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2014 IL App (3d) 120850-U

Order filed July 24, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-12-0850
JAROSLAW TEREFENKO,)	Circuit No. 02-CF-1372
Defendant-Appellant.)	Honorable Sarah F. Jones, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Carter dissented.

ORDER

- ¶ 1 *Held:* This court lacks jurisdiction to hear defendant's appeal from the circuit court's denial of his postconviction petition. Defendant filed a notice of appeal in the circuit court after the circuit court had lost jurisdiction over the cause.
- ¶ 2 Defendant, Jaroslaw Terefenko, pled guilty to burglary (720 ILCS 5/19-1(a) (West 2002)) and attempted burglary (720 ILCS 5/8-4(a), 19-1(a) (West 2002)) in exchange for a sentence of four years of Treatment Alternative to Street Crimes (TASC) probation. Defendant violated that probation and was eventually sentenced to 42 months' incarceration. Based on his

immigration status, the circuit court ordered defendant released to the custody of Immigration and Customs Enforcement (ICE), which began deportation proceedings.

¶ 3 While in the custody of ICE, defendant filed a petition for postconviction relief, arguing that his due process rights were violated because defense counsel failed to advise him of the immigration consequences of his plea. The circuit court granted the State's motion to dismiss the petition. We reversed that decision on appeal (*People v. Terefenko*, 2011 IL App (3d) 100782-U) and remanded for a third-stage evidentiary hearing. By the time the evidentiary hearing was conducted, defendant had been deported to Poland and was not present at the hearing. New counsel represented defendant at the hearing. After the hearing, the circuit court denied the petition.

¶ 4 The court set a status hearing for 30 days after the entry of its judgment denying the petition. Neither defendant nor counsel appeared. The trial court continued the hearing to the next day, when it entered a written order extending the deadline for posttrial motions until October 4, 2012. On October 4, the court appointed the appellate defender, who filed a notice of appeal on October 5. We dismiss the appeal for lack of jurisdiction.

¶ 5 **FACTS**

¶ 6 In 2003, defendant pled guilty to two counts of burglary (720 ILCS 5/19-1(a) (West 2002)) and one count of attempted burglary (720 ILCS 5/8-4(a), 19-1(a) (West 2002)). He was sentenced to four years of TASC probation. In 2007 the State filed a petition to revoke TASC probation, alleging that defendant had committed two new criminal offenses—driving under the influence and resisting a police officer. Defendant admitted the probation violation and entered into a one-year drug court contract. The State filed a petition to remove defendant from drug

court after he tested positive for cocaine. Defendant entered an admission to the petition to remove. He was sentenced to 42 months' incarceration.

¶ 7 In 2009, defendant filed a motion to withdraw his plea of guilty to burglary and attempted burglary, alleging that he was never advised of the immigration consequences of his plea. The court found that it lacked jurisdiction to consider the late motion. The court ordered that defendant be released to the custody of ICE, which began deportation proceedings.

¶ 8 Defendant filed a petition under the Post-Conviction Hearing Act (Act) (725 ICLS 5/122-1 *et seq.* (West 2010)), arguing that he was not admonished of the immigration consequences of his plea, in violation of the sixth amendment of the United States Constitution (U.S. Const., amend. VI), as outlined in *Padilla v. Kentucky*, 559 U.S. 356 (2010). After allowing defendant to amend his petition, the court granted the State's motion to dismiss. On appeal, we reversed that dismissal and remanded for a third-stage evidentiary hearing. *Terefenko*, 2011 IL App (3d) 100782-U.

¶ 9 On remand, the trial court held an evidentiary hearing after accepting that defendant was absent because he had been deported to Poland. On August 20, 2012, in open court, the court issued a written decision denying defendant's petition. The court found that defense counsel's representation of defendant was neither deficient nor prejudicial. Postconviction counsel was present on behalf of defendant. The court asked counsel if he wanted to appeal. Counsel reserved appeal. The court scheduled a status hearing for September 19, 2012, for counsel to file an appeal, if desired. Postconviction counsel did not appear at that hearing, and the court continued the case to the following day, September 20, 2012.

¶ 10 Postconviction counsel did not appear on September 20 either. The court questioned the circuit clerk and the State about whether defendant had received the proper notice of its decision

under Illinois Supreme Court Rule 651(b) (eff. April 26, 2012). The State reminded the court that defendant had been deported to Poland. The court entered a written order extending the deadline for posttrial motions until October 4, 2012.

¶ 11 At a hearing on October 4, postconviction counsel did not appear. The State informed the court that it had spoken to counsel, and counsel would not be filing any posttrial motions or a notice of appeal. The court stated:

"Okay. So here's the—pursuant to Supreme Court Rule, the clerk sent to [defendant's] last known address his rights of appeal. He has been deported to Poland. I don't know if I am required to just go ahead and appoint the appellate defender? Because I don't know what [defendant] wants to do. I am at a loss."

The court appointed the appellate defender to file a notice of appeal on defendant's behalf. Notice of appeal was filed in the circuit court on October 5, 2012. The notice stated that the appeal was being taken from the court's denial of defendant's petition, which the notice alleged occurred on both September 21, 2010, and August 20, 2012.

¶ 12 Defendant appeals the circuit court's denial of his petition for postconviction relief.

¶ 13 ANALYSIS

¶ 14 A. Jurisdiction

¶ 15 Our first task is to determine whether we have jurisdiction to consider this appeal.

People v. Shaw, 2014 IL App (2d) 121105. The State argues that we lack jurisdiction to hear the present appeal because defendant's notice of appeal was filed in the circuit court more than 30 days after final judgment was entered. Defendant argues that we have jurisdiction because the circuit court extended the 30-day deadline or, alternatively, that defendant's late filing may be

excused because the circuit court failed to notify defendant of his right to appeal under Illinois Supreme Court Rule 651(c) (eff. April 26, 2012). We agree with the State.

¶ 16 Appeals from postconviction proceedings are governed by the criminal appeals rules, as near as possible. Ill. S. Ct. R. 651(d) (eff. April 26, 2012). Illinois Supreme Court Rule 606(b) (eff. March 20, 2009) requires that:

"[T]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion." Ill. S. Ct. R. 606(b) (eff. March 20, 2009).

Generally, if no motion directed against the judgment is filed within 30 days, the trial court loses jurisdiction. See *People v. Flowers*, 208 Ill. 2d 291 (2003). The timely filing of a notice of appeal is required to vest the appellate court with jurisdiction. *In re J.T.*, 221 Ill. 2d 338 (2006). In the present case, the final judgment denying defendant's petition was entered on August 20, 2012. The deadline for filing a notice of appeal or posttrial motion was September 19, 2012. No notice of appeal or posttrial motion was filed by September 19, 2012. The only posttrial filing was defendant's notice of appeal filed October 5, 2012.

¶ 17 Defendant argues that his October 5 notice of appeal was timely because the trial court extended the time for posttrial filings. Defendant argues that on September 19, 2012, the circuit court extended the deadline for filing posttrial motions until September 20, 2012. On that date, the court again extended the deadline until October 4, 2012, when it ordered the appellate defender to file a notice of appeal. Notice of appeal was eventually filed on October 5, 2012.

¶ 18 The following is the entirety of the proceedings held on September 19, 2012:

"THE COURT: 02 CF 1372, People versus Jaroslaw Terefenko, J-a-r-o-s-l-a-w, T-e-r-e-f-e-n-k-o. This is 02 CF 1372. I will put it on the call tomorrow. I don't know if counsel was going to file a notice of appeal in regards to my decision. Ms. Griffin has been involved in it. So I will put it on tomorrow for that purpose."

Defendant argues that those statements by the circuit court were sufficient to properly extend the 30-day deadline for filing posttrial motions or a notice of appeal. We disagree.

¶ 19 The only case cited by defendant for the proposition that the circuit court may extend the deadline for filing posttrial motions in a criminal proceeding or a proceeding under the Act is *People v. Church*, 334 Ill. App. 3d 607 (2002), which involved a defendant's appeal from a guilty plea. The *Church* court held that "[a] trial court has the inherent authority, upon proper application and showing of good cause, to grant an extension of time for filing a motion to reconsider sentence or a motion to withdraw guilty plea." *Id.* at 614.

¶ 20 Even assuming, *arguendo*, that the holding of *Church* applies to proceedings under the Act, the requirements of *Church* were not met in the present case. On September 19, 2012, the court was not faced with a proper application from defendant establishing good cause for granting an extension of time. Neither defendant nor counsel had made any application for an extension. The implication from the lack of any filings was that defendant did not wish to challenge the court's denial of his motion.

¶ 21 Nor did the court's language explicitly authorize an extension for filing a notice of appeal. The court stated, "I don't know if counsel was going to file a notice of appeal in regards to my decision. Ms. Griffin has been involved in it. So I will put it on tomorrow for that purpose."

Even if the court had authority to extend the deadline, the language it used was not explicit enough to grant an extension.

¶ 22 If counsel were going to file a notice of appeal, he was required to do so by September 19, 2012. Because he did not, the circuit court lost jurisdiction over the cause on that day, and the October 5 notice of appeal was a nullity. Without a timely filed notice of appeal, we lack jurisdiction to consider the present case.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we dismiss the appeal.

¶ 25 Appeal dismissed.

¶ 26 JUSTICE CARTER, dissenting:

¶ 27 I respectfully dissent from the majority's decision to dismiss this appeal. I would hold that we have jurisdiction in this case and, upon consideration of the merits, that the circuit court properly denied the defendant's postconviction petition.

¶ 28 I believe that under *Church* and the cases cited therein, we have jurisdiction to hear this appeal. As the majority states, in *Church*, the court held that "[a] trial court has the inherent authority, upon proper application and showing of good cause, to grant an extension of time for filing a motion to reconsider sentence or a motion to withdraw guilty plea." *Church*, 334 Ill. App. 3d at 614. In this case, the circuit court continued the case for one day on September 19, 2012, which was the date of expiration for filing a posttrial motion or a notice of appeal. The following day, the court ordered an extension of the time to file a posttrial motion to October 4, 2012, on which date the court appointed the appellate defender. A notice of appeal was filed on October 5, 2012. While there was no formal "proper application and showing of good cause" (*Church*, 334 Ill. App. 3d at 614), the court was concerned about the defendant's absence due to

deportation and whether he received notice of the court's judgment under Supreme Court Rule 651(b) (eff. Apr. 26, 2012), so the court extended the time within which the defendant could file a posttrial motion anyway. I believe that the court had the inherent authority to do so under *Church*. See *id.* at 614. Under the circumstances of this case—given the extension, the continuances, and the deportation—I respectfully disagree with the majority that the defendant's notice of appeal was untimely.

¶ 29 Because I would hold that we have jurisdiction, I would address the merits of the defendant's argument that the circuit court erred when it denied his postconviction petition. In his amended postconviction petition, the defendant alleged that his attorney was ineffective for failing to give the defendant proper advice regarding the immigration consequences of pleading guilty. At the third-stage evidentiary hearing, the defendant's father and mother both testified that they met with trial counsel, with the defendant present, and trial counsel told them that the defendant was "legal" and they had nothing to worry about in terms of immigration consequences. Trial counsel testified that when he met with the defendant and the defendant's parents, they discussed the details of the case, which included that the defendant had confessed to the offenses and that the four individuals who were with the defendant at the time of the offenses all had implicated the defendant. Trial counsel told them that there would be a very small chance of prevailing if the case went to trial, so he discussed with them the possibility of probation under Treatment Alternatives for Safe Communities (TASC), which is the outcome trial counsel ultimately negotiated for the defendant.¹ Trial counsel also testified that he did in

¹ The circuit court noted in its decision that the defendant failed to complete his TASC probation, which would have resulted in the conviction being vacated. Subsequently, the defendant failed to complete "drug court," which would have resulted in dismissal via *nolle prosequi*.

fact discuss immigration consequences with the defendant and the defendant's parents, although trial counsel could not recall specifically what he said. Trial counsel testified that "I would never tell any client facing any immigration issue that a felony conviction would not result in any kind of issue for his immigration status." Further, trial counsel stated:

"What I believe I told [the defendant] is the same that I tell other clients that are facing immigration issues. And that is that I'm not an immigration attorney. I don't know exactly what would happen as a result of the felony conviction.

However, I tell them that a felony conviction will have negative consequences for your immigration status, and if you want more information, you should talk to an immigration attorney."

In the circuit court's order that denied the defendant's petition, the court stated:

"[Trial counsel] indicated that the extent of his knowledge of immigration law is that a felony conviction could have a negative impact on one's status in the US, and that an immigration lawyer should be consulted for more detailed advice. That advice was both correct and prudent. He testified that he had discussed with the Terefenkos the petitioner's immigration status prior to the plea of guilty."

The import of this statement is that the court found trial counsel's testimony to be more credible than the defendant's parents' testimony with regard to what was said at that meeting.

¶ 30

My review of the record in this case and the applicable law indicates that the circuit court's denial of the defendant's petition should be affirmed. First, I note that *Padilla*, 559 U.S. 356, does not apply retroactively. *Chaidez v. United States*, ___ U.S. ___, ___, 133 S. Ct. 1103, 1113 (2013). Thus, the law in effect at the time of this case treated immigration consequences as collateral to a guilty plea. *People v. Williams*, 188 Ill. 2d 365, 372 (1999). Further, whether trial

counsel's assistance was objectively unreasonable, under the first prong of *Strickland v. Washington*, 466 U.S. 668, 687 (1984), with regard to the collateral consequence of immigration status depended on whether counsel failed to inform the defendant (*People v. Huante*, 143 Ill. 2d 61, 71-72 (1991)) or whether counsel gave the defendant erroneous advice (*People v. Correa*, 108 Ill. 2d 541, 553 (1985)). See *People v. Manning*, 227 Ill. 2d 403, 421 (2008). Here, the question is the latter. The circuit court found trial counsel's testimony to be more credible, and I find no basis in the record for us to disturb that finding. See *People v. Ortiz*, 385 Ill. App. 3d 1, 6 (2008) (holding that "[b]ecause the postconviction trial judge is in the best position to observe and weigh the credibility of witnesses testifying at an evidentiary hearing, his findings of fact will not be overturned unless those findings are manifestly erroneous"). Given, then, that trial counsel told the defendant and his parents that a felony conviction could have a negative impact on the defendant's immigration status and that they should consult an immigration attorney if they wanted more information, I would hold under *Correa* and its progeny that trial counsel did not provide erroneous advice and therefore did not render ineffective assistance of counsel.

¶ 31 For the foregoing reasons, I respectfully dissent. I would hold that we have jurisdiction and that the case should be affirmed on the merits.