a lack probable cause to arrest the defendant; that he gave his confessions "in [order] to be rid of present and imminent physical and mental suffering" during questioning by the police; and that the record established that T.A., one of the multiple alleged victims who identified the defendant as the attacker, made a "tentative" identification, and that this fact was concealed from the grand jury.

¶ 5 In the meantime, on August 14, 2009, the defendant's motion for SOJ was found to be without merit, and the case was transferred back to the original trial judge. On October 6, 2009, a status hearing was held on all pending matters, and the following colloquy occurred:

> "[Assistant Public Defender]: Gwen Brown on behalf of Mr. Harris.
>
> The Court: Mr. Harris has filed not only a petition for post-conviction relief, but he's filed a [2-1401] and a DNA motion. Counsel, will you be representing him on all those matters.
>
> Ms. Brown: I don't think we represent him on the [2-1401], but if he has the post-conviction and the DNA, and I believe the DNA matter is what I'm here on today. Are they all together or ---
>
> The Court: Everything is – the entire case is up today.

Ms. Brown: I have this. I can't say, your Honor, that I have read it because I've just got the case.

The Court: I understand that, but I want you to be aware that he's filed those other petitions too. And I want to make sure that there's someone either representing him on all of these matters or be inquiring. You will be addressing all those matters with him?

Ms. Brown: the [2-1401] they usually represent themselves.

The Court: You will not take representation of him?

Ms. Brown: Right.

The Court: How about the DNA?

Ms. Brown: DNA, yes, post-conviction, yes.

The Court: Now, I will address the [2-1401] myself."

¶ 6 The defendant's case was then continued. On June 10, 2010, the defendant was sentenced to 18 years' imprisonment on each of five counts, with sentences to run consecutively. In a later proceeding, assistant public defender Brown reiterated to the court that she would not be representing the defendant on the 2-1401 petition, but would be his counsel on the post-conviction petition.

¶ 7 On December 5, 2011, the defendant moved for summary judgment under the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010)), as to his section 2-1401 petition. On December 16, 2011, the court entered an order denying the petition. The court summarized the proceedings following the defendant's direct appeal, and observed that the defendant's public defender had "informed the court that their office only accepted appointment for and is only representing" the defendant on his post-conviction petition, but "not his petitions for relief from

judgment under the Civil Code which is the subject of this Order." The court then issued the following order:

> "The Court has fully considered [the defendant's] 2-1401 claims for relief and his Motion for Summary Judgment along with pertinent law. The Court hereby finds that [the defendant's] claims are without merit. Wherefore, [the defendant's] motion for appointment of counsel, for relief from judgment and for Summary Judgment is hereby denied."

The defendant subsequently filed his *pro se* appeal.

¶ 8 On appeal, the defendant argues that the circuit court erred in failing to exercise its discretion to appoint him counsel for his section 2-1401 petitions.

¶ 9 As a preliminary matter, the State asserts that we lack jurisdiction over this issue, because the defendant failed to include it in his notice of appeal.

¶ 10 Illinois Supreme Court Rule 303(b)(2) requires that a notice of appeal "specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." 210 Ill. 2d R. 303(b)(2). If the notice does not comply with this rule, the reviewing court lacks jurisdiction and must dismiss the appeal. *People v. Patrick*, 2011 IL 111666, 960 N.E.2d 1114; *People v. Smith*, 228 Ill.2d 95, 104, 885 N.E.2d 1053 (2008). Although a notice of appeal is jurisdictional, it is generally accepted that such a notice is to be considered as a whole and construed liberally. *Patrick*, 2011 IL 111666 ¶ 23, 25; *Lang v. Consumers Insurance Service, Inc.*, 222 Ill.App.3d 226, 229, 583 N.E.2d 1147 (1991). The purpose of the notice is to inform the prevailing party in the trial court that the other party seeks review of the judgment. *Patrick*, 2011 IL 111666 ¶ 23. Thus, the question is whether the notice, taken as a whole, fairly and adequately sets out the judgment complained of and the relief sought, thus advising the

successful litigant of the nature of the appeal. *Smith*, 228 Ill. 2d at 105. Where the deficiency in notice is one of form, rather than substance, and there is no prejudice to the appellee, the failure to comply strictly with the form of notice is not fatal to the appeal. *Id.* at 104-05.

¶ 11 The State argues that the defendant here appealed only from the order denying his section 2-1401 petitions, and not from the denial of his request for counsel. Thus the notice was insufficient to confer jurisdiction. We disagree.

¶ 12 The notice of appeal provided that the "nature of order appealed" was from the "dismissal of Petition for relief from judgment pursuant to 735 ILCS 5/2-1401 (F) and Fraudulent Concealment and Misrepresentation of Material Facts." The "relief sought" was that the defendant's conviction be vacated, or, in the alternative, that an evidentiary hearing be held "on all grounds." The date of the order appealed was stated as December 16, 2011. The denial of the defendant's request for counsel, though not specifically included in the notice, was a component of the order of December 16, 2011, denying section 2-1401 relief. Accordingly, the date and description set forth in the notice here were sufficient to apprise the State of the nature of the appeal. (See *Smith*, 228 Ill. 2d at 105.) Also, the defendant's brief served to notify the State of the specific argument on appeal. *Patrick*, 2011 IL 111666 ¶ 26. Consequently, the deficiency in the notice here is merely one of form, and does not defeat jurisdiction. See *People v. Gutierrez*, 2012 IL 11159, 962 N.E.2d 437.

¶ 13 We now turn to the issue of whether the court erred in failing to exercise its discretion in appointing counsel on the section 2-1401 petitions. We note here that the defendant does not assert that the court committed any error in denying the petition itself; rather, he contends only that the court, in mistaken reliance upon statements by the assistant public defender that her office generally does not represent defendants in 2-1401 petitions, declined to recognize that it

had discretion to appoint counsel on the petition. Further, the defendant contends that when the initial 2-1401 petition was before the judge assigned to hear the SOJ motion, the public defender was appointed on the petition, but the order was disregarded by the trial judge.

¶ 14 Section 2–1401 provides a statutory procedure by which final orders, judgments, and decrees may be vacated after 30 days from their entry. *People v. Vincent*, 226 Ill. 2d 1, 7, 871 N.E.2d 17 (2007); *People v. Haynes*, 192 Ill. 2d 437, 460, 737 N.E.2d 169 (2000). Although a section 2–1401 petition is a civil remedy, its remedial powers have been extended to criminal cases. *Vincent*, 226 Ill.2d at 8 (citing *People v. Sanchez*, 131 Ill.2d 417, 420, 546 N.E.2d 574 (1989)). Unlike in the Post–Conviction Hearing Act, however, section 2–1401 does not explicitly confer a right to counsel (compare 725 ILCS 5/122–4 (West 2008) with 735 ILCS 5/2–1401 (West 2008)). Further, a criminal defendant generally has no constitutional right to the appointment of counsel in a civil action. *Tedder v. Fairman*, 92 Ill. 2d 216, 225, 441 N.E.2d 311 (1982).

¶ 15 The defendant here has failed to cite to any authority, nor have we uncovered any, specifically holding that a trial court has discretion to appoint counsel in a section 2-1401 petition. He relies upon *People v. Pinkonsly*, 207 Ill. 2d 555, 567–68, 802 N.E.2d 236 (2003), *People v. Welch*, 392 Ill. App. 3d 948, 952, 912 N.E.2d 756 (2009), and *People v. Muniz*, 386 Ill. App. 3d 890, 892, 899 N.E.2d 428 (2008), but in *Pinkonsly* and *Welch*, the court merely addressed the level of performance of counsel previously appointed by the lower court; the question of whether a court has discretion to do so in the first instance was never at issue in any of the three cases.

¶ 16 Regardless, we do not see any error in the trial court's decision to deny counsel. First, there is no basis in the record to conclude that the judge on the SOJ motion ever appointed

counsel on the section 2-1401 petition. Rather, the record indicates that the public defender was in fact appointed only on the section 122-1 petition, filed simultaneously. Further, the defendant's assertion is belied by the documents accompanying his amended petition, in which he clearly states that counsel has not been appointed and requests such appointment. Last, while the final order did note that the public defender's office was representing the defendant only on his section 122-1 petition and not the petition for relief from judgment, the court went on to specifically deny appointment of counsel only *after* it found the 2-1401 petition to be without merit.

¶ 17 We similarly find the section 2-1401 petition to be without merit. The purpose of a section 2–1401 petition is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry. *Haynes*, 192 Ill.2d at 463, 737 N.E.2d 169. To obtain relief under this section, defendant must file a petition no later than two years after the entry of the order of judgment (735 ILCS 5/2–1401 (West 2008)), and set forth a meritorious defense or claim, due diligence in presenting that defense or claim to the circuit court, and due diligence in filing the petition. *Id.* The function of a section 2-1401 petition is to address matters outside of the record, and accordingly, the statute mandates that the petition be supported by affidavit or other material making such a showing. 735 ILCS 5/2–1401(b) (West 2002); *Vincent*, 226 Ill. 2d at 7, 871 N.E.2d 17. Absent an evidentiary hearing on a petition, our review of the dismissal of a section 2–1401 petition is *de novo*. *Id.*, at 14-15.

¶ 18 Our review of the record indicates that each of the defendant's claims are merely attempts to reassert matters that were already fully considered and decided, or which could have been raised, either in the trial court in the context of the defendant's multiple pretrial motions, or on appeal before this court. In support of his contention of fraudulent concealment on the part of

the police and the prosecutor, he refers us to passages of testimony contained wholly within the record and already heard by the trial court. This is insufficient to support a petition for relief from judgment. See *People v. Coleman*, 206 Ill. 2d 261, 290, 794 N.E.2d 295 (2002). Accordingly, we agree with the trial court in finding that the petition lacked merit, and denying counsel.

¶ 19 Last, the defendant asks that we correct the mittimus in this case to reflect convictions for aggravated criminal sexual assault under 720 ILCS 5/12-14(a)(1), rather than (a)(3), as it currently states, and to properly specify the number of days he spent in custody through to sentencing. The State does not dispute this request, and it is supported by the record. We therefore will amend the mittimus to reflect the proper convictions, and to give the defendant credit for 3205 days served in presentence custody.

¶ 20 On cross-appeal, the State argues that the court erred in appointing the State Appellate Defender to represent the defendant in this appeal. However, the record fails to disclose any notice of cross-appeal by the State as to this or any other issue. Accordingly, we dismiss the cross-appeal for lack of jurisdiction pursuant to Supreme Court Rule 303.

¶ 21 For the foregoing reasons, we affirm the circuit court's order denying the section 2-1401 petitions and denying the defendant's request for appointment of counsel. The mittimus is corrected to reflect convictions for five counts of aggravated criminal sexual assault under section 5/12-14(a)(1) of the Criminal Code of 1963, and to give the defendant credit for 3205 days served. The State's cross-appeal is dismissed, and its request for fees and costs pursuant to *People v. Nicholls*, 71 Ill. 2d 166, 374 N.E.2d 194 (1978), is hereby denied.

¶ 22 Affirmed, mittimus corrected.