2017 IL App (1st) 143555-U

No. 1-14-3555

Order filed June 23, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 93 CR 12075
	)	
DWAYNE WILKERSON,	)	Honorable
	)	Gregory Robert Ginex,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: Admonishments pursuant to *People v. Pearson*, 216 Ill. 2d 58 (2005), were not warranted where the trial court did not recharacterize defendant's section 2-1401 petition for relief from judgment as a successive postconviction petition. We affirm the trial court's *sua sponte* dismissal of defendant's petition for relief from judgment where the petition is untimely as a matter of law.

¶ 2 Defendant Dwayne Wilkerson appeals the dismissal of his *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). He contends that the trial court improperly recharacterized his section 2-1401 petition as a

successive petition for postconviction relief without advising defendant of the consequences or allowing defendant to amend his petition to conform with the requirements of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). We affirm.

¶ 3 Following a 1995 jury trial, defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 1992)) and attempted murder (720 ILCS 5/8-4, 5/9-1(a)(1) (West 1992)) and sentenced to concurrent terms of 60 and 30 years' imprisonment. On direct appeal, defendant argued, *inter alia*, that the trial court abused its discretion by imposing concurrent 60- and 30-year sentences. *People v. Wilkerson*, 1-95-2713 (June 28, 1996) (unpublished summary order pursuant to Supreme Court Rule 23). This court affirmed defendant's convictions and sentences and found that the trial court did not abuse its discretion where the sentences were within the statutory guidelines, and the court "carefully and thoughtfully consider[ed] the circumstances and type of offenses committed, as well as balance[ed] defendant's negligible rehabilitative potential, and the need to protect the public." *Id.* at *6.

¶ 4 On January 10, 1996, defendant mailed a *pro se* petition for postconviction relief under the Act. For reasons unclear in the record, the petition was not filed until May 10, 1996. The trial court dismissed the petition on June 6, 1996. On January 10, 1997, defendant filed a *pro se* late notice of appeal, which this court denied. Defendant additionally filed on November 5, 1997 a "Motion to Comply" the trial court to consider his previously-filed *pro se* postconviction petition, alleging that he was entitled to an evidentiary hearing pursuant to the Act because the trial court failed to rule on his postconviction petition within 90 days. The trial court characterized this motion as defendant's second postconviction petition and dismissed it. No appeal was taken.

¶ 5 Defendant filed another *pro se* petition for postconviction relief on July 25, 2001, alleging his sentence was void because the statute he was sentenced under was unconstitutional. The trial court dismissed defendant's petition, finding it was frivolous and patently without merit and noted that it was defendant's third postconviction petition. Defendant appealed the dismissal, and defense counsel filed a motion to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), alleging that there were no arguable bases for collateral relief. This court allowed counsel's motion to withdraw and affirmed the trial court's dismissal. *People v. Wilkerson*, 1-01-4303 (September 13, 2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 On August 10, 2010, defendant filed a *pro se* section 2-1401 petition, alleging that the imposition of a three-year mandatory supervised release (MSR) was void because it was imposed by the Illinois Department of Corrections rather than the trial court at sentencing. The trial court dismissed defendant's petition. This court affirmed the trial court's decision on appeal, citing *People v. McChriston*, 2014 IL 115310, ¶¶ 16-17, which held that the MSR term was automatically included in a defendant's sentence regardless of whether the trial court mentioned the term at sentencing. *People v. Wilkerson*, 2014 IL App (1st) 122901-U (unpublished summary order under Supreme Court Rule 23).

¶ 7 On August 25, 2014, defendant filed a second *pro se* section 2-1401 petition, which is at issue in this appeal. The petition alleged that his sentences are void because the trial court ignored relevant mitigating factors and considered improper aggravating factors at sentencing. Specifically, defendant alleged that the trial court failed to consider mitigating evidence that showed defendant acted in self-defense, and erroneously considered evidence regarding

defendant's gang affiliation. While defendant acknowledged in his petition that his sentences were the maximum allowable, he also alleged that they did not conform to statutory guidelines.

¶ 8 On October 24, 2014, the trial court entered an order dismissing defendant's petition. At a hearing on defendant's petition, the State's Attorney waived any defects in service. The court stated,

> "I reviewed the petition, and I note that the defendant in the past has had another -- at least one or two collateral attacks regarding this on the same issue which had been denied. And I find that in reviewing the petition the -- the petition as a whole is frivolous and patently without merit, and, therefore, the defendant's petition will be denied.
>
> I would ask the court reporter to type that -- he's not entitled to this relief as a matter of law. But we will note that -- as I said, there's been two other matters that were denied, and apparently there was an affirmance on appeal on the same issue.
>
> Therefore, I will tell the court reporter to type it up and send notice to the defendant within ten days. And as a matter [of] law he is not entitled to relief."

¶ 9 The clerk of the circuit court informed defendant of the dismissal via a notice pursuant to Illinois Supreme Court Rule 651 (eff. Jan. 25, 1996). This appeal followed.

¶ 10 On appeal, defendant contends that the trial court recharacterized his section 2-1401 petition as a successive postconviction petition without admonishing him pursuant to *People v. Pearson,* 216 Ill. 2d 58 (2005), and allowing him to amend his complaint to comply with the requirements for successive petitions under the Act. Defendant argues that the recharacterization is demonstrated by the trial court's description of his petition as "frivolous and without merit" and because the notice sent cited to Rule 651, which pertains to appeals in postconviction

proceedings. The State responds that the court did not recharacterize defendant's petition, and argues that the court's language that defendant is "not entitled to relief as a matter of law" demonstrates the court's intent to treat it as a section 2-1401 petition. The State further argues that the court's oral pronouncement that defendant was not entitled to relief as a matter of law controls over the "form notification" sent to defendant which cited to Rule 651.

¶ 11 Section 2-1401 of the Code constitutes a comprehensive statutory procedure authorizing a trial court to vacate or modify a final order or judgment in civil and criminal proceedings. *People v. Thompson,* 2015 IL 118151, ¶ 28. A petition seeking relief under section 2-1401 must be filed more than 30 days from entry of the final order but not more than 2 years after that entry. 735 ILCS 5/2-1401(a), (c) (West 2012).

¶ 12 Trial courts have discretion to recharacterize section 2-1401 petitions as petitions for postconviction relief under the Act. *People v. Addison,* 371 Ill. App. 3d 941, 946 (2007). However, prior to recharacterizing a *pro se* section 2-1401 petition as a successive postconviction petition, the court must notify the *pro se* litigant of its intent to recharacterize the pleading, warn the litigant of the restrictions on successive postconviction petitions, and allow the litigant to withdraw the pleading to amend it to conform with the requirements of a successive postconviction petition. *Pearson,* 216 Ill. 2d at 68.

¶ 13 Here, after a careful review of the record, we find that the trial court did not recharacterize defendant's section 2-1401 petition as one brought under the Act. Although the court initially used the phrase "frivolous and patently without merit," which is typically associated with first-stage postconviction proceedings, the phrase is not exclusive to postconviction actions. Furthermore, the court found that defendant was not entitled to relief as a

matter of law, a phrase consistent with section 2-1401 *sua sponte* dismissals. See, *e.g.*, *People v. Allen*, 277 Ill. App. 3d 938, 948 (2007) (finding that we apply the *de novo* standard of review "when a trial court *sua sponte* dismisses a section 2-1401 petition *as a matter of law*." (Emphasis added.)).

¶ 14 While we acknowledge that the notice informing defendant that the petition was denied cited Rule 651, which applies to appeals in "post-conviction" proceedings (IL. S.Ct. R. 351 (eff. Jan. 25, 1996)), we find that the record as a whole does not support defendant's contention that the trial court recharacterized defendant's section 2-1401 petition. Without a more explicit indication of recharacterization, we presume the trial court knew the law and applied it correctly. See *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009) ("[A] trial court is presumed to know the law and apply it properly."). In light of these circumstances, we conclude that defendant has not established that the trial court recharacterized his section 2-1401 petition as a successive postconviction petition. Accordingly, contrary to defendant's assertions, the *Pearson* admonishments were not required here.

¶ 15 Defendant additionally takes issue with the trial court's statement that defendant had previously challenged his sentences and that this court affirmed his sentences on direct appeal, which appears to be a challenge to the trial court's *sua sponte* dismissal of his section 2-1401 petition. Defendant argues in his reply brief that his prior challenges to his sentences were distinct from his current claim. The State asserts that the trial court properly dismissed defendant's petition as a matter of law because this court previously addressed on direct appeal defendant's claim that the trial abused its discretion in imposing sentence.

¶ 16 The *sua sponte* dismissal or denial of a section 2-1401 petition for relief from judgment is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). Under the *de novo* standard, we review the disposition rather than the reasoning of the circuit court; that is, our "review is completely independent of the trial court's decision." *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 34.

¶ 17 We note that defendant now alleges that his sentences are void because the trial court failed to consider mitigating evidence and improperly considered aggravating evidence. On direct appeal, defendant argued that the trial court "abused its discretion by imposing the 60-year sentence and the 30-year sentence to run concurrently." *Wilkerson*, 1-95-2713 at *5. This court affirmed defendant's sentences after finding that the trial court properly considered the relevant sentencing factors. *Id.* at *5-6. It therefore appears that this issue was previously settled on defendant's direct appeal.

¶ 18 However, even if the claims are not identical as defendant contends, his claim fails as his petition was untimely filed more than two years after sentencing. Defendant's argument that the sentence was void does not excuse the untimely filing. Pursuant to *People v. Castleberry*, 2015 IL 116916, ¶¶ 115-17, a sentence is void only if the sentencing court lacks jurisdiction. Here, it is undisputed that the trial court retained jurisdiction over defendant and the subject matter of his criminal case. Accordingly, his sentence is not void. Because his sentence is not void, defendant is bound by the two-year limitation of the filing of a section 2-1401 petition, which in this case ended two years after defendant's 1995 conviction. See *Thompson*, 2015 IL 118151, ¶¶ 28-29, 33 (noting that a petitioner must file a section 2-1401 petition no more than two years after the entry of the challenged judgment and may only avoid the limitation if the petitioner is

challenging a void order" and *Castleberry* "abolished the void sentence rule"). Defendant's petition, which was filed in 2014, much more than two years after sentence was imposed in 1995, is therefore untimely as a matter of law.[1]

¶ 19 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.

[1] We may affirm the trial court on any basis in the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010)