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2013 IL App (4th) 120958-U

NO. 4-12-0958

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 21, 2013

Carla Bender

4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
KRISTOPHER DAVIS,)	No. 02CF2024
Defendant-Appellant.)	
)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

ORDER

¶ 1 Held: This court lacks jurisdiction over this appeal; defendant's appeal was untimely as his motion to reconsider the denial of his postjudgment motion did not extend the appeal time.

¶ 2 In April 2012, defendant, Kristopher Davis, filed a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), alleging he was denied the effective assistance of counsel during the 2003 proceedings in which he pleaded guilty to unlawful possession with intent to deliver (720 ILCS 550/5(c) (West 2002)). Defendant maintained counsel erroneously advised him of the consequences of his guilty plea, which, according to defendant, resulted in his serving an enhanced sentence after a 2008 federal prosecution. The trial court dismissed the petition, finding defendant could not establish he was prejudiced by the alleged erroneous advice. Defendant filed a postjudgment motion to recon-

sider, which the court denied as untimely. Defendant also moved for reconsideration of the denial of his motion to reconsider. That motion was denied.

¶ 3 Defendant appeals, arguing (1) the inaccurate legal advice he received during the 2003 proceedings rendered his guilty plea involuntary; and (2) his motion to reconsider was timely filed. The State argues this court lacks jurisdiction over defendant's appeal. The State maintains neither the initial motion to reconsider nor the later motion to reconsider the denial of the first motion extended the deadline for filing the appeal. We agree defendant's appeal is too late and dismiss it.

¶ 4 I. BACKGROUND

¶ 5 In April 2003, defendant entered a negotiated plea of guilty to unlawful possession with intent to deliver more than 10 grams but not more than 30 grams of a substance containing cannabis (720 ILCS 550/5(c) (West 2002)). In exchange for his plea, the parties agreed he would be placed on 24 months' probation as a first offender under section 10 of the Cannabis Control Act (720 ILCS 550/10 (West 2002)). The trial court informed defendant, if he complied with the terms of his probation, he would not have a felony conviction on his record. Defendant did not file a direct appeal.

¶ 6 In April 2012, defendant filed his section 2-1401 petition. In his petition defendant argued his counsel, who represented him during the 2003 guilty-plea proceedings, improperly advised him regarding the consequences of his plea. He stated counsel told him if he completed the probation, the charge against him would be dismissed and not adversely impact him "in the future in any proceeding, in any jurisdiction." Defendant asserted, however, he was arrested in December 2007 on a federal charge of conspiracy to distribute a controlled substance.

His sentence on that charge was enhanced due to his April 2003 conviction. Defendant argued had counsel properly informed him of the effects of his guilty plea, he would not have pleaded guilty to the 2003 offense.

¶ 7 On May 11, 2012, the trial court dismissed defendant's section 2-1401 petition. The court found defendant failed to prove he was prejudiced by counsel's incorrect advice. The court concluded defendant made no showing he "would have benefitted by not taking the negotiations he was offered."

¶ 8 On June 12, 2012, a Tuesday, the Clerk of the Circuit Court of Champaign County received the motion to reconsider. Defendant argued because he relied on inaccurate legal advice in deciding to plead guilty, he established prejudice and the dismissal of his section 2-1401 petition was erroneous.

¶ 9 On August 27, 2012, the trial court, citing section 2-1301(e) of the Code of Civil Procedure (735 ILCS 5/2-1301(e) (West 2012)), found the motion to reconsider untimely and denied it. The court concluded defendant, under section 2-1301(e), had 30 days to file a motion to reconsider and the filing was one day too late.

¶ 10 On September 4, 2012, defendant filed a motion to reconsider the trial court's denial of his June 2012 motion to reconsider. He argued his June 2012 motion to reconsider was timely as it was placed in the United States mail on June 11, 2012, and received by the clerk on June 12, 2012.

¶ 11 On October 4, 2012, the trial court entered an "Order on Motion to Hear [Defendant's] Motion to Reconsider Instantly." The trial court wrote the following, summarizing the end of the section 2-1401 proceedings in that court:

"A hearing was set at the request of [defendant] for October 4, 2012[,] at 9:15 a.m. for [defendant's] Motion to Reconsider Circuit Court's Denial of the Motion to Reconsider Relief. By 9:20, when no counsel appeared for [defendant], and the people had been waiting, and after this Court checked its phone messages to determine if counsel for [defendant] had tried [to] contact the court, the matter was called for hearing.

No argument was allowed. The Court noted that pursuant to the Court's notice, [defendant] was seen as having withdrawn his motion. The Court, however[,] did, for purposes of any appeal [defendant] might file, go over why [defendant] was not entitled to have his ruling reconsidered.

It was after 9:30 a.m. when the Court finished its ruling and left the bench. Sometime after that [defendant] filed the motion referred to herein. No hearing is necessary. [Defendant's] Motion to Reconsider Instanter is denied."

¶ 12 On October 11, 2012, defendant filed his notice of appeal. He asserted his appeal was timely because the trial court disposed of the "final justiciable matter" on October 4, 2012.

¶ 13 II. ANALYSIS

¶ 14 The State contends the October 11, 2012, notice of appeal was untimely on two grounds. First, the State argues the time for appeal was not tolled by the initial motion to reconsider because that motion was not timely filed. See Ill. S. Ct. R. 303(a)(1) (eff. June 4,

2008). According to the State, the usual 30-day period applied and defendant's appeal time expired on June 11, 2012—four months before his October 2012 appeal. Second, the State maintains, assuming defendant's initial motion to reconsider was timely, defendant's latter motion to reconsider did not further toll the appeal time. In support, the State cites Illinois Supreme Court Rule 303(a)(2) (eff. June 4, 2008) and argues a request, like defendant's, to reconsider the denial of a postjudgment motion does not toll the appeal time. According to the State, the latest defendant could have filed was 30 days after the court denied his initial motion to reconsider, specifically, September 26, 2012 (see Ill. S. Ct. R. 303(a)(2) (eff. June 4, 2008)). The State concludes the October 11, 2012, filing was too late, leaving this court with no jurisdiction to consider the appeal.

¶ 15 Defendant maintains his notice of appeal was timely. He contends the 30-day appeal time was twice tolled, extending the deadline until November 5, 2012. Defendant argues he timely placed the initial motion to reconsider in the United States mail on June 11, 2012, tolling the appeal time until the trial court ruled on that motion on August 27, 2012. Defendant contends his second motion to reconsider, filed September 4, 2012, further tolled the appeal time until the trial court's denial of it on October 4, 2012. Relying on Illinois Supreme Court Rule 274 (eff. Jan. 1, 2006), defendant denies the bar of Rule 303(a)(2) applies because, he contends, the second motion was not an attack on the trial court's decision denying his section 2-1401 motion, but a challenge to the August 27, 2012, order finding his postjudgment motion too late.

¶ 16 We agree with the State's latter argument and find this court has no jurisdiction over the appeal. Illinois Supreme Court Rule 303(a)(2) (eff. June 4, 2008) mandates "[n]o request for reconsideration of a ruling on a postjudgment motion will toll the running of the time

within which a notice of appeal must be filed under this rule." Defendant's September 4, 2012, motion to reconsider, entitled "Motion to Reconsider Circuit Court's Denial of the Motion to Reconsider Relief Pursuant to 735 ILCS 5/2-1401," is a "request for reconsideration of a ruling on a postjudgment motion" (Ill. S. Ct. R. 303(a)(2) (eff. June 4, 2008)). The time for defendant to appeal was not tolled by this motion. The latest possible appeal date, assuming the first motion to reconsider was timely filed, was September 26, 2012. Defendant's appeal, filed October 11, 2012, was filed too late.

¶ 17 Defendant's reliance on Illinois Supreme Court Rule 274 (eff. Jan. 1, 2006) is misplaced. Rule 274 states the following: "A party may make only one postjudgment motion directed at a judgment order that is otherwise final. If a final judgment order is modified pursuant to postjudgment motion, or if a different final judgment or order is subsequently entered, any party affected by the order may make one postjudgment motion directed at the superseding judgment or order." Ill. S. Ct. R. 274 (eff. Jan. 1, 2006). The final order in this appeal is the order denying defendant's section 2-1401 petition. This order, entered May 11, 2012, remained unchanged by the denial of the first motion to reconsider. It was neither modified nor superseded by the one authorized postjudgment motion. Rule 274 does not apply. This court has no jurisdiction over defendant's appeal.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we dismiss defendant's appeal.

¶ 20 Appeal dismissed.