

No. 1-16-0701

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. 13 CR 18900
)	
MARCO ALVAREZ-ULLOA,)	Honorable
)	Thomas J. Hennelly,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court twice struck the defendant's postconviction petition without prejudice so that the petition was never heard by the trial court, the appellate court is without jurisdiction. There is no final, appealable order from which an appeal can be taken.

¶ 2 The defendant-appellant, Marco Alvarez-Ulloa (defendant) appeals from an order entered by the circuit court of Cook County on January 27, 2016, which struck the defendant's petition for postconviction relief, without hearing the petition.

¶ 3

BACKGROUND

¶ 4 The undisputed facts which gave rise to the petition for postconviction relief and ultimately this appeal began when the defendant was arrested in 2014 after a police raid at the home of his girlfriend, Beatrice Cisneros (Cisneros). Following an anonymous tip, the Chicago police conducted an investigation at Cisneros' home. During the raid they discovered a small plot of land adjacent to Cisneros' garage on which marijuana plants were growing. The police asked the defendant and Cisneros who owned the property. When Cisneros acknowledged ownership, the police prepared to arrest her. The defendant says he then secured an agreement from the police by which he would be arrested instead of Cisneros, if he claimed ownership of the marijuana. He then claimed ownership and was arrested. Cisneros was not arrested. On April 2, 2014, the defendant pleaded guilty to possession of marijuana. He was sentenced to two years of probation, which required him to report to a probation officer monthly. Subsequently on January 6, 2016, the defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The petition sought to withdraw his guilty plea. The defendant, who was not an American citizen, alleged that he was unaware of the immigration consequences of his guilty plea when he made it in 2014. Subsequently, the guilty plea led to his being taken into federal custody by the United States Immigration and Customs Enforcement Authority and for the purpose of deportation.

¶ 5 The defendant's petition for postconviction relief claimed that neither the judge who accepted his guilty plea, nor the attorney who represented him in the marijuana possession case, admonished nor advised him regarding the potential negative immigration consequences of pleading guilty.

¶ 6 The postconviction petition further alleges that he is innocent of the marijuana possession charge. The defendant claims that after pleading guilty he subsequently discovered that the area where the marijuana plants were found adjacent to Cisneros' garage was not, in fact, on her property, but was instead part of a neighboring property. Additionally, Cisneros' adult son and adult nephew were residents in her home with equal access to the area where the marijuana was discovered. The defendant essentially posits that the State could not have met its burden of proof against him under the true facts of the case. None of this is disputed by the State.

¶ 7 At the time that he filed his petition for postconviction relief, the defendant was already in the custody of federal immigration authorities. His custodial status had caused him to miss a meeting with his probation officer. In turn, this caused the probation department to file a petition in the circuit court of Cook County on January 8, 2016, charging him with violation of probation. This filing resulted in the scheduling of a hearing on the violation of probation charge on a parallel track before the trial court on the same calendar as his petition for postconviction relief.

¶ 8 On January 27, 2016, the defendant's petition for postconviction relief was set for a hearing. The attorney representing the defendant on the postconviction petition sent another attorney in his stead. The trial court refused to hear the petition for postconviction relief on January 27, 2016, stating that as far as the court was concerned, the matter was before the court for a hearing on the petition for violation of probation which had been filed on January 8, 2016, not for a hearing on the postconviction petition. The court inquired as to the defendant's whereabouts. The court then told the attorney that it would not hear the defendant's postconviction petition while the petition for violation of probation was pending and the defendant was not present in court.

¶ 9 The court further stated that it had issued a no bail arrest warrant for the defendant pursuant to the petition for violation of probation filed on January 8, 2016. The court said that it considered the defendant a "fugitive." It then struck his postconviction petition from its calendar. The court admonished the attorney attending the January 27, 2016 hearing that he should convey to the defendant's attorney that he "needs to find [the defendant] before I entertain any other motion."

¶ 10 On February 9, 2016, the postconviction petition was again set to be heard by the trial court. The defendant's attorney again sent another attorney to court in his stead. The trial court again admonished the attorney for setting a hearing on the defendant's postconviction petition while there was a petition pending against him for violation of probation. The court stated that it would not entertain the defendant's postconviction petition while the petition for violation of probation and concurrent arrest warrant were pending. The court acknowledged that the defendant was in the custody of federal immigration authorities and that his custodial status was the reason for his failure to appear before the court. Nevertheless, the court opined that unless and until the defendant appeared before the court, it would not entertain his postconviction petition. The defendant's attorney advised the court that withdrawal of his guilty plea was necessary to avoid deportation. The court again admonished the attorney regarding the defendant's failure to appear before the court. The court told the attorney to convey to the defendant's primary attorney that he (the primary attorney) would be subject to sanctions if he attempted to file the postconviction petition again before bringing the defendant personally before the court. The court then struck the defendant's postconviction petition for the second time. Subsequently, on March 23, 2016, this court allowed the defendant to file a late notice of appeal from the order of January 27, 2016.

¶ 11

ANALYSIS

¶ 12 Before we address the merits of the case regarding the trial court's action, we must address the issue of our jurisdiction. Our supreme court has said that we have an independent duty to consider jurisdiction regardless of whether the parties raise the issue. See *People v. Smith*, 228 Ill. 2d 95, 104 (2008). We are duty bound to dismiss an appeal over which we lack jurisdiction. See *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011). Notably, in this case, the State argues lack of jurisdiction in urging us to dismiss this appeal. The State's lack of jurisdiction argument is based on the assertion that the trial court's action in striking the defendant's postconviction petition was without prejudice and is not a final order. The State argues that there was no ruling on the merits of the defendant's postconviction petition and therefore, there is no order from which an appeal can be taken.

¶ 13 The State points out that the trial court's striking of the defendant's postconviction petition was pursuant to the fugitive dismissal doctrine. See *People v. Partee*, 125 Ill. 2d 24, 37 (1988); *People v. Vasquez*, 339 Ill. App. 3d 546, 552 (2003). The State argues that under the doctrine, the trial court's action was without prejudice and was therefore not final and appealable.

¶ 14 The defendant makes a wide-ranging argument in which he argues that he was unable to comply with the requirements of his probation because federal authorities had taken him into custody. His custodial status, in turn, caused him to file his postconviction petition seeking to withdraw his guilty plea. In the interim, the trial court issued an arrest warrant for him notwithstanding the court's knowledge that he was in federal custody. He further asserts that the content of his postconviction petition shows that he has a meritorious defense to the underlying marijuana possession charge to which he pled guilty. According to the defendant, the State does not dispute that the evidence would show that the area where the marijuana was found was not

on Cisneros' property. Furthermore, there were clearly others in the vicinity who may have owned the plants. Therefore, he reasons, the State could not have proved his guilt beyond a reasonable doubt. Thus, he points out that he would not have pled guilty because the marijuana had nothing to do with Cisneros, thereby removing the motive for his guilty plea. He further argues that despite informing his original criminal defense attorney of his non-citizen status, the attorney advised him to plead guilty, thereby directly jeopardizing his immigration status and ultimately leading to his arrest by federal authorities.

¶ 15 He also argues that the trial court erred in not inquiring as to his immigration status before accepting his guilty plea. The court later compounded the problem by insisting that the defendant appear personally before the court would entertain his postconviction petition. The defendant concludes that the trial court committed reversible error warranting remandment for a hearing on his postconviction petition.

¶ 16 We note that Illinois Supreme Court Rule 651 governs appeals in postconviction proceedings. That rule states:

"An appeal from a final judgment of the circuit court in any postconviction proceeding shall lie to the Appellate Court in the district in which the circuit court is located." Ill. S. Ct. Rule 651(a) (eff. Feb. 6, 2013).

A final judgment is defined as one that fixes the rights of the parties, and it is final if it determines the litigation *on the merits* and if affirmed, leaves only the execution of the judgment. *In re D.D.*, 212 Ill. 2d 410, 418 (2000) (citing *In re J.N.*, 91 Ill. 2d 122, 127 (1982)).

¶ 17 This appeal arose because the trial court did not allow the defendant's postconviction petition to proceed under the three stages of the Act. The court struck the petition twice and

threatened sanctions against the defendant's attorney if he attempted a third filing without producing the defendant in court. Understandably, the defendant's attorney was reluctant to bring the petition before the court a third time given the threat of sanctions against the attorney. Because the trial court twice struck the defendant's petition, the defendant's postconviction petition was never heard on the merits and there was no judgment entered on the petition.

¶ 18 The defendant makes what amounts to an equitable argument in pointing out that he was caught in a circular situation by the trial court's "recalcitrance" which denied him his day in court. The defendant points out that he was prevented by the trial court from pursuing his postconviction petition. The reason given by the court was that there was a warrant for his arrest for failing to appear on the petition to revoke probation. The defendant argues that he could not report to the probation department and appear on the petition to revoke probation because he was in federal custody as a result of the guilty plea. The only way in which he could extricate himself from federal custody was to seek to withdraw his guilty plea. He attempted to do so by filing a postconviction petition in which he makes a strong argument challenging his guilty plea. Yet, the trial court refused to allow him to challenge his guilty plea pursuant to his postconviction petition unless he personally appeared in court to answer the violation of probation petition. The defendant infers that the court's action was particularly unfair because the court was advised by the probation department that the defendant's failure to report was due to his being in federal custody. The defendant had never missed a probation appointment prior to being taken into federal custody. Nevertheless the trial court declared him a fugitive and issued a no bail arrest warrant. The defendant argues that his only hope of extricating himself from federal custody and the impending threat of deportation was to seek to withdraw his guilty plea. He argues that his postconviction petition is meritorious. He reasons that he would prevail

in the underlying case if he were allowed to withdraw his guilty plea, thereby removing the conviction which subjected him to being taken into federal custody for deportation. He concludes that the trial court's recalcitrance completely stymied his legitimate efforts to have his postconviction petition heard. The defendant concludes that he is essentially left without a remedy, notwithstanding his constitutional and statutory right to be heard.

¶ 19 The record makes it clear that the court would not entertain the defendant's postconviction petition unless the defendant was present in court given the outstanding arrest warrant which the court had issued. However, the defendant was in federal custody because of his guilty plea, so he could not be present in court. This conundrum presented a challenge for the defendant and his attorney. It can be inferred that after being admonished by the trial court, and threatened with sanctions, the defendant's attorney sought recourse through the appellate process, rather than make a third attempt to present the defendant's postconviction petition. While we recognize the frustration which the defendant and his attorney experienced regarding obtaining a hearing on his postconviction petition, the result is that no judgment, final or otherwise, was ever entered on the defendant's postconviction petition. Therefore, we are without jurisdiction to review this case as there is no *final judgment* for us to review. Ill. S. Ct. R. 651(a) (Feb. 6, 2013).

¶ 20 The defendant cites no authority which would give us jurisdiction to review the striking without prejudice of his postconviction petition, even under these circumstances. We acknowledge that the trial court's action was likely improper in refusing to even allow the defendant's postconviction petition to proceed to the first stage under the Act. While the court has a right to seek the defendant's presence in response to the charge of violation of probation, we know of no similar requirement for the defendant's presence in order to present a

postconviction petition at the first stage. By tying the two together, the trial court heightened the appearance of unfairness by the court. However, equitable argument and empathy aside, there must be a final judgment entered on the defendant's postconviction petition in order for the trial court's action to be appealable. There is no such order or judgment from the trial court in this case. While recognizing the plight in which the defendant finds himself and the trial court's role in that plight, appellate jurisdiction is nevertheless lacking. Accordingly, we must dismiss this appeal.

¶ 21 Appeal dismissed.