2017 IL App (2d) 150136-U
No. 2-15-0136
Order filed June 23, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GRANT HOLLINGSWORTH, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of De Kalb County. Nos. 11-CM-1915 12-CM-288 Honorable William P. Brady, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant did not receive unreasonable assistance of counsel on his section 2-1401 petition, as the claims that counsel allegedly should have included in the petition either were not cognizable under section 2-1401 or otherwise would not have entitled defendant to relief.

¶ 2 Defendant appeals from an order of the circuit court of De Kalb County denying his petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) for relief from his conviction of two counts of domestic battery (720 ILCS 5/12-3.2(a)(1) (West

2010)). Defendant contends that he did not receive reasonable assistance of counsel in connection with his petition. We affirm.

¶ 3 On January 17, 2014, defendant entered a negotiated plea of guilty in each of two separate prosecutions (case No. 11-CM-1915 and case No. 12-CM-288) to a single count of domestic battery. He was represented by a private attorney, Timothy Johnson. Pursuant to his agreement with the State, defendant was sentenced to an 18-month term of probation and other domestic battery charges were nol-prossed. The State did not recite a factual basis for the plea. When defendant entered his plea, a motion by the State to revoke or increase defendant's bond was pending. One week earlier, defendant informed the trial court that he had just been advised of the motion to revoke his bond. He indicated that he was innocent and wanted to proceed to trial.

¶ 4 On March 14, 2014, defendant appeared in court without counsel. With reference to his plea agreement, defendant told the trial court, "I never wanted to make this bargain, and I told my attorney within the 30 days that I wanted him to come in here and recall it, and ever since I made that statement to him, he's been avoiding me." Defendant advised the trial court that he wanted the matter set for trial. Defendant stated that he did not commit the crimes to which he pleaded guilty. He asked the trial court to appoint the public defender to represent him. The trial court directed defendant to file a written motion for the relief he sought. On the same day, defendant filed, *pro se*, a notice of motion to "take to trial-amend." Defendant did not file an actual motion. He later filed a notice of motion to "file a new trial." Again, defendant did not file an actual motion.

¶ 5 On June 13, 2014, the trial court appointed the public defender's office to represent defendant. On October 17, 2014, assistant public defender Meera Al-Henaey filed a "motion"

pursuant to section 2-1401 to vacate defendant's guilty plea on the grounds that (1) defendant entered his plea "under the assumption that the charges against him were not expugnable [*sic*]" and with the belief that "he had more options available to him than those that he was informed of" when he entered his plea and (2) he pleaded guilty under duress inasmuch as he believed that if he chose to go to trial he would be sentenced to 120 days in jail. On December 23, 2014, Al-Henaey submitted an affidavit from defendant in support of the "motion." According to the affidavit, before pleading guilty, defendant repeatedly told Johnson that he wanted to go to trial, but the State had moved to revoke defendant's bond and Johnson told defendant that if he did not enter a negotiated guilty plea he would go to jail. Johnson did not advise defendant that he had the option of having a hearing on the State's motion. The affidavit further stated that, within the 30-day period after defendant entered his plea, defendant called Johnson numerous times to discuss withdrawing his plea. According to the affidavit, Johnson indicated that he needed to discuss the matter with the State's Attorney. The trial court denied defendant's "motion," and this appeal followed.

¶ 6 During the relevant time frame, Section 2-1401 provided, in pertinent part, as follows:

> (a) Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. ***

> (b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(a), (b) (West 2014).

Although section 2-1401 specifies that a "petition" shall be filed, the document that defendant filed is designated a "motion." For purposes of our analysis we shall nonetheless treat it—and refer to it—as a "petition."

¶ 7 In *People v. Pinkonsly*, 207 Ill. 2d 555, 565-66 (2003), our supreme court offered the following observations regarding proceedings under section 2-1401 in criminal prosecutions:

> "To obtain relief under section 2-1401, the defendant 'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.' [Citations.] That is, in order to obtain relief under section 2-1401, the defendant must show both a meritorious defense to the charges against him and due diligence in presenting it.
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> A meritorious defense under section 2-1401 involves errors of fact, not law. [Citations.] As we have stated:
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> > 'A section 2-1401 petition for relief from a final judgment is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition. [Citations.] A section

> 2-1401 petition, however, is "not designed to provide a general review of all trial errors nor to substitute for direct appeal." ' [Citation.]"

¶ 8 Defendant argues that there were grounds for relief under section 2-1401 beyond those set forth in the petition that Al-Henaey filed. According to defendant, in addition to claiming that he entered his plea under duress, and under the assumption that the charges against him were not expungeable, the section 2-1401 petition should have set forth claims that: (1) Johnson provided ineffective assistance of counsel by forfeiting defendant's right to appeal; (2) doubt exists as to defendant's guilt; and (3) no factual basis was presented in support of defendant's guilty plea. Defendant argues that Al-Henaey's failure to raise these additional issues represents a failure to provide reasonable assistance.

¶ 9 Defendant cites no authority definitively holding that a criminal defendant represented by counsel in connection with proceedings under section 2-1401 is entitled any particular level of assistance. However, in *Pinkonsly*, 207 Ill. 2d at 568, our supreme court proceeded from the assumption that a defendant is entitled to the same level of assistance as a petitioner in a proceeding under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). A petitioner in a postconviction proceeding is entitled to reasonable assistance. *People v. Cotto*, 2016 IL 119006, ¶ 30. For purposes of our analysis, we likewise assume that defendant was entitled to reasonable assistance from Al-Henaey.

¶ 10 We first consider whether Al-Henaey failed to provide reasonable assistance because the section 2-1401 petition omitted the claim that Johnson failed to provide the effective assistance of counsel. The argument depends on the proposition that such a claim would have been cognizable in a proceeding under section 2-1401. However, in *Pinkonsly*, our supreme court observed, "We have long held that section 2-1401 proceedings are not an appropriate forum for

ineffective-assistance claims because such claims do not challenge the factual basis for the judgment." *Pinkonsly*, 207 Ill 2d at 567. Claims of ineffective assistance of counsel can be raised in a petition under the Act. By its terms, the Act is applicable only to cases in which the defendant has been sentenced to prison. *People v. Warr*, 54 Ill. 2d 487, 491 (1973). However, in *Warr* our supreme court held that an analogous procedure may be used in other cases. Where judgment has been entered on a plea of guilty, a proceeding under *Warr* must be commenced within four months of the entry of the judgment. *Id.* at 493. Defendant essentially argues that, once that relief under *Warr* became time-barred, the ineffective-assistance claim became cognizable in a section 2-1401 proceeding. For the reasons set forth below, we disagree.

¶ 11 Defendant cites *People v. Mathis*, 357 Ill. App. 3d 45, 50 (2005), for the proposition that (in defendant's words) "a defendant who is unable to seek relief under the Act can nevertheless raise a claim through a Section 2-1401 petition, in the interest of justice, where it is the only available means." *Mathis* is inapposite. In that case the trial court permitted the defendant to raise a *nonconstitutional* issue of law in a section 2-1401 petition. Postconviction relief is permissible only in cases of constitutional violations (725 ILCS 5/122-1(a)(1) (West 2014)), so the defendant in *Mathis* had no recourse under the Act. Here, however, defendant did have recourse to postconviction-like relief under *Warr* for Johnson's claimed ineffectiveness. That defendant allowed the time for seeking such relief to lapse does not put this case in the same category with *Mathis*, where the claimed error simply was not cognizable in a postconviction proceeding.

¶ 12 For essentially the same reason, defendant's reliance of *People v. Lawton*, 212 Ill. 2d 285 (2004), is misplaced. In *Lawton*, our supreme court explained that proceedings under the Sexually Dangerous Persons Act (725 ILCS 205/0.01 *et seq.* (West 2002)) are civil, so one

committed under that statute cannot seek postconviction relief, which applies only to those imprisoned for a criminal conviction. *Lawton*, 212 Ill. 2d at 297. Concluding that those committed under the Sexually Dangerous Persons Act must have some mechanism for raising ineffective-assistance-of-counsel claims, the *Lawton* court held that such claims may be raised in a proceeding under section 2-1401. Here, defendant could have raised his claim in a petition under *Warr*. Accordingly *Lawton* does not apply.

¶ 13 Defendant also contends that the section 2-1401 petition should have claimed that doubt existed as to defendant's guilt and that the State failed to present a factual basis for defendant's plea. Defendant's claim that his guilt is in doubt stems from his statements to the trial court that he was innocent and wanted the case tried. The mere allegation of innocence does not warrant setting aside a guilty plea. *People v. Pierce*, 48 Ill. 2d 48, 54 (1971). Furthermore, the State's failure to recite the factual basis of defendant's plea was known to the trial court when it entered judgment. Therefore, pursuant to the principles described in *Pinkonsly*, the State's failure to recite the factual basis of defendant's plea is not grounds for relief under section 2-1401. *Pinkonsly*, 207 Ill. 2d at 565-66.

¶ 14 For the foregoing reasons, the judgment of the circuit court of De Kalb County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 15 Affirmed.