

No. 1-15-1497

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 91 CR 29024
)	
ERICK FLEMING,)	Honorable
)	Stanley J. Sacks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* Appeal dismissed for lack of jurisdiction where defendant's motion for leave to file a late notice of appeal was untimely; order granting defendant leave to file the late notice of appeal vacated.

¶ 2 Defendant Erick Fleming appeals from the circuit court's dismissal of his *pro se* petition for relief pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 *et seq.* (West 2014)). On appeal, defendant maintains that the circuit court violated his due process rights when it granted the State's motion to dismiss his section 2-1401 petition the same day the motion was filed. Although the State concedes that there was a due process

violation, we find that we lacked jurisdiction to grant defendant's motion for leave to file a late notice of appeal. Accordingly, we vacate our order granting leave and dismiss this appeal.

¶ 3 In 1992 defendant entered an open guilty plea to the first-degree murder of Jontiel Witherspoon, the attempted murder of Robert Thomas, and aggravated arson. Defendant was sentenced to concurrent terms of 70, 30, and 30 years' imprisonment, respectively. Defendant did not file a direct appeal or a timely petition to withdraw his guilty plea. On January 13, 2004, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence, which the circuit court treated as a postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)). Finding that the petition stated the gist of a claim of a constitutional violation, the circuit court appointed postconviction counsel. The State filed a motion to dismiss, which the circuit court granted in 2005. Defendant did not appeal that decision.

¶ 4 On June 16, 2014, defendant filed the instant *pro se* "petition for post-conviction relief" pursuant to section 2-1401 of the Code. Defendant alleged that during the 1992 plea proceedings, his attorney failed to inform him that he would be required to serve three years of mandatory supervised release. Defendant further contended that his attorney misinformed him that he would only remain in custody for 35 years and failed to explain that defendant might have to serve the full 70-year sentence. Defendant stated that he did not become aware of these facts until April of 2014 and asked the court to appoint him counsel.

¶ 5 At a status hearing without defendant on September 5, 2014, the court inquired whether the State wished to respond to defendant's section 2-1401 petition. The State replied, "Judge, if you need a response from us, maybe we should writ him in to argue this. Do you want to do it

that way?" The case was set for October 3, 2014. When the court asked whether the State would "have something in writing to file on or about that date," the State responded in the affirmative, and the court stated that defendant could respond at that time.

¶ 6 Defendant appeared on October 3, 2014, without counsel and the court noted that defendant "filed a *pro se* petition for relief under Section 735 ILCS 5/2-1401." After the State filed its motion to dismiss the petition that same day, defendant objected because "they didn't give [him] no heads up" and he had not received a copy of the State's motion. The court asked defendant to explain the basis for his petition and defendant briefly argued the points raised therein. The court found that the petition failed to allege an "error of fact, which would [be] require[d] for a 1401" and that it was "past the two year time to file." In addition, the court noted that the petition had "no basis in law or fact." Accordingly, the court granted the State's motion to dismiss.

¶ 7 In a motion that was postmarked on April 28, 2015, defendant requested leave to file a late notice of appeal "pursuant to Supreme Court Rule 606(c)." On June 24, 2015, this court granted defendant leave to file his late notice of appeal and appointed the State Appellate Defender.

¶ 8 On appeal, defendant maintains, and the State agrees, that the circuit court's dismissal of his section 2-1401 petition on the same day the State filed its motion to dismiss the petition violated his due process rights because defendant did not receive the motion or notice that it was set for ruling.

¶ 9 As an initial matter, we have an independent duty to consider whether we have jurisdiction to review this case. *People v. Smith*, 228 Ill. 2d 95, 104 (2008). The filing of a notice

of appeal "is the jurisdictional step which initiates appellate review." *Id.* Absent a timely filed notice of appeal, this court lacks jurisdiction to consider issues relating to any part of the ruling (*People v. Love*, 2013 IL App (2d) 120600, ¶ 32), and we must dismiss the appeal (*Smith*, 228 Ill. 2d at 104). Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) provides a civil remedy for obtaining relief from final judgments which extends to criminal cases. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). Although a section 2-1401 petition must be filed in the same proceeding in which the final order or judgment was entered, it is not a continuation of the original action. 735 ILCS 5/2-1401(b) (West 2014). Thus, our supreme court has "consistently held that proceedings under section 2-1401 are subject to the usual rules of civil practice." *Vincent*, 226 Ill. 2d at 8 (citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279 (1982)).

¶ 10 In this case, defendant's petition must be considered a section 2-1401 petition despite his labeling it "petition for post-conviction relief." First, defendant repeatedly cited section 2-1401 of the Code in his petition. The State then filed a "motion to dismiss defendant's 2-1401 petition pursuant to 735 ILCS 5/2-615." The circuit court referred to the petition as a section 2-1401 request for relief on several court status dates and, prior to granting the State's motion to dismiss, the court indicated that defendant "filed a *pro se* petition for relief under Section 735 ILCS 5/2-1401." Defendant now appeals from the order granting the State's motion to dismiss his section 2-1401 petition. Thus, the rules of civil practice govern the proceedings on defendant's petition. See *Vincent*, 226 Ill. 2d at 8; see also *Tapp*, 2012 IL App (4th) 100664, ¶ 4 (finding that supreme court rules governing civil appeals, not the supreme court rules applicable to appeals in criminal cases, apply in civil proceedings).

¶ 11 Article III of the Illinois Supreme Court Rules governs "Civil Appeals" and sets forth the requirements for perfecting civil appeals in Rule 303 (eff. June 4, 2008). Rule 303(a) requires a notice of appeal to be filed within 30 days after the entry of a final judgment. *Tapp*, 2012 IL App (4th) 100664, ¶ 4. A party seeking to appeal the final judgment after the expiration of the 30-day period may file a motion for leave to file a late notice of appeal "within 30 days after expiration of the time for filing a notice of appeal." Ill. S. Ct. R. 303(d) (eff. June 4, 2008). Weekends and holidays are excluded as the last day from the computation of any time requirement fixed by a statute in force in Illinois. 5 ILCS 70/1.11 (West 2014).

¶ 12 Here, defendant appealed the October 3, 2014, dismissal of his section 2-1401 petition. The 30-day time frame to file a notice of appeal expired Monday, November 3, 2014. See 5 ILCS 70/1.11 (West 2014). Thus, the last date defendant could file a motion for leave to file a late notice of appeal was December 3, 2014, and his April 28, 2015, motion was untimely under Rule 303(d). Regardless of the merits of a defendant's claim, our supreme court has stressed that "the appellate court does not have the authority to excuse the filing requirements of the supreme court rules governing appeals." *Secura Ins. Co. v. Illinois Farmers Ins. Co.*, 232 Ill. 2d 209, 217-18 (2009). Therefore, we lack jurisdiction over this case and had no authority to grant defendant's motion for leave to file his late notice of appeal on June 24, 2015. See *Tapp*, 2012 IL App (4th) 100664, ¶¶ 7, 8 (dismissing a defendant's appeal for lack of jurisdiction because defendant failed to comply with the time limitations of Rule 303(a), (d)).

¶ 13 Although defendant cited Illinois Supreme Court Rule 606(c) (eff. Dec. 11, 2015) as the basis for his motion for leave to file his late notice of appeal, Rule 606 does not apply in this case. Rule 606 appears in article VI of our supreme court's rules, which governs "Appeals in

Criminal Cases, Post-Conviction Cases, and Juvenile Court Proceedings." Under Rule 606(c), a defendant may seek leave to file a late notice of appeal up to six months after the 30-day time for filing the notice of appeal expires. If Rule 606 controlled in this case, defendant's April 28, 2015, motion could have been timely. However, as noted above, defendant initiated the instant proceedings under the civil remedy provided in section 2-1401 of the Code and the court treated the petition as such. Thus, this civil matter is not a postconviction case and it does not fall under the purview of Rule 606.

¶ 14 In so finding, we are mindful that circuit courts generally must construe a criminal defendant's section 2-1401 petition as a postconviction petition if it alleges a deprivation of constitutional rights that is cognizable under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2014)). *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003). However, section 122-1 of the Act provides that only one postconviction petition may be filed without leave of court. 725 ILCS 5/122-1(f) (West 2014). A circuit court *may* grant a defendant's request for leave to file a successive postconviction petition if cause and prejudice are shown. 725 ILCS 5/122-1(f) (West 2014). Nevertheless, absent a defendant's request for leave to file a successive postconviction petition, the circuit court is not *required* to determine whether a defendant has made the requisite showing of cause and prejudice. *People v. Tidwell*, 236 Ill. 2d 150, 158 (2010).

¶ 15 In this case, postconviction proceedings under the Act were previously conducted. In 2004, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence, which was treated as a postconviction petition and eventually dismissed. In filing his current petition, defendant did not request leave to file a successive postconviction petition, nor did the circuit court make a *sua sponte* determination that sufficient cause and prejudice permitted the filing of

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a successive postconviction petition. As such, the instant proceedings were initiated and conducted pursuant to the civil remedy provided in section 2-1401 of the Code, and defendant's request for leave to file his late notice of appeal was untimely under Rule 303(d). See *Tapp*, 2012 IL App (4th) 100664, ¶ 4 (applying Rule 303(d), and not Rule 606(c), to a criminal defendant's appeal in a civil proceeding).

¶ 16 Accordingly, we vacate the order granting leave to file late notice of appeal and dismiss this appeal.

¶ 17 Order vacated; appeal dismissed.