2018 IL App (1st) 151407-U
Order filed: February 23, 2018

FIFTH DIVISION

No. 1-15-1407

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. 98 CR 30721
	)	
SAM COOK,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
PRESIDING JUSTICE REYES and JUSTICE LAMPKIN concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not abuse its discretion by denying retained counsel's request for a continuance or err by dismissing defendant's *pro se* section 2-1401 petition.

¶ 2 Defendant-appellant, Sam Cook, appeals from the circuit court's dismissal of his *pro se* petition, which he brought pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 *et seq.* (West 2014) (petition). On appeal, defendant contends that the petition should not have been dismissed because it set forth a valid claim that the mittimus incorrectly lists two murder convictions. Defendant argues that the "surplus conviction" should be vacated, as should

the fees and costs the circuit court imposed for filing a frivolous successive section 2-1401 petition. Defendant further contends that a new hearing is warranted because the circuit court violated his due process rights when it denied a request for a continuance by private counsel retained by defendant's family (retained counsel) to allow him to review defendant's *pro se* petition. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the 1998 shooting death of his wife, Fannie Cook. He was charged with two counts of first degree murder: "murder with intent to kill or injure" (count 1); and "murder with a strong probability of death" (count 2). Following a trial in 2002, a jury returned a general verdict and found him guilty of first degree murder. At sentencing, the circuit court merged count 2 into count 1, and imposed a sentence of 42 years' imprisonment. The half-sheet of orders includes the following notation: "Sentence: 42 years IDOC ct 1[;] ct 2 merges." The mittimus indicates that defendant was "adjudged guilty" on count 1 and on count 2, and lists a sentence of 42 years' imprisonment on count 1 only. The mittimus also states: "IT IS FURTHER ORDERED THAT COUNT ONE MERGES INTO COUNT TWO."

¶ 4 Defendant appealed his conviction and sentence (*People v. Cook*, No. 1-02-1313 (2003) (unpublished order under Supreme Court Rule 23)), contending that the State had not proved beyond a reasonable doubt that he possessed the requisite mental state for first degree murder, that he was denied a fair trial and due process where the circuit court refused to excuse for cause a juror who was observed "nodding off" during his direct testimony, and that the prosecutors made improper comments during closing arguments. We rejected defendant's contentions and affirmed.

¶ 5 In 2004, defendant filed a *pro se* postconviction petition, which the circuit court dismissed as frivolous and patently without merit. Defendant appealed (*People v. Cook*, No. 1-

05-2085 (2006) (unpublished order under Supreme Court Rule 23)), contending that his petition had set forth the gist of a meritorious claim that trial counsel was ineffective for failing to request a clarifying instruction regarding the proper use of a medical intake sheet that was given to the jury during deliberations, and that appellate counsel was ineffective for failing to raise this issue on appeal. Defendant also contended that he set forth a meritorious claim of circuit court error for failing to *sua sponte* give a clarifying instruction concerning the intake sheet. We determined that defendant had forfeited appellate review of these issues because he did not include them in his *pro se* petition, and affirmed the circuit court's summary dismissal.

¶ 6 In 2009, defendant attempted to file a successive *pro se* postconviction petition, alleging: (1) that the State withheld exculpatory evidence at trial and during earlier postconviction proceedings, specifically, a particular witness's statement to the police that defendant claimed would have supported his accidental death defense; and (2) that two detectives committed perjury by claiming to have interviewed this witness. The circuit court denied defendant leave to file and subsequently denied defendant's request for reconsideration of that ruling. On appeal, we granted counsel's motion to withdraw and affirmed. *People v. Cook*, No. 1-09-1517 (2010) (unpublished order under Supreme Court Rule 23).

¶ 7 In 2010, defendant filed a *pro se* pleading entitled: "*Pro Se* Motion to Vacate and Void the Judgment." In it, defendant alleged that Public Act 80-1099 (Pub. Act 80-1099 (eff. Feb. 1, 1978)), was unconstitutionally enacted and, thus, void. Defendant asserted that this voidness "took the prosecutor[']s powers away to prosecute the petitioner in this case." The circuit court characterized the pleading as having been brought under section 2-1401, dismissed it *sua sponte*, and denied defendant's motion to reconsider. We determined that the circuit court had correctly

characterized the pleading and affirmed its dismissal. *People v. Cook*, 2012 IL App (1st) 103723-U.

¶ 8 On January 20, 2015, defendant filed the petition here which raised numerous issues. As relevant to this appeal, defendant asserted: (1) "the mittimus states that Sam Cook was convicted of *** two counts of First Degree Murder, for which he received 42 years in prison;" (2) where there is only one decedent, there can be only one conviction for murder; (3) the circuit court erroneously entered judgment against him for two counts of first degree murder, even though Fannie Cook was the only decedent; and (4) the circuit court should vacate one of his convictions for first degree murder and issue a corrected mittimus. On March 13, 2015, the case appeared on the court's call and the circuit court indicated it would rule upon the petition on March 20, 2015.

¶ 9 On March 20, 2015, defendant's retained counsel appeared before the circuit court stating that he had been retained by defendant's family "to pursue whatever collateral remedies might be available to him." Retained counsel indicated he was aware that the petition was set for a decision on that day. Retained counsel stated:

> "I would respectfully seek to -- seek leave to file my appearance with respect to that, and I would ask, Judge, if you could, if you would be willing to hold off for just say a month or so, so I could sort of familiarize myself with it. It may well be I will ask leave to withdraw, and at that point, or if I think that it could be amended or things could be added, then I would ask for more time or whatever needs to be done in order to make it viable. I'm not sure exactly what's alleged in it at this point, I was just retained."

¶ 10 The circuit court passed the case. When the case was recalled shortly thereafter, the court dismissed the petition and made the following comments to retained counsel:

"All right. As to [defendant], before you filed your appearance, I will certainly allow you leave to file your appearance but maybe you want to hold off on that based on what I was prepared to do. [Defendant] had filed and [*sic*] seeking relief from judgment of conviction entered against him back in 2002. He had been found guilty of first degree murder, and he alleged numerous issues in his petition.

His petition is going to be dismissed, and I'm going to do that pursuant to a written order, which will be available to you today if you wish to look at it. So his case has had a very lengthy history before this court as to various postconviction type petitions that he has filed over the many years, all of which have -- I mean he's had numerous appeals, either judges before myself or rulings that I've made have gone against him he's appealed and he's been unsuccessful in those numerous attempts. So I was actually ready to enter this order a week ago and then I kicked it over one more week in order to -- just to review everything, so I've actually signed and dated the orders, I just didn't enter them, I was going to enter them today.

But I've reviewed them again, trying to determine whether or not in my mind it would be *** appropriate to have you file an appearance and perhaps try to undo it, but having reviewed the order, I am still confident in the dismissal order that I'm going to enter, and I'm also going to enter an order for court fees and costs that will be assessed against [defendant] because of the frivolous nature of his latest motion, so that's going to be entered against him as well. Notice will be sent to him as well as to the Illinois Department of Corrections.

But perhaps what you may wish to do if the family lose[s] or something, or perhaps if you wish to appeal this order, that would be an appropriate way for you to

proceed. But I don't know if you really want to file your appearance at this stage -- I'm just going to enter that order today."

¶ 11 Retained counsel responded that he knew the court had intended to enter an order on that day, that he had assumed it would be a dismissal order, and that he "frankly was a little uncertain as to what I ought to do." He then said that he would "prefer to go ahead, file an appearance, check and see if there's any reason for me to try and seek a reconsideration of your Honor's order, and if not, discuss with [defendant's] family whether they wish me to proceed by appealing the order or trying [a] new petition." The circuit court replied: "All right. That's fine. That would be clearly a choice that you can make." The court then indicated that retained counsel could file a motion to reconsider or a notice of appeal within 30 days. Retained counsel stated: "We will file something within 30 days." Thereafter, the circuit court stated that its written order would be entered that day.

¶ 12 The half-sheet entry for March 20, 2015, includes a notation that "[retained counsel] #56512 files app." Similarly, the court sheet for that date indicates "[retained counsel] #56512 files app."

¶ 13 In its written dismissal, the circuit court addressed each issue defendant raised in the petition. With respect to defendant's claim that he was improperly convicted of two counts of murder, the circuit court found that the record clearly indicated he had been convicted of only one count of first degree murder. The circuit court entered a separate written order assessing defendant $105 in fees and costs for a frivolous filing. Defendant has appealed.

¶ 14 On appeal, defendant first contends that the petition should not have been dismissed because it set forth a valid claim that the mittimus incorrectly lists two murder convictions. He asserts that the mittimus is ambiguous and "conveys mixed messages as to which offenses a

sentence was imposed on" because it lists "convictions" for two murder counts, but also indicates that one of the counts had been merged. Noting that a mittimus can be corrected at any time, defendant argues that the "surplus conviction" should be vacated. He further maintains that, because this issue has merit, the fees and costs imposed by the circuit court for filing a frivolous successive section 2-1401 pleading should also be vacated.

¶ 15 We disagree with defendant that the mittimus is ambiguous, conveys mixed messages, and reflects a "surplus conviction." A conviction is "a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury." 720 ILCS 5/2-5 (West 2014). A finding of guilt is not a conviction. Rather, it is the trial court's entry of judgment and imposition of a sentence that constitutes a conviction. *People v. Woods*, 193 Ill. 2d 483, 488 (2000); see also *People v. Cruz*, 196 Ill. App. 3d 1047, 1052 (1990) (citing *People v. Lashmett*, 126 Ill. App. 3d 340, 345 (1984) ("A jury verdict does not equal a judgment of conviction.")).

¶ 16 Here, the mittimus accurately reflects that: (1) defendant was found guilty on both charged counts of first degree murder; (2) a sentence of 42 years' imprisonment was imposed on count 1 (intentional murder); (3) no sentence was imposed on count 2 (strong probability murder); (4) and the circuit court merged both counts. The only "conviction" reflected on the mittimus is defendant's conviction for first degree murder on count 1, for which he was sentenced to 42 years' imprisonment. Accordingly, defendant's contention that the petition should not have been dismissed because it set forth a meritorious claim, fails, as does his related argument that we should vacate his "surplus conviction."

¶ 17 We note that, although the court at sentencing merged count 2 into count 1, and the half-sheet reflects that as well, the mittimus includes a statement that count 1 merges into count 2. As we may correct the mittimus at any time (*People v. Pyror*, 372 Ill. App. 3d 422, 438 (2007), we order the correction of the mittimus to reflect that count 2 merged with count 1. This correction does not change the fact that defendant was sentenced on only one count—count 1—and our conclusion that the court did not err in dismissing the petition.

¶ 18 Given our determination that defendant's petition did not set forth a meritorious claim, we reject his argument that we must vacate the fees and costs imposed by the circuit court for the filing of a frivolous successive section 2-1401 petition. Section 22-105 of the Code of Civil Procedure allows a court to assess filing fees and court costs if it finds that a filed legal document, including a "second or subsequent" section 2-1401 petition, is frivolous. 735 ILCS 5/22-105(a) (West 2008). The purpose of allowing a circuit court to assess fees and costs under section 22-105 is to "curb the large number of frivolous collateral pleadings filed by prisoners which adversely affect the efficient administration of justice, and to compensate the courts for the time and expense incurred in processing and disposing of them." *People v. Conick*, 232 Ill. 2d 132, 141 (2008) (and cases cited therein). Under section 22-105, a frivolous filing must meet at least one of the following criteria:

> "(1) it lacks an arguable basis either in law or in fact; (2) it is being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (3) the claims, defenses, and other legal contentions therein are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (4) the allegations and other factual contentions do not have evidentiary support or, if specifically so identified, are

not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; or (5) the denials of factual contentions are not warranted on the evidence, or if specifically so identified, are not reasonably based on a lack of information or belief." 735 ILCS 5/22-105(b)(1)-(5) (West 2008).

¶ 19 Here, defendant's petition raised a number of claims, each of which was carefully and thoroughly addressed and rejected by the circuit court. Defendant's sole claim on appeal—that the mittimus incorrectly lists two murder convictions—lacks an arguable basis in law or in fact and evidentiary support. Under these circumstances, we agree with the circuit court's assessment of the petition as frivolous and find that it did not err in ordering payment of costs and fees under section 22-105.

¶ 20 We are mindful of defendant's argument that, when counts merge, the merged counts should not be listed on the mittimus. In support of this argument, defendant relies on this court's decisions in *People v. Lucious*, 2016 IL App (1st) 141127, and *People v. Walker*, 2011 IL App (1st) 072889.

¶ 21 In *Lucious*, the circuit court found the defendant guilty of aggravated robbery and unlawful restraint, but only imposed sentence on the greater offense of aggravated robbery. *Lucious*, 2016 IL App (1st) 141127, ¶ 59. However, the defendant's mittimus showed "a conviction for 'aggravated unlawful restraint' and a corresponding sentence of three years in prison." *Id*. ¶ 60. On appeal, we determined that "there should have been nothing at all on the mittimus with regard to the unlawful-restraint conviction," as it had merged with the conviction for aggravated robbery under the one-act, one-crime rule. *Id*. ¶¶ 60-62. We did not address correcting the mittimus, as we vacated the defendant's conviction for aggravated robbery on other grounds and remanded for a new trial. *Id*. ¶ 70.

¶ 22 In *Walker*, the defendant was convicted of the first degree murder of Juliette Robinson and was sentenced to 65 years' imprisonment. *Walker*, 2011 IL App (1st) 072889, ¶¶ 1, 4. On appeal, the defendant contended, among other things, that the mittimus should be corrected to accurately reflect a single conviction for first degree murder instead of two. *Id*. ¶ 39. Noting that "[t]he mittimus reflects two convictions for first degree murder," we determined that only the conviction for the most serious charge should be reflected on the mittimus, and that the conviction on the less serious charge must be vacated. *Id*. Accordingly, we vacated the conviction for knowing murder and directed the clerk of the circuit court to correct the mittimus to reflect a single conviction for intentional murder. *Id*. ¶ 41.

¶ 23 The instant case is readily distinguishable from *Lucious* and *Walker*. In *Lucious*, the mittimus listed a "conviction" and sentence for a count that had been merged, and in *Walker*, the mittimus listed "two convictions for first degree murder," despite the fact that there had been only one act of murder. Here, in contrast, the mittimus only reflects one "conviction." As such, no correction to the mittimus is required.

¶ 24 Defendant's second contention on appeal is that the circuit court violated his due process right to counsel of his choice. While acknowledging that the sixth amendment does not apply in collateral proceedings, defendant maintains that section 2-1401 proceedings are civil proceedings to which the right to retained counsel applies. As such, he argues that the circuit court abused its discretion and violated his right to counsel when it denied retained counsel a continuance to review the petition. Defendant asserts that, while retained counsel indicated that he wanted to file an appearance, "[n]o appearance is in the record and no document was filed by [him]." Defendant argues that retained counsel tried to file an appearance and secure a continuance so as to review the case, but the circuit court's actions left defendant without the representation of

counsel of choice during the proceedings. Finally, he maintains that no showing of prejudice is required on this issue, given the importance of the right to counsel of choice, and he requests as relief a new hearing on the petition, as well as an opportunity for retained counsel to review and amend the petition.

¶ 25 We reject defendant's position. First, we disagree with defendant's assertion that retained counsel merely "attempted" to file an appearance in the case. Despite the absence of a freestanding "appearance" document in the common law record, the transcript of proceedings from March 20, 2015—quoted extensively above—reflects that the circuit court allowed retained counsel to file an appearance. The circuit court stated: "I will certainly allow you leave to file your appearance." Retained counsel responded that he was going "to go ahead [and] file an appearance." The circuit court replied: "All right. That's fine." Moreover, both the half sheet and the court sheet reflect that retained counsel filed an appearance on March 20, 2015.

¶ 26 Second, it is firmly established that the decision whether to grant or deny a continuance is a matter within the discretion of the circuit court, and that a reviewing court will not interfere with that decision absent a clear abuse of discretion. *People v. Walker*, 232 Ill. 2d 113, 125 (2009) (citing *People v. Chapman*, 194 Ill. 2d 186, 241 (2000)). However, reversal is justified where it appears that the refusal of additional time in some manner " 'embarrassed the accused in the preparation of his defense and thereby prejudiced his rights.' " *Id.* (quoting *People v. Lewis*, 165 Ill. 2d 305, 327 (1995)).

¶ 27 Here, retained counsel requested a continuance so as to review defendant's *pro se* petition and then determine whether it would be appropriate to amend it "to make it viable," or whether he should simply withdraw as counsel. In this court, defendant has not identified how retained counsel could have amended the petition to render it meritorious. As such, we cannot find that

defendant was prejudiced by the circuit court's denial, or in turn, that the circuit court abused its discretion in not granting retained counsel's request.

¶ 28 As noted above, defendant argues that he need not show prejudice due to the importance of the right to counsel of choice. However, the cases to which defendant cites in support of this proposition reveal that a showing of prejudice is not required when the issue on appeal involves a defendant's sixth amendment right to counsel of choice at trial. See *People v. Graham*, 2012 IL App (1st) 102351, ¶ 32; *People v. Childress*, 276 Ill. App. 3d 402, 410-13 (1995).

¶ 29 Here, retained counsel's continuance request was not made at trial, but during proceedings on a section 2-1401 petition. Section 2-1401 does not confer a right to counsel (735 ILCS 5/2-1401 (West 2016); *People v. Pinkonsly*, 207 Ill. 2d 555, 568 (2003)) and, as defendant acknowledges, the sixth amendment does not apply to collateral proceedings (*id.* at 567). Accordingly, defendant is not relieved of the burden of showing prejudice.

¶ 30 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 31 Affirmed.