2012 IL App (4th) 100950-U

Filed 5/4/12

NOS. 4-10-0950, 4-11-0566 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DWIGHT C. WISHARD,	)	No. 08CF359
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* We grant appointed counsel's motion to withdraw and affirm the trial court's judgment where no meritorious issues can be raised on appeal as to the following issues: (1) whether the trial court had personal jurisdiction over defendant; (2) whether defendant's claims of ineffective assistance of trial and appellate counsel could be raised in a section 2-1401 petition for relief from judgment; (3) whether defendant's petition was properly dismissed as untimely; and (4) whether the trial court properly considered defendant's amended petition.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we agree and affirm.

¶ 3 In June 2008, defendant, Dwight C. Wishard, pleaded guilty to attempt (residential burglary) (720 ILCS 5/8-4(a) (West 2008)), aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)) , and disarming a peace officer (720 ILCS 5/31-1(a) (West 2008)). In

August 2008, the trial court sentenced defendant to seven years for each offense, ordering his sentences for aggravated battery and disarming a peace officer to run concurrently with each other but consecutively to his sentence for attempt (residential burglary). Defendant filed a motion to reconsider his sentence, which the court later denied. Defendant appealed, and in December 2009, this court affirmed. *People v. Wishard*, 396 Ill. App. 3d 283, 919 N.E.2d 1118 (2009).

¶ 4 In August 2010, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), arguing that (1) he received ineffective assistance of trial counsel, (2) he received ineffective assistance of appellate counsel on direct appeal, (3) the trial court's judgment was void because the court did not have jurisdiction over him, and (4) his petition should not be found to be untimely filed because he was under legal duress caused by his cancer treatment. In September 2010, the State filed a motion to dismiss the petition pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)). The court later granted the State's motion. Defendant filed a motion to reconsider, which the court denied in November 2010. Later that month, defendant filed a notice of appeal, which was designated as No. 4-10-0950. The trial court appointed OSAD to represent him.

¶ 5 In December 2010, defendant filed an amended petition for relief from judgment, pursuant to sections 2-616(a) through (c) of the Code (735 ILCS 5/2-616(a) to (c) (West 2010)), restating some of the claims in his original petition. That month, the trial court entered a docket order stating the issues raised in defendant's amended petition had previously been reviewed and ruled on when the court dismissed defendant's original petition. In July 2011, this court allowed

defendant's motion for leave to file a late notice of appeal. The next day, defendant filed a late notice of appeal, and the appeal was designated as No. 4-11-0566. OSAD was again appointed to represent defendant.

¶ 6 In November 2011, OSAD filed a motion to consolidate appeals and to withdraw as counsel on appeal, attaching to its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). In December 2011, this court allowed OSAD's motion to consolidate. On its own motion, this court also granted defendant leave to file additional points and authorities by January 2, 2012. Defendant did so. The State has responded, and defendant has filed a reply.

¶ 7 OSAD raises the following four potential issues for review and concludes that all would be without merit: (1) whether the trial court had personal jurisdiction over the defendant; (2) whether defendant's claims of ineffective assistance of trial and appellate counsel could be raised in a petition for relief from judgment under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)); (3) whether the section 2-1401 petition for relief from judgment was properly dismissed as untimely; and (4) whether the amended section 2-1401 petition for relief from judgment referencing section 2-616 of the Code was properly considered by the trial court. We agree with OSAD, and address each potential issue in turn.

¶ 8 OSAD first considers and disposes of the argument that the trial court did not have personal jurisdiction over the defendant. Specifically, defendant argues that because he was arraigned by closed circuit television, the court did not obtain personal jurisdiction over him. As OSAD correctly notes, however, the Illinois Supreme Court has determined that appearance by video for arraignment does not violate a defendant's federal and state constitutional right to be

present at all critical stages of a trial. *People v. Lindsey*, 201 Ill. 2d 45, 60, 772 N.E.2d 1268, 1278 (2002). Moreover, section 106D-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/106D-1 (West 2010)) states that a person being held in a place of custody operated by the State or any of its political subdivisions may appear by a closed circuit television in an arraignment on an information or indictment at which a plea of not guilty will be entered. Finally, even if the video arraignment on February 26, 2008, did not confer personal jurisdiction on the court, defendant appeared personally in court on March 11, 2008, for arraignment on the indictment. We therefore agree with OSAD that no colorable argument can be made that the trial court did not have personal jurisdiction over the defendant.

¶ 9 OSAD next explains that no meritorious argument can be made that defendant did not receive effective assistance of counsel at either the trial or direct appeal stages because claims of ineffective assistance of counsel cannot be raised in a section 2-1401 petition for relief from judgment. We agree. See *People v. Pinkonsly*, 207 Ill. 2d 555, 567, 802 N.E.2d 236, 244 (2003) ("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.").

¶ 10 Third, OSAD states it would be frivolous to argue that the trial court should not have dismissed defendant's section 2-1401 petition on grounds of untimeliness. Under section 2-1401(c) of the Code (735 ILCS 5/2-1401(c) (West 2010)), a petition for relief from judgment must be filed within two years after the entry of the order or judgment. An exception to the two-year period has been recognized where a clear showing has been made that the person seeking relief is under a legal disability or duress. *People v. Harvey*, 196 Ill. 2d 444, 447, 753 N.E.2d

293, 295 (2001).

¶ 11 Here, the trial court sentenced defendant on August 1, 2008, but defendant did not file his petition until August 18, 2010; thus, defendant filed his section 2-1401 petition outside the two-year period. See *People v. Caballero,* 179 Ill. 2d 205, 211, 688 N.E.2d 658, 661 (1997) (judgment is entered when sentence is imposed). Defendant asserts that this court should recognize an exception for him because he was undergoing cancer treatment during the two-year period, and therefore, he was under duress. In support of his contention, defendant filed exhibits consisting of medical records showing that he underwent extensive treatment in 2009. However, OSAD correctly notes that, even if defendant could make a clear showing that he was under duress, defendant's petition does not contain any other substantive meritorious issues entitling defendant to relief. We therefore agree it would be frivolous for OSAD to argue as to the timeliness of defendant's section 2-1401 motion.

¶ 12 Finally, OSAD explains no colorable argument can be made that the trial court failed to properly consider defendant's amended petition. Defendant filed his amended petition on December 22, 2010, pursuant to sections 2-616(a) to (c) of the Code (735 ILCS 5/2-616(a) to (c) (West 2010)), reasserting the claims he made in his earlier section 2-1401 petition that (1) the trial court lacked jurisdiction, and (2) he received ineffective assistance of counsel. He said that he was filing the amended petition to "correct or change the matter of form or substance, which will enable [defendant] to sustain the claims in the action for which they were brought." On December 29, 2010, the trial court entered a docket order that stated, "Issues raised in Defendant's Amended Petition reviewed and ruled on with Court's order dismissing original petition. Amended Petition no [*sic*] considered by the Court."

¶ 13 OSAD correctly asserts that it would be frivolous to argue that the trial court either failed to rule on the amended petition or, alternatively, prematurely dismissed the petition *sua sponte* before conclusion of the 30-day period to file answers or other pleadings in violation of *People v. Laugharn*, 233 Ill. 2d 318, 323, 909 N.E.2d 802, 805 (2009). Defendant presented his December pleading as an amendment to his original petition, not as an original pleading. Moreover, defendant's amended petition contained the same arguments as his original petition, and as previously detailed, those arguments are without merit. We agree with OSAD that no colorable argument can be made that the trial court failed to properly consider defendant's amended section 2-1401 petition.

¶ 14 For the foregoing reasons, we grant appointed counsel's motion to withdraw and affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 15 Affirmed.