2016 IL App (4th) 140710-U

NO. 4-14-0710

FILED
August 11, 2016
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.	)	Vermilion County
JEROME JOHNSON,	)	No. 07CF654
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's due process rights were violated when he was denied a meaningful opportunity to reply to the State's limited response and motion to dismiss.

¶ 2 In March 2013, defendant, Jerome Johnson, filed a *pro se* petition for postjudgment relief brought under section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2012)). On June 17, 2014, the Vermilion County circuit court ordered the State to file a responsive pleading or a special and limited appearance contesting jurisdiction within 14 days. On July 8, 2014, the State filed a special and limited response to defendant's section 2-1401 petition or, in the alternative, a motion to dismiss defendant's petition. Two days later, the court gave defendant 14 days to respond to the State's response and ordered the circuit clerk to provide defendant with a copy of the motion and the court's order. On July 14, 2014, defendant filed a motion for the entry of a default judgment. The next day, the court

treated defendant's default-judgment motion as his reply and entered an order dismissing defendant's section 2-1401 petition because the State was not properly served and defendant's petition was meritless for several enumerated reasons.

¶ 3 Defendant appeals, asserting his due process rights were violated because the circuit court dismissed his section 2-1401 petition without giving him an opportunity to respond. We reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 In March 2008, after a bench trial, the circuit court found defendant guilty of one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2006)), one count of criminal sexual assault (720 ILCS 5/12-13 (a) (3) (West 2006)), and two counts of indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2006)) for his actions from February through August 2007. At a May 2008 sentencing hearing, the court merged the aggravated-criminal-sexual-abuse conviction into defendant's conviction for criminal sexual assault and sentenced defendant to consecutive prison terms of 30 years for criminal sexual assault and 5 years each for his two indecent-solicitation-of-a-child convictions. In June 2008, defendant filed a motion to reconsider his sentence, which the court denied.

¶ 6 Defendant appealed. On appeal, defendant argued the circuit court erred by imposing an excessive sentence. We affirmed defendant's sentence but remanded the cause for an amended sentencing judgment to show defendant's indecent-solicitation-of-a-chi1d convictions as Class 3 felonies rather than Class 2. *People v. Johnson*, No. 4-08-0470 (Mar. 24, 2009) (unpublished order under Supreme Court Rule 23).

¶ 7 In March 2013, defendant filed a section 2-1401 petition, asserting the sentence for his criminal-sexual-assault conviction was void, along with several other claims. He also

filed a memorandum of law in support of his section 2-1401 petition and a motion for leave to amend his section 2-1401 petition. On June 17, 2014, the circuit court entered an order, stating, in pertinent part, the following:

> "It appears the State has been served with a copy of the Petition. If so, they should file a responsive pleading thereto or file a special and limited appearance contesting jurisdiction in order for the Court to determine whether they have been properly served. The State is directed to do so within 14 days. Docket to serve as Order of the Court. Copy of the docket to both the Petitioner and the State."

¶ 8 On July 8, 2014, the State filed a special and limited response to defendant's section 2-1401 petition contesting jurisdiction or, in the alternative, a motion to dismiss. In its motion, the State argued defendant's petition should be dismissed because (1) the court lacked jurisdiction due to the State not being properly served, (2) the petition was untimely filed, (3) defendant's sentencing argument was barred by the doctrines of *res judicata* and waiver, and (4) defendant's ineffective-assistance-of-counsel claims failed because defendant had not shown prejudice as a result of counsel's alleged ineffectiveness. On July 10, 2014, the circuit court entered an order giving defendant 14 days to respond to the State's response. In the order, the court directed the circuit clerk to provide defendant with a copy of the State's response and the court's order. A July 11, 2014, docket entry stated, "Copy of docket and response mailed to deft at Stateville Correctional [C]enter on today's date." On July 14, 2014, defendant filed a motion for default and entry of a final judgment by default. In his motion, defendant notes the State's response was due July 1, 2014, and nine days had passed since that date. Thus, defendant asserted he was entitled to a default judgment. On July 15, 2014, the circuit court entered the following order:

> "The Court has reviewed the Petition, State's Response and Petner's [*sic*] Reply fashioned as a Motion for Default and Entry of Judgment. The State's response is well-taken. The State was never properly served as required by the Illinois Rules of Civil Procedure. In addition, the Petition is untimely, [and] the claims raised are not supported by the record, affidavits or other documents indicating any reason to consider the sentence void. In addition, the issues raised should have been addressed on direct appeal. Lastly, Petitioner's claims of ineffective assistance of counsel fail to meet the threshold requirement of prejudice. For all the reasons set forth above, the Petition for Relief from Judgment is dismissed."

This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Jurisdiction

¶ 11 Citing the general rule "the dismissal of a complaint without prejudice is not final and appealable" (*People v. Vari*, 2016 IL App (3d) 140278, ¶ 10, 48 N.E.3d 265), the State argues we lack jurisdiction of this appeal because defendant was not prejudiced by the circuit court's dismissal. Defendant asserts this case is distinguishable from *Vari*, which the State cites in support of its argument. We agree with defendant.

¶ 12 In *Vari*, 2016 IL App (3d) 140278, ¶ 5, 48 N.E.3d 265, the circuit court dismissed the defendant's section 2-1401 petition for lack of jurisdiction because the defendant did not properly serve the State with his petition. In this case, while the circuit court found defendant did not properly serve the State with his section 2-1401 petition, it did not expressly state it was dismissing the petition for lack of jurisdiction and went on to find numerous reasons why the

petition failed to state a cause of action for relief. The court then declared that, for all of the stated reasons, it was dismissing defendant's section 2-1401 petition. Thus, the circuit court's ruling disposed of all of the issues on the merits, making it a final decision. See *People v. Kuhn*, 126 Ill. 2d 202, 207, 533 N.E.2d 909, 911 (1988) (a judgment is final when it decides the controversy between the parties on the merits and fixes the parties' rights, so that, if the reviewing court affirms the judgment, nothing remains for the circuit court to do but to proceed with its execution).

¶ 13 Even if the dismissal was for lack of jurisdiction, the exception recognized in *Vari* would apply. Citing *Kahle v. John Deere Co.*, 104 Ill. 2d 302, 306-07, 472 N.E.2d 787, 789 (1984), the *Vari* court recognized a dismissal may be appealable in limited circumstances, such as when a defendant argues that service was proper, because, as in *Kahle*, that "would be an attack on the conditions precedent for the dismissal." *Vari*, 2016 IL App (3d) 140278, ¶ 22, 48 N.E.3d 265. In *Kahle*, 104 Ill. 2d at 306-07, 472 N.E.2d at 789, our supreme court held a voluntary dismissal without prejudice at the plaintiff's request was final and appealable by the defendants because they had no recourse unless they could appeal. Here, defendant is asserting a due process violation based on the manner in which the court dismissed his petition as requested by the State and that violation prevented him from raising any response to the State's pleading. Accordingly, defendant is attacking a condition precedent for the dismissal that he did not request, and thus the dismissal would be final and appealable under *Kahle* and the exception noted in *Vari*.

¶ 14 Since, on August 5, 2014, defendant filed a timely *pro se* notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008), we have jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). Moreover, even if

defendant's *pro se* notice of appeal was insufficient, an additional notice of appeal filed by the Vermilion County circuit clerk's office on defendant's behalf on August 11, 2014, was also timely and in sufficient compliance with Rule 303.

¶ 15 B. Due Process

¶ 16 Citing *Merneigh v. Lane*, 87 Ill. App. 3d 852, 409 N.E.2d 319 (1980), defendant asserts his due process rights were violated because the circuit court did not give him a chance to respond to the State's pleading. The State asserts *Merneigh* is distinguishable and the court's characterization of defendant's motion for a default judgment as a responsive pleading was a reasonable inference from the record. We review *de novo* defendant's claim of the denial of due process. See *In re Shirley M.*, 368 Ill. App. 3d 1187, 1190, 860 N.E.2d 353, 356 (2006).

¶ 17 "Section 2-1401 [of the Procedure Code] allows for relief from final judgments more than 30 days after their entry, provided the petition proves by a preponderance of evidence certain elements." *People v. Laugharn*, 233 Ill. 2d 318, 322, 909 N.E.2d 802, 804-05 (2009). Proceedings under section 2-1401 are subject to the civil practice rules. *People v. Vincent*, 226 Ill. 2d 1, 8, 871 N.E.2d 17, 23 (2007). Section 2-1401 petitions "are essentially complaints inviting responsive pleadings." *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23. If the State fails to answer the petition, all well-pleaded facts are deemed admitted, rendering the petition ripe for adjudication. *Vincent*, 226 Ill. 2d at 9-10, 871 N.E.2d at 24. A circuit court may *sua sponte* dismiss a section 2-1401 petition without a responsive pleading. *Vincent*, 226 Ill. 2d at 13-14, 871 N.E.2d at 26. However, in this case, the State filed a joint special and limited response to the petition and a motion to dismiss. Defendant contends his due process rights were violated because he did not get an opportunity to respond to the State.

¶ 18 An individual's right to procedural due process is guaranteed by the United States and Illinois constitutions. U.S. Const., amend. XIV, § 1; Ill. Const. 1970, art. I, § 2. That right entitles an individual to "the opportunity to be heard at a meaningful time and in a meaningful manner." *In re D.W.*, 214 Ill. 2d 289, 316, 827 N.E.2d 466, 484 (2005). The opportunity to be heard " 'has little reality or worth unless one is informed that the matter is pending.' " *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 28, 6 N.E.3d 162 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306, 314 (1950)).

¶ 19 In *Merneigh*, 87 Ill. App. 3d at 854, 409 N.E.2d at 320, the Fifth District found the inmate petitioner was denied due process when the State moved to dismiss the petitioner's *mandamus* petition without giving him notice of the motion to dismiss and opportunity to respond. The *Merneigh* court noted basic due process required the petitioner to have, *inter alia*, "a meaningful opportunity to respond to the motion by submitting a written memorandum in opposition thereto." *Merneigh*, 87 Ill. App. 3d at 854, 409 N.E.2d at 320. We also note the Fifth District's decision in *People v. Gaines*, 335 Ill. App. 3d 292, 296, 780 N.E.2d 822, 825 (2002), *abrogated on other grounds by Vincent*, 226 Ill. 2d at 12, 871 N.E.2d at 25, where it held the petitioner's due process rights were violated when the circuit court dismissed a section 2-1401 petition after hearing a motion by the State and not providing the petitioner time to respond. The *Gaines* court recognized the "basic notions of fairness dictate that the defendant be afforded notice of, and an opportunity to respond to, any motion or responsive pleading by the State." *Gaines*, 335 Ill. App. 3d at 296, 780 N.E.2d at 825.

¶ 20 In this case, on June 17, 2014, the circuit court gave the State 14 days to file a responsive pleading to defendant's section 2-1401 petition. Thus, the State had until July 1, 2014, to file a response. The State filed its response late, on July 8, 2014. The appellate record

does not contain a certificate of service for the State's response. On July 10, 2014, the court gave defendant 14 days to reply to the State's response and ordered the circuit clerk to provide a copy of its order and the State's response to defendant. A July 11, 2014, docket entry indicates the circuit clerk mailed defendant a copy of the court's order and the State's response that day. On July 14, 2014, defendant filed a motion for a default judgment. In the motion, defendant stated nine days had passed since July 1, 2014, and the State had not filed a responsive pleading. Since the State had not filed a responsive pleading, defendant asserted he was entitled to a default judgment. The next day, which was only 5 days after the court had given defendant 14 days to respond, the court treated defendant's motion for a default judgment as his responsive pleading to the State's response. The court agreed with the State's assertions in its motion and dismissed defendant's section 2-1401 petition.

¶ 21 Defendant argues his motion for a default judgment was in response to the State not filing its response within the time frame ordered by the circuit court, and thus he was denied due process when the circuit court considered the State's response without giving him an opportunity to respond. The State asserts the record shows the court's inference the default judgment was defendant's responsive pleading was reasonable. We disagree.

¶ 22 Defendant requested a default judgment because he believed the State had not filed a response nine days after July 1, 2014, which was July 10, 2014. The default-judgment motion in no way addressed the claims made by the State in its response. The record shows it was not until July 11, 2014, when the circuit clerk *mailed* defendant at Stateville Correctional Center both the State's response and the circuit court's order giving him 14 days to respond. Defendant's *pro se* default-judgment motion was filed on July 14, 2014. The language of the defendant's motion for default judgment did not indicate it was in reply to the State's response.

Moreover, it is unreasonable to infer defendant, an inmate, (1) received the State's response and the court's order, (2) drafted the default-judgment motion, and (3) got his motion to the circuit court in three days. We find defendant was denied a meaningful opportunity to respond to the State's motion, and thus his due process rights were violated.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we reverse the Vermilion County circuit court's judgment and remand the cause for further proceedings.

¶ 25 Reversed and remanded.