

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).

FILED

May 9, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160216-U

NOS. 4-16-0216, 4-16-0225 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Pike County
MARK W. BARROW,)	Nos. 12CF24
Defendant-Appellant.)	13CF39
)	
)	Honorable
)	Thomas J. Brannan,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding the trial court properly denied the claims raised in defendant's section 2-1401 petition and that defendant forfeited review of the claims raised for the first time on appeal.

¶ 2 In February 2014, defendant, Mark W. Barrow, pleaded guilty to one count of failure to report an April 2013 change of address, a Class 2 felony (730 ILCS 150/6 (West 2012)) (Pike County case No. 13-CF-39). As part of the negotiated plea agreement, defendant admitted a probation violation in Pike County case No. 12-CF-24, in which he previously pleaded guilty to one count of failure to register as a sex offender, a Class 3 felony (730 ILCS 150/3(a)(1) (West 2010)). The fully negotiated guilty plea provided for concurrent terms of five years' imprisonment in the Illinois Department of Corrections (DOC), a one-year term of mandatory supervised release (MSR) in case No. 12-CF-24, and a two-year term of MSR in case No. 13-

CF-39. In December 2015, defendant filed a "motion for relief from modified sentence pursuant to [section] 2-1401" of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)), requesting the trial court void his sentence and reinstate a previous term of probation in case No. 12-CF-24. The motion alleged (1) the court failed to hold a probation revocation hearing, and (2) the use of the charges in case No. 13-CF-39 as the basis for revoking his probation in case No. 12-CF-24 constituted double jeopardy. In February 2016, the trial court *sua sponte* denied defendant's section 2-1401 petition, finding (1) a section 2-1401 petition was an inappropriate method for defendant to raise his claims, and (2) no double jeopardy violation.

¶ 3 Defendant appeals, arguing (1) a section 2-1401 petition was the appropriate method to raise his claims regarding an alleged improper admonishment prior to his guilty plea in case No. 13-CF-39 (docketed No. 4-16-0225), and (2) the trial court erred in allowing him to incriminate himself in case No. 12-CF-24 (docketed No. 4-16-0216) by pleading guilty in case No. 13-CF-39.

¶ 4 I. BACKGROUND

¶ 5 In April 2012, the State charged defendant with one count of failure to register as a sex offender, a Class 3 felony (730 ILCS 150/3(a)(1) (West 2010)), for failing to register following a February 2012 change of address (Pike County case No. 12-CF-24). In June 2012, the trial court accepted defendant's guilty plea and, pursuant to a fully negotiated plea, sentenced him to 30 days in jail and 30 months' probation.

¶ 6 In May 2013, the State charged defendant with one count of failure to report an April 2013 change of address, a Class 2 felony (730 ILCS 150/6 (West 2012)) (Pike County case No. 13-CF-39). In October 2013, the State filed a petition to revoke defendant's probation in case No. 12-CF-24 based on the charge brought in case No. 13-CF-39. At a court appearance

later that month, the State indicated the parties had an agreed disposition regarding the charge in case No. 13-CF-39 and the petition to revoke probation in case No. 12-CF-24, and it asked the court to set both cases for a hearing in January 2014. The matter was continued and, in February 2014, proceeded to a plea hearing.

¶ 7 At the February 2014 hearing, counsel for defendant informed the trial court the parties had reached a plea agreement, which incorporated both the pending petition to revoke probation in case No. 12-CF-24 and the pending charge in case No. 13-CF-39. In case No. 12-CF-24, the plea agreement provided for a sentence of five years' imprisonment in DOC and a one-year term of MSR. In case No. 13-CF-39, the agreement provided for a sentence of five years' imprisonment, to run concurrently with the sentence in case No. 12-CF-24, and a two-year term of MSR. The court first turned to case No. 13-CF-39 and admonished defendant regarding the nature of the charge against him, the possible penalties, and his constitutional rights. The court found (1) defendant understood the nature of the charge and the possible penalties, (2) the plea was free and voluntary, and (3) a factual basis for the plea.

¶ 8 The trial court then turned to case No. 12-CF-24 and noted the nature of the charge, the possible penalties, and defendant's prior plea of guilty. Prior to accepting defendant's admission to a probation violation, the court, in relevant part, admonished defendant regarding the specific allegations in the petition to revoke probation and his right to a hearing with defense counsel present. The court found (1) defendant understood the possible penalties, (2) the admission was made voluntarily, and (3) a factual basis for the admission. The court sentenced defendant to concurrent five-year terms of imprisonment in each case and periods of MSR as set forth in the plea agreement.

¶ 9 Following its February 2014 acceptance of defendant's guilty plea in case No. 13-CF-39 and his admission of probation violation in case No. 12-CF-24, the trial court admonished defendant regarding his right to appeal and the requirement of a postsentencing motion to vacate the judgment and withdraw the guilty plea or admission. Defendant did not file (1) a motion to vacate the judgment and withdraw his guilty plea or admission, (2) a direct appeal, or (3) a postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)).

¶ 10 In December 2015, defendant filed a "motion for relief from modified sentence pursuant to [section] 2-1401" of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). The motion requested that the trial court (1) void his sentence in case No. 12-CF-24, and (2) reinstate the original term of 30 months' probation. The motion alleged no hearing on the petition to revoke probation was held and the failure to hold such a hearing denied defendant due process and rendered the probation revocation void. Defendant further argued the conviction in case No. 13-CF-39 and the revocation of probation in case No. 12-CF-24 were based on the same set of evidence and, thus, constituted double jeopardy.

¶ 11 In February 2016, the trial court *sua sponte* denied defendant's section 2-1401 motion. In its written order, the court noted, "a petition under section 2-1401 is not a proper vehicle to collaterally attack alleged denials of constitutional rights. *** Further, it is not a proper means of raising issues such as whether a defendant was properly admonished as to the consequences of a plea of guilty or whether a defendant had incompetent counsel." The court found defendant raised no factual issues and further found defendant's motion barred by *res judicata* or collateral estoppel because defendant knew of his claims at the time in which he could have appealed, but he did not raise them.

¶ 12 This appeal followed. We have docketed the appeal in case No. 12-CF-24 as No. 4-16-0216 and the appeal in case No. 13-CF-39 as No. 4-16-0225. We have consolidated the cases for review.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues (1) a section 2-1401 petition was the appropriate method to raise his claims regarding the alleged improper admonishment prior to his guilty plea in case No. 13-CF-39, and (2) the trial court erred in allowing him to incriminate himself in case No. 12-CF-24 by pleading guilty in case No. 13-CF-39.

¶ 15 Section 2-1401 provides the statutory procedure by which a final order, judgment, or decree may be vacated more than 30 days after entry. *People v. Haynes*, 192 Ill. 2d 437, 460, 737 N.E.2d 169, 182 (2000). Section 2-1401 provides a civil remedy that extends to both civil and criminal cases. *People v. Vincent*, 226 Ill. 2d 1, 8, 871 N.E.2d 17, 22-23 (2007).

Accordingly, proceedings under section 2-1401 are subject to the usual rules of civil procedure, and "[t]he petition is subject to dismissal for want of legal or factual sufficiency." *Id.* at 8, 871 N.E.2d at 23. Furthermore, trial courts have the authority to *sua sponte* dismiss a claim without notice where the petitioner cannot possibly win relief. *Id.* at 13, 871 N.E.2d at 26. "[W]hen a court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, that order will be reviewed, on appeal, *de novo*." *Id.* at 18, 871 N.E.2d at 28.

¶ 16 "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Id.* at 7-8, 871 N.E.2d at 22. Section 2-1401 petitions require a determination as to whether facts existed at the time of trial that were unknown to the court and would have precluded entry of the

original judgment. *People v. Pinkonsly*, 207 Ill. 2d 555, 566, 802 N.E.2d 236, 243 (2003). "A section 2-1401 petition, however, is 'not designed to provide a general review of all trial errors nor to substitute for direct appeal.'" *Haynes*, 192 Ill. 2d at 461, 737 N.E.2d at 182 (quoting *People v. Berland*, 74 Ill. 2d 286, 314, 385 N.E.2d 649, 662 (1978)). "Issues which could have been raised in a motion for rehearing or on direct appeal are *res judicata* and may not be relitigated in the section 2-1401 proceeding, which is a separate action and not a continuation of the earlier action." *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 794, 590 N.E.2d 89, 92 (1992).

¶ 17 In the instant case, the trial court, relying on *In re Charles S.*, 83 Ill. App. 3d 515, 404 N.E.2d 435 (1980), noted, "a petition under section 2-1401 is not a proper vehicle to collaterally attack alleged denials of constitutional rights. [Citation.] Further, it is not a proper means of raising issues such as whether a defendant was properly admonished as to the consequences of a plea of guilty or whether a defendant had incompetent counsel." The court found defendant raised no factual issues and further found defendant's motion barred by *res judicata* or collateral estoppel because defendant knew of his claims at the time in which he could have appealed, but he did not do so.

¶ 18 We agree defendant's claims were not proper for a section 2-1401 petition. "Motions brought pursuant to section 2-1401 have been held to be an *improper* means of raising issues such as whether a defendant was properly admonished as to the consequences of a plea of guilty." (Emphasis in original.) *People v. Smith*, 188 Ill. App. 3d 387, 392, 544 N.E.2d 413, 415 (1989). As stated above, the purpose of a section 2-1401 petition is to raise a meritorious claim or defense which, if known at the time of the judgment, would have precluded entry of the original judgment. *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22. Defendant's claims regarding

(1) the alleged lack of a probation revocation hearing, (2) double jeopardy, (3) the allegedly improper admonishments regarding the consequences of his guilty plea, and (4) self-incrimination are not meritorious claims or defenses, unknown at the time of his guilty plea, which would have precluded the entry of the plea in case No. 13-CF-39 and the admission to a probation violation in case No. 12-CF-24.

¶ 19 Defendant contends a section 2-1401 petition is a proper means to raise the question of whether he was admonished as to the consequences of a plea of guilty. In support, defendant cites *People v. Hallom*, 265 Ill. App. 3d 896, 638 N.E.2d 765 (1994). In *Hallom*, the defendant filed a section 2-1401 petition alleging newly discovered evidence from a number of witnesses discovered subsequent to the trial. *Id.* at 904, 638 N.E.2d at 771. Although the appellate court determined a section 2-1401 petition was the appropriate means for raising his claims, the defendant failed to demonstrate that the witnesses could not have been discovered prior to trial when the witnesses lived in the same neighborhood and some of them were related to the defendant. *Id.* at 905-06, 638 N.E.2d at 771-72. Accordingly, the appellate court affirmed the trial court's finding of a lack of diligence and denial of the defendant's petition. *Id.* at 906, 638 N.E.2d at 772.

¶ 20 *Hallom* is readily distinguishable from the instant case. Despite his lack of diligence, the defendant in *Hallom* raised *newly discovered* evidence in his section 2-1401 petition. Here, defendant alleged he received a copy of the court docket after the expiration of the 30-day period for filing a postjudgment motion and learned for the first time that no probation revocation hearing had occurred. Based on this "newly discovered evidence," defendant alleged he was denied a probation revocation hearing and raised a double jeopardy claim. However, the transcript from the February 2014 proceedings shows the trial court

properly informed defendant of his right to have a hearing before the court regarding the probation revocation. Defendant stated he understood that right, did not request a hearing, and did not object to the lack of a hearing. Defendant (and the trial court) already had knowledge of these events and, therefore, he did not raise any newly discovered evidence in his section 2-1401 petition.

¶ 21 As to due diligence, defendant's excuse for the delay in raising these claims is that he did not learn of his right to a probation revocation hearing until after the 30-day period for the filing of a postjudgment motion. However, this is belied by the record. The transcript of defendant's guilty plea hearing shows the trial court fully admonished defendant prior to accepting his guilty plea and his admission to a probation violation, including admonishing defendant as to his right to a probation revocation hearing.

¶ 22 Even if defendant's claims were properly raised in his section 2-1401 petition, we conclude he has forfeited the argument he makes on appeal. Defendant's section 2-1401 petition argued (1) the trial court failed to provide him with a probation revocation hearing; and (2) the use of the same evidence as the basis for (a) the charge in case No. 13-CF-39, and (b) the revocation of his probation in case No. 12-CF-24 subjected him to double jeopardy for the same offense. On appeal, defendant now contends (1) the admonishment regarding his right to a probation revocation hearing was inadequate and denied him due process, and (2) the trial court erred in allowing him to incriminate himself in case No. 12-CF-24 by pleading guilty in case No. 13-CF-39. As these claims were not included in his section 2-1401 petition, defendant has forfeited, that is, procedurally defaulted, these claims on appeal. See *People v. Thompson*, 2015 IL 118151, ¶ 40, 43 N.E.3d 984 (an as-applied constitutional challenge to sentence raised for the

first time on appeal from the dismissal of a section 2-1401 petition did not constitute a void judgment which could be attacked at any time).

¶ 23

III. CONCLUSION

¶ 24 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 25

Affirmed.