NOTICE
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2016 IL App (4th) 160003-U

NO. 4-16-0003

FILED
December 13, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SEAN D. ELLIS, Defendant-Appellant.	)	Appeal from Circuit Court of Champaign County No. 09CF176 Honorable Thomas J. Difanis, Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The motion of the office of the State Appellate Defender to withdraw as counsel on appeal is granted and the trial court's dismissal of defendant's *pro se* petition for relief from judgment is affirmed.

¶ 2 Defendant, Sean D. Ellis, appeals the trial court's dismissal of his *pro se* petition for relief from judgment. The office of the State Appellate Defender (OSAD) was appointed to represent defendant on appeal. OSAD filed a motion to withdraw as counsel, asserting an appeal would lack arguable merit. We grant OSAD's motion and affirm the trial court's dismissal.

¶ 3 I. BACKGROUND

¶ 4 In November 2008, Champaign police officers investigated a report a Mitsubishi Galant was missing from a used-car dealership. According to trial testimony, officers located the stolen vehicle in front of a residence. After an officer knocked on the front door of the residence,

a female known as "Falana" answered. Defendant was inside the residence. An officer spoke to defendant, who identified himself as "Sean Williams." Defendant stated he rented the car from his brother-in-law and drove it for approximately five days. Defendant gave the officer the keys. Defendant was not arrested at that time.

¶ 5 In October 2009, defendant was convicted of unlawful possession of a stolen or converted motor vehicle (625 ILCS 5/4-103(a)(1) (West 2008)), a Class 2 felony. Because of defendant's criminal history, he was subject to Class X sentencing (730 ILCS 5/5-5-3(c)(8) (West 2008)). The trial court sentenced defendant to 25 years' imprisonment. Defendant appealed his conviction, and this court affirmed. *People v. Ellis*, 2011 IL App (4th) 100407-U. In June 2012, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)). The trial court dismissed the petition as frivolous and patently without merit, and this court affirmed the dismissal. *People v. Ellis*, 2014 IL App (4th) 120667-U.

¶ 6 In July 2013, defendant filed his *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). In his petition, defendant argued his conviction violated his constitutional rights. Defendant asserted (1) the prosecutor improperly was the sole witness in support of the arrest warrant, rendering his arrest and conviction unconstitutional; and (2) the grand-jury indictment was improper as there was no indictment number and to add one later would result in a "*Brady* violation" under Illinois Supreme Court Rule 412 (eff. March 1, 2001).

¶ 7 On August 15, 2013, defendant placed a petition for a default judgment in the prison mail system. Defendant alleged he was entitled to a default judgment because the State

failed to respond to his petition within 30 days. Four days later, the State moved to dismiss defendant's section 2-1401 petition. The State argued, in part, defendant's claims lacked merit and defendant failed to show he exercised due diligence in making his claim. The State failed to serve defendant with a copy of its motion to dismiss. The docket sheet indicates defendant's *pro se* petition for a default judgment was filed in the trial court.

¶ 8 On August 22, 2013, the trial court dismissed defendant's section 2-1401 petition. The court agreed with the State's assertions regarding the substantive issues raised in defendant's petition for relief from judgment. The court further found the petition failed to state a cognizable violation of defendant's rights and the petition was frivolous and patently without merit.

¶ 9 Defendant appealed the dismissal, alleging his rights to due process were violated because he had no notice of the State's motion to dismiss and no opportunity to respond before the court ruled on his section 2-1401 motion. This court agreed with defendant, and we reversed the dismissal and remanded for further proceedings. *People v. Ellis*, 2015 IL App (4th) 130751-U, ¶¶ 23, 26.

¶ 10 On remand, the State served defendant with a copy of its motion to dismiss. The trial court gave defendant 30 days to respond. Defendant filed a response and requested a default judgment. Defendant argued, in part, the State failed to respond to his initial petition within 30 days and he was entitled to a judgment in his favor. In December 2015, the trial court denied defendant's motion for a default judgment and granted the State's motion to dismiss.

¶ 11 Defendant filed a timely notice of appeal, and the trial court appointed OSAD to represent defendant on appeal. OSAD moved to withdraw as counsel. Notice of OSAD's motion was sent to defendant. This court provided defendant time to file additional points and

authorities, which he did. In turn, the State filed a responding brief.

¶ 12 II. ANALYSIS

¶ 13 This appeal arises from the dismissal of defendant's section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)). Section 2-1401 creates a "procedure that allows for the vacatur of a final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7, 871 N.E.2d 17, 22 (citing 735 ILCS 5/2-1401 (West 2002)). Section 2-1401 petitions seek relief from final judgments to correct factual errors that (1) occurred during the State's prosecution of the case and (2) were unknown to the petitioner and the court when judgment was entered. *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000). The dismissal of a section 2-1401 petition absent an evidentiary hearing is reviewed *de novo*. *People v. Garza*, 2014 IL App (4th) 120882, ¶ 18, 5 N.E.3d 240.

¶ 14 OSAD initially argues any contention defendant's arrest was improper and a denial of due process lacks merit. OSAD emphasizes the procedures used to charge defendant were proper.

¶ 15 In his points and authorities, defendant disputes the State's conclusion the procedures were proper. Defendant contends the charging information was not presented "in open court" or signed by the trial judge. Defendant argues the later arrest warrant, supported only by statements of the prosecutor, violates the mandate of *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997), that probable cause be supported by oath or affirmation, not by the mere filing of criminal charges. Defendant further contends, because he was charged by information, he was entitled to a preliminary hearing that was not held.

¶ 16 The record establishes, on January 30, 2009, the State filed an information

charging defendant with unlawful possession of a stolen motor vehicle. The information was not signed by a trial judge. That same day, the State appeared in court requesting a warrant for defendant's arrest. The trial court issued an arrest warrant. On February 18, 2009, defendant was arraigned. A preliminary examination was scheduled for March 10, 2009. However, on March 5, 2009, grand-jury proceedings were held. That day, a police officer testified before the grand jury, which returned an indictment against defendant on the charge of unlawful possession of a stolen motor vehicle.

¶ 17 We agree with OSAD and the State—the grand-jury indictment nullified the necessity of the preliminary hearing. Although defendant was initially charged by information and arrested, the grand jury later indicted the defendant on the same charge. Section 109-3.1(b) of the Code of Criminal Procedure of 1963 states a preliminary examination is not required "when the defendant has been indicted by the Grand Jury on the felony offense for which he or she was initially taken into custody." 725 ILCS 5/109-3.1(b)(2) (West 2012). No preliminary hearing was required.

¶ 18 Defendant's argument regarding his arrest warrant also lacks merit. Even if the arrest warrant was unconstitutionally obtained under *Kalina*, an illegal arrest would not, as defendant asserts, void the conviction. See *People v. Holcomb*, 192 Ill. App. 3d 158, 167, 548 N.E.2d 613, 621 (1989). Defendant's only recourse would have been the exclusion of evidence resulting from the arrest. See *People v. Pettis*, 184 Ill. App. 3d 743, 752, 540 N.E.2d 1097, 1103 (1989); see also *People v. Ingram*, 316 Ill. App. 3d 319, 325, 736 N.E.2d 218, 224 (2000) ("[A]n illegal arrest has no legal consequences when no evidence was obtained as a result of the arrest."). Here, no evidence was seized or gained by the State as a result of the arrest. The

officers located the stolen vehicle and the keys months before defendant was arrested. Because there is no available remedy, defendant's argument would fail if raised on appeal. See *Pettis*, 184 Ill. App. 3d at 752, 540 N.E.2d at 1103 ("Even if we assume *arguendo* that defendant was illegally arrested, an illegal arrest is of no consequence when, as here, the police obtain no evidence as a result of the arrest.").

¶ 19 OSAD further contends there is no arguable claim defendant was unlawfully denied information regarding the grand-jury proceedings. OSAD contends defendant's argument regarding the absence of a grand-jury case number is meritless, as the technical defect would not be fatal to the otherwise valid indictment. OSAD also contends no constitutional error occurred when defendant was not provided transcripts of the grand-jury proceedings.

¶ 20 We agree with OSAD. Technical defects, such as the absence of a foreman's signature, do not nullify a grand-jury indictment. See *People v. Benitez*, 169 Ill. 2d 245, 252-53, 661 N.E.2d 344, 348 (1996). When the sufficiency of the charging instrument is challenged for the first time posttrial, the charging instrument will be found sufficient if it (1) apprised the defendant of the offense charged with sufficient specificity to allow the defendant to prepare a defense, and (2) would allow the defendant to plead the conviction as a bar for future prosecution of the same offense. See *People v. Walton*, 2013 IL App (3d) 110630, ¶ 20, 990 N.E.2d 861; see also *People v. Grieco*, 44 Ill. 2d 407, 409, 255 N.E.2d 897, 898-99 (1970). The grand-jury indictment was signed by the grand-jury foreman. The indictment specified Mark Vogelzang, of the Champaign police department, testified. It further specified defendant was charged with unlawful possession of a stolen or converted motor vehicle (625 ILCS 5/4-103(a)(1) (West 2008)) in that defendant, "a person not entitled to possession of said vehicle, possessed a 2001

Mitsubishi Galant, Illinois registration number A373485 knowing it to have been stolen or converted." This information allowed defendant to prepare a defense and would serve to bar future prosecution of the same offense.

¶ 21 There is no colorable argument the State's failure to provide grand-jury transcripts to defendant resulted in constitutional or discovery violations. Illinois Supreme Court Rule 412(a)(iii) (eff. Mar. 1, 2001) requires the State to disclose to defense counsel "a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." The only witness to testify before the grand jury was Mark Vogelzang. Vogelzang did not testify at defendant's trial. The State did not violate Rule 412(a)(iii) by not providing a transcript of Vogelzang's grand-jury testimony to defendant.

¶ 22 In addition, there is no colorable claim the alleged failure to provide a grand-jury indictment number constitutes a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the United States Supreme Court found an accused's right to due process is violated when the State suppresses evidence favorable to the accused and material to guilt or punishment. *Id.* at 87. To prove the violation and obtain a new trial, defendant must establish the State suppressed the evidence and the evidence was either favorable to defendant or material. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 35, 964 N.E.2d 1139. Defendant cannot establish the absence of a grand-jury indictment number was evidence favorable to him or material to the issue of his guilt or evidence. This argument lacks merit.

¶ 23 Further, in his points and authorities, defendant contends his argument the default judgment was improperly denied has merit. Defendant contends the facts alleged in his petition

for a default judgment must be admitted as true and he was entitled to the judgment.

¶ 24 Defendant's argument, if brought on appeal, would fail. The decision whether to grant a request for a default judgment is one within the trial court's discretion. See 735 ILCS 5/2-1301(d) (West 2012) (stating "[j]udgment by default *may* be entered for want of an appearance, or for failure to plead" (emphasis added)). There is no mandate such judgment must be entered in the circumstances alleged in defendant's petition. The record shows the court considered the request for a default judgment and denied it. The record does not establish this denial was in error.

¶ 25 III. CONCLUSION

¶ 26 We grant OSAD's motion to withdraw as appellate counsel 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. 55 ILCS 5/4-2002 (West 2014).

¶ 27 Affirmed.