2014 IL App (4th) 121043-U

NO. 4-12-1043

FILED
May 8, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
JOHN H. GRIFFIN,	)	No. 11CF242
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's appeal is dismissed for want of jurisdiction.

¶ 2 In August 2011, defendant, John H. Griffin, pleaded guilty to robbery of a victim over 60 years old with the use, or threat, of force (720 ILCS 5/18-1(a) (West 2010)) pursuant to a partially negotiated plea agreement. In October 2011, the trial court sentenced defendant to 20 years' imprisonment. Defendant did not file a motion to withdraw his guilty plea or a direct appeal. In July 2012, defendant filed a motion for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010). In September 2012, the trial court *sua sponte* dismissed the petition because it had not been properly served. Defendant appeals the trial court's dismissal of his section 2-1401 petition and maintains he is entitled to a

$5-per-day pre-sentence incarceration credit against the State Police operations assistance fee. Because we lack jurisdiction to hear defendant's arguments we dismiss the appeal.

¶ 3 I. BACKGROUND

¶ 4 In August 2011, defendant pleaded guilty to robbery of a victim over 60 years old with the use, or threat, of force (720 ILCS 5/18-1(a) (West 2010)) pursuant to a partially negotiated plea agreement. Although the offense was a Class 1 felony, the parties agreed defendant had to be sentenced as a Class X offender because of his prior criminal record. See 730 ILCS 5/5-4.5-95(b) (West 2010). As part of the plea agreement, the State agreed to cap the potential sentence at 25 years in prison.

¶ 5 The State presented a factual basis for the plea, alleging in March 2011, the 66-year-old female victim was walking into a grocery store when defendant approached her from behind and grabbed her purse, pulling her to the ground. When she fell, the victim sustained multiple abrasions and bruises. Defendant dragged the victim until he gained control of her purse and then he ran. Several bystanders gave chase and eventually stopped defendant, holding him until the police arrived. The victim's purse was retrieved from along defendant's escape route. When confronted by police, defendant admitted grabbing the purse and running because he had not worked and he was hungry, messed up, and desperate.

¶ 6 On October 24, 2011, the trial court sentenced defendant to 20 years in the Department of Corrections (DOC), three years' MSR, and gave defendant 211 days of sentence credit for time served. The court further stated, "The defendant is ordered to pay all the mandatory court costs, fines and fees, including the mandatory local Child Advocacy Center and drug court fine." Defendant did not file a motion to withdraw his guilty plea or a direct appeal.

¶ 7 Between March and May 2012, defendant filed multiple letters and motions requesting he be given a free copy of the trial court record and transcripts. Both the trial judge and the circuit clerk advised defendant he would have to pay for copies. Defendant filed a notice of appeal regarding his inability to obtain a free copy of his file along with a late notice of appeal raising issues relating to ineffective assistance of counsel, his sentence, and due process. Although this court allowed defendant's late notice of appeal, that appeal was dismissed on defendant's motion on May 17, 2012. In June 2012, defendant filed *pro se* motions to reduce sentence, which the trial court struck on June 13, 2012, for lack of jurisdiction.

¶ 8 On July 2, 2012, defendant filed a motion to reconsider and the section 2-1401 petition for relief from judgment which is the subject of the instant appeal. On July 5, 2012, defendant filed a notice of appeal regarding his motion to reduce sentence.

¶ 9 On August 21, 2012, the trial court wrote to defendant advising him as follows:

> "I have received and reviewed your *pro se* [p]etition [f]or [r]elief [f]rom [j]udgment which was filed with the McLean County Circuit Clerk in the above case on 2 July 2012. There is no proof of proper service of the petition in the court file. Your petition has been filed pursuant to [s]ection 2-1401 of the Illinois Code of Civil Procedure [(735 ILCS 5/2-1401 (West 2012))]. That section requires that notice of the petition be given as provided in Supreme Court Rules. Rule 106 governs the methods of notice to be used for 2-1401 petitions, and states that notice '[s]hall be given by the same methods provided in Rule 105,' [Ill. S. Ct. R. 106 (eff. Aug. 1, 1985)]. Rule

105 sets forth the requirements that must be included in the notice, and further provides three methods for service of the notice: personal service; service by certified or registered mail; or service by publication. You have not complied with Rule 105's service requirements.

This letter is to inform you that unless you take steps to obtain proper service of your petition, it will be dismissed for want of prosecution within 30 days of the date of this letter. If you have any questions about this letter, you should consult with an attorney."

¶ 10 On September 24, 2012, defendant filed a "Response to Judge Frietag," which stated:

"Supreme Court Rules - Rule 106, Rule 105,

1. Affidavit

2. Proof/certificate of service

This [p]etition for [r]elief from [j]udgment which was filed July 2, 2012

Plus I filed an appeal from reduction of sentence. 'No Response' only that it was filed."

Attached to this response was another copy of the petition for relief from judgment and a notarized Proof/Certificate of Service to "Clerk of Circuit Court of McLean County" and "A.S.A. Jennifer McCoskey" dated June 25, 2012, indicating defendant had "placed the attached or enclosed documents in the institutional mail at Pickneyville [*sic*] Correctional Center, properly

addressed to the parties listed above for mailing through the United States Postal Service."

¶ 11 On September 27, 2012, the trial court sent defendant a letter informing him the court was in receipt of defendant's correspondence filed September 24, 2012, and that:

> "The court sent you a letter dated 21 August 2012 explaining that your [p]etition [f]or [r]elief [f]rom [j]udgment, filed 2 July 2012, had not been properly served and was subject to dismissal unless you took steps to obtain proper service. Your response does not meet with the requirements of service of a [s]ection 2-1401 petition. Therefore, the court has today entered an order dismissing your [p]etition [f]or [r]elief [f]rom [j]udgment."

The court further advised defendant his notice of appeal from the dismissal of his motion for reduction of sentence had been stricken because it indicated he was appealing to the Eleventh Judicial Circuit, which was not a court of review.

¶ 12 On October 26, 2012, defendant filed a reply, with attachments, to the trial court's letter advising defendant his notice of appeal had been stricken stating, "Making me send the same appeal to the appellate court at copies and mailing cost to [defendant]. The appellate court has a letter also. Please get this right."

¶ 13 On October 26, 2012, defendant filed another notice of appeal concerning the dismissal of his motion for reduction of sentence. Once again, defendant stated he was appealing to the Eleventh Judicial Circuit.

¶ 14 On October 29, 2012, defendant filed a late notice of appeal regarding "my relief of judgment." On the same date, defendant also filed a response, with attachments, to the dismissal

of his petition for relief from judgment purporting to show he had attempted to prevent dismissal of his petition for lack of proper service. Defendant stated:

> "I[, defendant,] sending [*sic*] the exhibits to show [defendant] is doing everything in his power and not his culpable negligence for this petition to be dismissed.
>
> Pickneyville [*sic*] Corr. trust fund showing that my [defendant] legal mail is not sent certified or registered mail only as authorization for payment show's [*sic*] and now relief of judgment was dismissed because of this. I can not [*sic*] mail anything. I do not work in the mail room. 'I can not [*sic*]'."

Among the attachments to the response was an "Offender Authorization for Payment" form dated September 18, 2012, purporting to direct correctional staff to deduct money from defendant's trust fund for "certified or registered mail only" and an "Inmate Transaction Statement" with transactions for "Legal Postage" circled showing a $2.50 deduction from defendant's trust fund, and containing a handwritten addendum stating, "No certified or registered mail on trust fund."

¶ 15 On October 30, 2012, defendant filed a second notice of appeal regarding dismissal of his petition for relief from judgment. On November 5, 2012, defendant filed a late notice of appeal regarding his motion to reduce sentence, which this court allowed on November 15, 2012. On January 11, 2013, OSAD filed a motion for leave to file late notice of appeal and proposed late notice of appeal in which OSAD stated defendant's *pro se* late notice of appeal failed to accurately reflect the date of judgment and the nature of the appeal. OSAD indicated its motion was being filed pursuant to Illinois Supreme Court Rule 606(c) (eff. Jan. 1, 2013), allowing for

extension of time to file notice of appeal under certain circumstances. The corrected late notice of appeal indicated defendant was appealing from dismissal of his petition for relief from judgment. On January 31, 2013, this court allowed the motion for leave to file late notice of appeal. Therefore, defendant has abandoned his appeal of the dismissal of his motion to reduce sentence and the instant appeal involves only the dismissal of defendant's section 2-1401 petition.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant argues (1) the trial court should have applied an "equitable exception" to his failure to provide proper proof of service of his petition for relief from judgment because (a) he is a *pro se* litigant and (b) mailroom personnel at Pinckneyville Correctional Center are to blame for not mailing the petition by certified or registered mail; and (2) the sentencing judgment must be corrected to reflect the proper amount of fines owed. In supplemental briefing at the request of this court, defendant also argues this court has jurisdiction to consider his appeal.

¶ 18 We need not address whether the trial court erred in dismissing defendant's 2-1401 petition because we hold the trial court's dismissal of the petition for want of prosecution (DWP) was not a final and appealable order under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) or Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010).

¶ 19 Section 2-1401 of the Code of Civil Procedure (Code) provides a procedure by which final orders and judgments may be vacated by the trial court after more than 30 days have elapsed from the date of entry. A section 2-1401 petition must be filed no later than two years after entry of the judgment. 735 ILCS 5/2-1401(c) (West 2012). Although section 2-1401 is a

civil remedy, it extends to criminal cases. *People v. Vincent*, 226 Ill. 2d 1, 8, 871 N.E.2d 17, 22-23 (2007). Appeals from section 2-1401 petitions brought in criminal proceedings are regulated by the civil rules of procedure. *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23; Illinois Supreme Court Rule 651(d) (eff. Apr. 26, 2012).

¶ 20 Illinois Supreme Court Rule 301 provides, "Every final judgment of a circuit court in a civil case is appealable as of right." As discussed below, the trial court's DWP order was not a final judgment. Illinois Supreme Court Rule 304 sets forth the procedure for appeals from final judgments which do not dispose of an entire proceeding, including "[a] judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code of Civil Procedure." As discussed below, the trial court's DWP order was not a final judgment, and neither granted nor denied any of the relief prayed for in defendant's section 2-1401 petition.

¶ 21 In *Flores v. Dugan*, 91 Ill. 2d 108, 111, 435 N.E.2d 480, 481 (1982), the parties appeared for trial and the plaintiffs sought a continuance because a witness was unavailable. The trial judge refused to grant a continuance but gave the plaintiffs a choice of an immediate trial, voluntary dismissal, or DWP. The plaintiffs chose DWP and proceeded with an appeal. The supreme court found a DWP is not a final and appealable order as the plaintiff has an absolute right to refile his action within statutory limits, *i.e.*, section 24 of the Limitations Act, now section 13-217 of the Code (735 ILCS 5/13-217 (West 2012)). *Flores*, 91 Ill. 2d at 112-13, 435 N.E.2d at 482. Section 13-217 of the Code provides if an action is DWP, the plaintiff has the option to refile the action within one year of the entry of the DWP order or within the remaining period of limitations, whichever is greater.

¶ 22 Defendant argues his case is distinguishable from *Flores*. Defendant maintains,

unlike in *Flores*, the trial court's dismissal of his petition was with prejudice because the court did not specifically state whether the dismissal was with or without prejudice and did not grant him leave to amend or refile the petition. Such language is superfluous when dealing with DWP orders. *Flores*, 91 Ill. 2d at 114, 435 N.E.2d at 483. When the court first wrote defendant on August 21, 2012, advising him he must meet the service requirements before the court could consider his petition, the court stated "unless you take steps to obtain proper service of your petition, it will be *dismissed for want of prosecution* within 30 days of the date of this letter." (Emphasis added.) In the court's September 27, 2012, letter to defendant, the court referred to its August 21, 2012, letter before advising defendant the court was dismissing his petition. Considering the two letters together, clearly the court dismissed the petition for want of prosecution and, therefore, without prejudice. Further, the docket entry for the dismissal order stated, "Pet. For Rel. From Judgment filed 2 Jul. 2012, DWP."

¶ 23 Defendant also argues, unlike the plaintiffs in *Flores*, he does not have an "absolute" right to refile because his status as a prisoner makes him subject to sanctions and other repercussions for filing successive petitions. Defendant cites section 3-6-3 of the Unified Code of Corrections, which allows for revocation of good-conduct credit if the court makes a specific finding a lawsuit is frivolous, which may include a second or subsequent section 2-1401 petition. 730 ILCS 5/3-6-3(d) (West 2012). Defendant also refers to section 22-105(a) of the Code, which provides a prisoner may be required to pay filing fees and court costs if the court makes a specific finding that the successive petition is frivolous. 735 ILCS 5/22-105(a) (West 2012). Defendant argues this could be prohibitively expensive for an incarcerated person.

¶ 24 In *People v. Gale*, 376 Ill. App. 3d 344, 876 N.E.2d 171 (2007), the defendant

unsuccessfully challenged the constitutionality of section 22-105 of the Code. There, the court stated:

> "[S]ection 22-105 informs all prisoners, regardless of wealth, that they may not file a frivolous petition; it then outlines exactly what 'frivolous' means so they can guard against such a determination (see 735 ILCS 5/122–105(b) (West 2004)); and finally, it specifies that payment of fees and costs charged when a petition is held to be frivolous is to be collected from that prisoner only '*when funds exist*,' only in the amount corresponding to his prison trust fund account, and only until the fees are collected in full (735 ILCS 5/22–105(a) (West 2004) (setting out the payment scheme based on prison trust fund account)). *In fact, on this last point, section 22-105(a) specifically states that '[n]othing in this Section prohibits an applicant from filing an action or proceeding if the applicant is unable to pay the court costs.*' [(Emphasis added.)] 735 ILCS 5/22–105(a) (West 2004)." (Emphasis in original unless otherwise noted.) *Gale*, 376 Ill. App. 3d at 361, 876 N.E.2d at 187.

¶ 25 Moreover, section 22-105 does not require payment of court costs and filing fees as a condition of the clerk filing a legal document. Such assessment is required only if the filed document is later found by the trial court to be frivolous. See *People v. Hunter*, 376 Ill. App. 3d 639, 647, 875 N.E.2d 1145, 1154 (2007).

¶ 26 Section 22-105 did not stand in the way of defendant refiling his petition. No

prepayment was required to file the petition with the trial court. In light of the fact the court had dismissed defendant's petition, not on the merits, but rather for want of prosecution, it is unlikely the court would have found a refiling frivolous. Even if the court found the refiling frivolous and ordered defendant to pay, he would not be required to pay if he was unable to do so. Therefore, defendant had an absolute right to refile his petition.

¶ 27 In *S.C. Vaughan Oil Co. v. Caldwell*, 181 Ill. 2d 489, 491, 693 N.E.2d 338, 339 (1998), plaintiffs brought a legal malpractice claim. The trial court dismissed the case for want of prosecution. *Id.* Nearly two years later, the plaintiffs filed a motion for relief from a final judgment, seeking reinstatement of the case. *Id.* A year later, plaintiffs filed an amended motion to reinstate under section 2-1401. *Vaughan*, 181 Ill. 2d at 492, 693 N.E.2d at 340. The court granted the petition. *Vaughan*, 181 Ill. 2d at 493, 693 N.E.2d at 340. Defendant appealed. *Vaughan*, 181 Ill.2d at 494, 693 N.E.2d at 340. The appellate court dismissed the appeal for lack of jurisdiction. *Vaughan*, 181 Ill.2d at 494-95, 693 N.E.2d at 340-41. The supreme court granted leave to appeal. *Vaughan*, 181 Ill. 2d at 495, 693 N.E.2d at 341.

¶ 28 The supreme court clarified the *Flores* decision "stands for the proposition that because the entry of a DWP order does not prejudice a plaintiff's case nor bar a subsequent suit on the same issues as long as the section 13-217 period for refiling exists, a DWP order cannot be considered final and appealable during the time period within which the refiling option is available. *Flores*, 91 Ill. 2d at 111-12, [435 N.E.2d at 483]." *Vaughan*, 181 Ill. 2d at 501-02, 693 N.E.2d at 344.

¶ 29 The plaintiffs in *Vaughan* filed their section 2-1401 motion to vacate the judgment after the refiling period under section 13-217 had expired and, therefore, they no longer had an

absolute right to refile their action under section 13-217. *Vaughan*, 181 Ill. 2d at 502, 693 N.E.2d at 344. The supreme court found the characterization of the DWP order as a nonappealable interlocutory order under these circumstances was error. *Vaughan*, 181 Ill. 2d at 507, 693 N.E.2d at 346. Thus, the appellate court's dismissal for lack of jurisdiction was also error because "after the period for refiling provided by section 13-217 expires, a DWP order operates as a termination of the litigation between the parties, and constitutes a final and appealable order." *Vaughan*, 181 Ill. 2d at 508, 693 N.E.2d at 347.

¶ 30 Defendant maintains his case is similar to the situation in *Vaughan*. Defendant points out, pursuant to section 13-217 of the Code, he had until September 27, 2013, to refile his section 2-1401 petition (one year from the trial court's September 27, 2012, dismissal of his petition). Defendant also contends, pursuant to section 2-1401, he had until October 24, 2013, to file a pleading attacking the judgment (two years from the trial court's sentencing judgment entered on October 24, 2011). Because defendant's opportunity to refile has now expired, he argues the trial court's dismissal order of September 27, 2012, operated as a termination of the litigation and constitutes a final and appealable order. Consequently, he argues this court may review the trial court's judgment under Supreme Court Rule 304(b)(3), which allows for the immediate appeal of the resolution of section 2-1401 petitions. We disagree.

¶ 31 Supreme Court Rule 304(a) provides, "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Paragraph (b) allows for appeal of various judgments and orders

without the finding required for appeals under paragraph (a), including, "[a] judgment or order granting or denying any of the relief prayed in a petition under section 2-1401 of the Code of Civil Procedure." Ill. S. Ct. R. 304(b)(3) (eff. Feb. 26, 2010). In the case *sub judice*, the trial court did not grant or deny any of the relief prayed for in defendant's petition. The court dismissed it for want of prosecution without making any ruling on the merits of the petition, *i.e.*, this dismissal was without prejudice. Therefore, Supreme Court Rule 304 does not apply.

¶ 32 Here, defendant had either one year from the DWP, *i.e.*, until September 27, 2013, or two years from the sentencing judgment, *i.e.*, October 24, 2013, whichever was greater, to refile his petition. Instead of refiling his petition, defendant filed premature notices of appeal from the DWP on October 29 and 30, 2012. The DWP was not a final order. Therefore, this court does not have jurisdiction to address the merits of defendant's appeal.

¶ 33 III. CONCLUSION

¶ 34 We dismiss defendant's appeal for want of jurisdiction, as the order from which defendant appealed was not final.

¶ 35 Appeal dismissed.