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2016 IL App (3d) 140186-U

Order filed June 7, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 13th Judicial Circuit, Bureau County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0186
)	Circuit No. 99-CF-47
RANDY L. ROYER,)	Honorable
Defendant-Appellant.)	Cornelius J. Hollerich, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice O'Brien and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion to vacate sentence as an untimely posttrial motion.

¶ 2 Defendant, Randy L. Royer, appeals the denial of his motion to vacate sentence.

Defendant argues the trial court should have construed the motion as a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). We affirm.

FACTS

¶ 3

¶ 4

On June 22, 2000, a jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 1998)). The murder occurred on August 3, 1999, when defendant was 17 years old. Defendant faced a possible sentencing range of 20 to 60 years' imprisonment (730 ILCS 5/5-8-1(a)(1)(a) (West 1998)). A sentencing hearing was held on August 15, 2000. The prosecutor advised the court that the recently-decided United States Supreme Court case, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), prevented the State from seeking an extended-term sentence or a sentence of natural life imprisonment if the court were to make a finding of exceptionally brutal or heinous conduct indicative of wanton cruelty because that factor was not submitted to the jury and proven beyond a reasonable doubt.¹ The trial court sentenced defendant to the maximum sentence of 60 years' imprisonment.

¶ 5

On direct appeal, defendant argued, among other things, that his sentence was excessive given his youth, remorse, and potential for rehabilitation. This court rejected defendant's argument and affirmed his conviction and sentence. *People v. Royer*, No. 3-00-0719 (2002) (unpublished order under Supreme Court Rule 23).

¶ 6

On January 21, 2014, defendant filed a *pro se* motion entitled "Motion to Vacate Sentence Due to New Precedent by the United States Supreme Court." In his motion, defendant argued the trial court should vacate his 60-year sentence and resentence him to "a more proportionate sentence *** of 20 years to 30 years" in light of the decision of the United States Supreme Court in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012). Specifically, defendant argued the *Miller* court held juveniles under 18 years of age were scientifically and

¹The report of proceedings erroneously refers to the United States Supreme Court case as "*Friendly vs. New Jersey*" rather than "*Apprendi v. New Jersey*."

constitutionally different from adults and should not be sentenced to the harshest adult penalties. Defendant contended his 60-year sentence was an example of the harshest adult penalties available and was equivalent to a life sentence. Defendant argued a sentence of 20 to 30 years' imprisonment would be consistent with his youth at the time of the offense and would reflect his rehabilitation potential under article 1, section 11 of the Illinois Constitution (Ill. Const. 1970, art. I, §11).

¶ 7 The State filed a motion to strike defendant's motion to vacate sentence, arguing that defendant's motion to vacate sentence was untimely because it was not filed within 30 days of defendant's sentence, as required by Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001). The State noted that defendant's motion to vacate sentence cited no statutory or common law authority that would permit defendant to file the motion at that time. The State also argued *Miller*, 567 U.S. ___, 132 S. Ct. 2455, was inapplicable because defendant was not sentenced to a mandatory life sentence without parole.

¶ 8 The trial court issued a written order denying defendant's motion on the basis that the court was without jurisdiction because the motion was filed more than 30 days after defendant was sentenced. The trial court stated it was electing not to recharacterize defendant's motion as a postconviction petition. The trial court reasoned that even if it were to recharacterize defendant's motion as a postconviction petition, defendant's motion did not present the gist of a constitutional claim. The trial court reasoned that *Miller* merely held that statutes mandating life in prison for juvenile offenders convicted of first degree murder violate the eighth amendment. See *id.* Consequently, the trial court reasoned, *Miller* was inapplicable to defendant's case because defendant did not receive a mandatory natural life sentence without the possibility of parole.

¶ 9

ANALYSIS

¶ 10

The motion at issue was filed by defendant more than 30 days after sentencing. Clearly, the trial court no longer had subject matter jurisdiction to consider an untimely posttrial motion. See *People v. Flowers*, 208 Ill. 2d 291, 303 (2003).

¶ 11

At the outset, we note defendant does not argue on appeal that the trial court should have recharacterized his motion as a postconviction petition. This position seems to recognize that well-accepted case law provides "a trial court's decision *not* to recharacterize a defendant's pro se pleading as a postconviction petition may not be reviewed for error." (Emphasis in original.) *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010).

¶ 12

Consequently, to avoid longstanding precedent foreclosing review of a trial court's decision not to treat a posttrial pleading as a postconviction petition, defendant creatively requests this court to review the trial court's decision not to recharacterize defendant's motion as a section 2-1401 petition.

¶ 13

In order to secure relief under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)), "the petitioner must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986).

¶ 14

In this case, defendant's motion did not cite section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)) or allege the purported section 2-1401 petition, which was filed more than two years after entry of the challenged judgment, was not timely filed because defendant "was under a legal disability or duress or the grounds for relief were fraudulently concealed." *People*

v. Pinkonsly, 207 Ill. 2d 555, 562 (2003). Additionally, the motion did not: (1) allege a meritorious defense based on facts unknown to the trial court when defendant's sentence was entered; or (2) make a showing of due diligence. *Id.* Further, the motion made no claim that the sentencing judgment was void, either because it was based on a facially unconstitutional statute or because the court that entered it lacked subject matter or personal jurisdiction. See *People v. Thompson*, 2015 IL 118151, ¶¶ 31-32 (holding that voidness challenges based on a facially unconstitutional statute or lack of subject matter or personal jurisdiction are exempt from the two-year limitations period for filing a section 2-1401 petition).

¶ 15 Accordingly, we conclude the trial court would have been without a clue that defendant's motion was intended to serve as a section 2-1401 petition. Instead, we conclude from the content of the pleading itself that defendant's motion was no more than a freestanding motion which the trial court lacked jurisdiction to consider due to its untimely nature. See *Flowers*, 208 Ill. 2d at 303.

¶ 16 In reaching this conclusion, we note that our supreme court has stated that a section 2-1401 petition may be used to challenge a defective judgment for legal reasons, as well as factual ones. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). However, the supreme court has generally allowed legal challenges to be presented in section 2-1401 petitions only where: (1) the petitioner claims that the challenged judgment is void (See *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002); *People v. Vincent*, 226 Ill. 2d 1, 4 (2007); or (2) postconviction relief is unavailable (See *People v. Lawton*, 212 Ill. 2d 285, 295-96 (2004) (persons facing involuntary commitment as sexually dangerous persons may bring claims of ineffective assistance of counsel in section 2-1401 petitions); compare *Pinkonsly*, 207 Ill. 2d at 566 (criminal defendants may not bring constitutional claims of ineffective assistance of counsel

in section 2-1401 petitions). Defendant does not argue that either of the above two scenarios are at issue in the present appeal.

¶ 17 Lastly, we reject defendant's reliance on the holding in *People v. Morfin*, 2012 IL App (1st) 103568, in support of his argument that we may reach the merits of his *Miller* claim on review. In *Morfin*, the court vacated the defendant's sentence and remanded for a new sentencing hearing where the defendant raised a *Miller* claim for the first time on appeal from the denial of a section 2-1401 petition. *Id.* ¶¶ 56, 59. In *Morfin*, unlike the instant case, the defendant successfully invoked the jurisdiction of the trial court by initiating a valid collateral proceeding under section 2-1401 of the Code. As we have found the trial court lacked jurisdiction to consider the merits of defendant's motion, we lack jurisdiction to consider the merits of defendant's *Miller* claim on appeal. See *In re Estate of Randell*, 12 Ill. App. 3d 640, 641 (1973) ("Where the trial court has no jurisdiction an appeal can confer no jurisdiction on the reviewing court.")

¶ 18 Finally, we grant defendant's motion to cite additional authority, namely the First District's recent decision in *People v. Nieto*, 2016 IL App (1st) 121604, for purposes of this appeal. Similarly, we also grant the State's request for this court to consider *People v. Walker*, 2016 IL App (3d) 140723. However, neither case factors into our analysis, because we do not reach the merits of defendant's *Miller* claim. We affirm the trial court's denial of the petition as an untimely posttrial motion.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Bureau County is affirmed.

¶ 21 Affirmed.