

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2016 IL App (4th) 140777-U

NO. 4-14-0777

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

November 4, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Jersey County
CHRISTOPHER L. PARKER,)	No. 07CF176
Defendant-Appellant.)	
)	Honorable
)	Eric S. Pistorius,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court (1) vacated the trial court’s *sua sponte* dismissal of defendant’s petition for relief from judgment and remanded for further proceedings but (2) affirmed the court’s denial of his motion for recusal.

¶ 2 In January 2008, defendant, Christopher L. Parker, pleaded guilty to the offense of criminal sexual assault. In February 2008, the trial court sentenced him to 10 years in prison with a 2-year term of mandatory supervised release (MSR). In March 2008, defendant filed a *pro se* motion to reduce his sentence, and the court reduced the sentence to five years and three months with a two-year MSR term. In February 2009, defendant filed a *pro se* successive postconviction petition, and the court granted his request to withdraw his guilty plea. In June 2009, defendant pleaded guilty to the offense of criminal sexual assault, and the court sentenced him to five years and three months in prison with an MSR term of three years to life. In July 2014, defendant filed a *pro se* petition for relief from judgment and a *pro se* motion for Judge

Eric S. Pistorius to recuse himself. The court denied both the petition and the motion.

¶ 3 On appeal, defendant argues the trial court erred in (1) *sua sponte* dismissing his petition for relief from judgment and (2) denying his motion for substitution of judge. We affirm in part, vacate in part, and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In October 2007, the State charged defendant with two counts of criminal sexual assault (counts I and II) (720 ILCS 5/12-13(a)(2) (West 2006)), one count of predatory criminal sexual assault of a child (count III) (720 ILCS 5/12-14.1(a)(1) (West 2006)), and one count of criminal sexual abuse (count IV) (720 ILCS 5/12-15(c) (West 2006)).

¶ 6 In January 2008, defendant pleaded guilty to the offense of criminal sexual assault in count II in an open plea agreement. In February 2008, the trial court sentenced defendant to 10 years in prison with a 2-year term of MSR. After sentencing, defendant asked the court for a furlough to “take care of a few small matters on the outside” and for the opportunity to see his grandfather “one more time.” The court denied the request, and defendant responded, “Fuck you too, Your Honor.” Following the outburst, the court held defendant in contempt and sentenced him to an indeterminate period of time not to exceed six months. The court later vacated the contempt conviction after defendant sent a letter of apology.

¶ 7 In March 2008, defendant filed a *pro se* motion for a reduction of his sentence. At the hearing on the motion, defendant argued his sentence should be reduced because he had been advised at the guilty plea hearing that he would receive day-for-day good-time credit in prison and later discovered he was required to serve 85% of his 10-year sentence. The trial court reduced defendant’s sentence to five years and three months with a two-year MSR term.

¶ 8 In September 2008, defendant filed a *pro se* petition for postconviction relief

under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2008)), claiming MSR violates the fourteenth amendment to the United States Constitution (U.S. Const., amend. XIV) and he was unaware of the two-year MSR term at the time of sentencing. The trial court dismissed the petition, finding it frivolous and patently without merit.

¶ 9 In February 2009, defendant filed a *pro se* successive petition for postconviction relief, claiming his guilty plea was involuntary because he had been advised at the plea hearing that he would receive a two-year MSR term and prison records indicate he had received a mandatory MSR term of three years to life. In March 2009, the trial court granted defendant's request to withdraw his guilty plea.

¶ 10 In June 2009, defendant pleaded guilty in a negotiated agreement to the offense of criminal sexual assault in count II. The trial court sentenced him to five years and three months in prison with an MSR term of three years to life.

¶ 11 On July 24, 2014, defendant filed a *pro se* petition for relief from judgment, claiming he was not told at the time of his guilty plea "that if I could not find a 'host site' I would not have an out date" from prison. Defendant asked to withdraw his plea.

¶ 12 Defendant also filed a *pro se* motion for Judge Pistorius to recuse himself from hearing the petition for relief from judgment. Defendant argued he did not feel he could receive an unbiased ruling due to the contempt finding in February 2008.

¶ 13 On July 31, 2014, the trial court denied defendant's petition for relief from judgment. The court also denied defendant's motion for recusal, stating he failed to present any basis for the relief sought.

¶ 14 In August 2014, defendant filed a *pro se* motion to reconsider the denial of his petition for relief from judgment, arguing he was not receiving the benefit of his plea bargain

because he does not have an out date and has served almost seven years. The trial court denied the motion to reconsider, stating the MSR term is controlled by the Department of Corrections and not by the court. This appeal followed.

¶ 15

II. ANALYSIS

¶ 16

A. Petition for Relief From Judgment

¶ 17 Defendant argues the trial court's *sua sponte* dismissal of his petition for relief from judgment fewer than 30 days after its filing was premature and must be vacated. We agree.

¶ 18 Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) sets forth the procedure to vacate a final judgment order older than 30 days. Our supreme court has noted "section 2-1401 is a civil remedy that extends to criminal cases as well as to civil cases." *People v. Vincent*, 226 Ill. 2d 1, 8, 871 N.E.2d 17, 22-23 (2007). Pursuant to the rule, the State has 30 days to file a response. See *People v. Laugharn*, 233 Ill. 2d 318, 323, 909 N.E.2d 802, 805 (2009). "While *Vincent* allows for *sua sponte* dismissals of section 2-1401 petitions, it did not authorize such action prior to the expiration of the 30-day period." *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805.

¶ 19 In the case *sub judice*, defendant filed his *pro se* petition for relief from judgment on July 24, 2014. The trial court dismissed the petition only seven days after it was filed and before the State had filed a response. The "court's dismissal short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead." *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805. Accordingly, as defendant's petition was not ripe for adjudication, we vacate the court's premature dismissal of the petition and remand for further proceedings. We express no opinion on the merits of the substantive arguments raised by defendant in his petition.

¶ 20

B. Motion for Recusal

¶ 21 Along with his petition for relief from judgment, defendant filed a motion for Judge Pistorius to recuse himself from the case, claiming he did not feel he could get an unbiased ruling from Judge Pistorius due to the contempt finding in February 2008. On appeal, defendant equates the motion as a motion for substitution of judge filed pursuant to section 114-5 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-5 (West 2014)) and argues Judge Pistorius erred in denying his motion. We disagree.

¶ 22 Section 114-5(a) of the Code (725 ILCS 5/114-5(a) (West 2014)) provides, in part, as follows:

“Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion.”

Pursuant to section 114-5(d) of the Code (725 ILCS 5/114-5(d) (West 2014)), the State or the defendant seeking a substitution of judge based on prejudice must allege such and submit affidavits in support. *People v. Brim*, 241 Ill. App. 3d 245, 248-49, 608 N.E.2d 958, 961 (1993).

¶ 23 Along with a motion for a substitution of judge under the Code, a defendant may also file a motion to recuse pursuant to Illinois Supreme Court Rule 63(C)(1) (eff. July 1, 2013), which directs a judge to voluntarily recuse himself where his impartiality may reasonably be questioned. See *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 43, 958 N.E.2d 647. Our

supreme court has noted “recusal and substitution for cause are not the same thing.” *Marriage of O'Brien*, 2011 IL 109039, ¶ 45, 958 N.E.2d 647. “Unlike a motion for substitution of judge, a motion for recusal does not trigger a duty on the part of the trial judge to transfer the motion to another judge for determination.” *Kamelgard v. American College of Surgeons*, 385 Ill. App. 3d 675, 681, 895 N.E.2d 997, 1003 (2008); see also *People v. Klein*, 2015 IL App (3d) 130052, ¶ 84, 40 N.E.3d 720.

¶ 24 In this case, we find defendant filed a motion to recuse and not a motion for a substitution of judge. The title of defendant’s *pro se* motion is “Motion for Eric S. Pistorius to recuse himself from case.” Defendant did not indicate he was seeking a substitution of judge pursuant to section 114-5 of the Code. He also did not ask that the motion be transferred to another judge for a ruling. Accordingly, we refuse to treat defendant’s motion for recusal as a motion for a substitution of judge under section 114-5 of the Code.

¶ 25 We note “the trial judge is in the best position to determine whether he or she is prejudiced against the defendant when presented with a motion for recusal.” *People v. Antoine*, 335 Ill. App. 3d 562, 570, 781 N.E.2d 444, 452 (2002). Here, the judge denied defendant’s motion, stating he failed to present any basis for relief. We agree and find defendant’s motion was unsubstantiated. Defendant claimed Judge Pistorius was biased due to the contempt finding in 2008, six years before the motion was filed. However, Judge Pistorius vacated the contempt conviction in March 2008 and even reduced defendant’s sentence on the same day, hardly evidence of bias. We find the judge did not err in denying the motion.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the trial court’s decision denying defendant’s motion for recusal. We vacate the court’s dismissal of defendant’s petition for relief from

judgment and remand for further proceedings. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 28 Affirmed in part and vacated in part; cause remanded.