

FIRST DIVISION
Order filed February 5, 2018
Modified upon denial of rehearing on December 24, 2018

No. 1-16-0604

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. 97 CR 25837
)	
OMAR JOHNSON,)	Honorable
)	Gregory Ginex,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Griffin concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court did not err in dismissing defendant's successive *pro se* 2-1401 petition.
- ¶ 2 Defendant, Omar Johnson, appeals from an order of the circuit court of Cook County

dismissing his successive *pro se* section 2-1401 (735 ILCS 5/2-1401 (West 2012)), petition to vacate judgment. Defendant argues that the trial court violated his procedural due process rights when it *ex parte* instructed the State to file a response to his 2-1401 petition, informed the State of case law adverse to defendant's claim, and allowed the State to file a late responsive pleading *ex parte*. He also argues that the circuit court erred in dismissing his 2-1401 petition because the "trial court lacked the inherent authority to enter a conviction and sentences based on intentional murder" and maintains that his sentences should be vacated because they "violate the Constitution and are prohibited after [*People v. Smith*, 233 Ill. 2d 1 (2009) and *People v. Bailey*, 2013 IL 113690]." Finally, defendant claims that the omission of certain jury instructions deprived him of a fair trial. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 Defendant is currently serving the sentence of life imprisonment imposed on his 1999 jury conviction of first degree murder, the 60-year terms imposed on his convictions of aggravated kidnapping, armed robbery, aggravated vehicular hijacking, and a 10-year sentence for his concealment of a homicidal death. This court affirmed those judgments on direct appeal (*People v. Johnson*, No. 1-99-1989 (2004) (unpublished order under Supreme Court Rule 23)), as well as the denial of his subsequent *pro se* post-conviction and section 2-1401 petitions (*People v. Johnson*, Nos. 1-99-1989 (2006), 1-05-3285 (2006) (unpublished orders under Supreme Court Rule 23)). We also ultimately affirmed the State's motion to dismiss defendant's second section 2-1401 petition (*People v. Johnson*, 2012 IL App (1st) 111378); however, in accordance with the directive of the supreme court in *People v. Johnson*, 2013 IL 114639, we vacated the assessment of a \$50 State's Attorney fee. In *People v. Johnson*, 2015 IL App (1st)

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131079-U, we affirmed the circuit court's denial of leave to file defendant's successive postconviction petition. Most recently, we dismissed defendant's appeal from the dismissal of his successive 2-1401 petition for lack of jurisdiction. *People v. Johnson*, 2016 IL App (1st) 130697-U.

¶ 4 On December 11, 2014, defendant filed the current *pro se* 2-1401 petition for relief from judgment. Defendant attached his own notarized affidavit to the petition. In the petition, defendant claimed that after closing argument, but before the case went to the jury, defense counsel approached the bench and made an off-the-record request to the trial judge for separate jury verdict forms for the charge of murder. Defendant claimed that the trial judge denied his request because the jury instruction conference had already been held and therefore the jury would only be given the general verdict form. In his affidavit, defendant claims that he requested that defense counsel ask the trial judge for two separate verdict forms "because intentional murder carries more time than felony murder." Defendant also averred that if called to testify, defense counsel would testify to those same facts.

¶ 5 Defendant also claimed that the jury was provided a general verdict form as to first degree murder and "an instruction on first-degree murder with the word 'or' between the difference theories of murder." In the same vein, defendant also claimed that the jury returned a general verdict of guilty of first degree murder without specifying under which theory they found defendant guilty. The trial judge then entered a conviction under intentional murder and sentenced him to life for first degree murder and 60 years' imprisonment for each of the underlying felonies.

¶ 6 In addition, defendant argued that *People v. Bailey*, 2013 IL 113690, wherein our supreme court held that where a defendant faces more severe sentencing consequences for a finding of knowing or intentional murder, it is error for a trial court to fail to provide the jury separate verdict forms and the remedy is for a court of review to interpret the general verdict of guilty as a finding of felony murder and an acquittal of intentional and knowing murder.

Defendant argued that under *Bailey*, he was acquitted of intentional and knowing murder and therefore the trial court lacked the jurisdiction to enter a conviction and impose a sentence for intentional murder. According to defendant, the conviction should have been entered on felony murder. Defendant argued that the trial court's imposition of life imprisonment for intentional murder is void and must be vacated, a conviction for felony murder should be entered and his convictions for armed robbery, aggravated vehicular hijacking, aggravated kidnapping, and concealment of a homicidal death must also be vacated.

¶ 7 Defendant also argued that alternatively, the *Bailey* rule should be extended to him even if he cannot establish that defense counsel requested separate murder verdict forms because the trial court did not provide the jury with separate murder verdict forms, the jury instructions on murder were unclear, the evidence supporting the three theories is closely balanced and the jury returned a general verdict of guilty "making it impossible to ascertain the meaning of their verdict."

¶ 8 A few months after defendant filed his petition, in January and February 2015, defendant filed a petition for substitution of judge for cause. In March 2015, defendant filed a motion for default judgment arguing that the State had not answered or responded to his 2-1401 petition within 30 days.

¶ 9 The court informed the State on March 13, 2015, that defendant had filed a 2-1401 petition and gave the State until April 10, 2015, to file a response. On April 3, 2015, defendant withdrew his petition for substitution of judge. On May 22, 2015, the court and the State discussed defendant's pending appeals, and the State explained that it was trying to obtain the trial record so that it could respond to defendant's 2-1401 petition. The court gave the State until July 17, 2015, to file a response to the petition.

¶ 10 On June 16, 2015, defendant filed a motion for summary judgment and a "motion to vacate the court's order granting the State's motion for an extension of time to respond to petitioner's *pro se* petition for relief from judgment." The State filed a written response on July 17, 2015, to defendant's motion for summary judgment. The State filed a motion to dismiss defendant's 2-1401 petition on August 7, 2015. Defendant filed replies to the State's written response to his motion for summary judgment and to the State's motion to dismiss the 2-1401 petition.

¶ 11 On August 28, 2015, the trial court continued the matter to November 20, 2015, to have defendant present in court. Due to a chickenpox outbreak and a paperwork error, the case was continued twice. On February 19, 2016, defendant was present before the trial court, at which time defendant requested a substitution of judge. The case was transferred to another judge who heard argument on defendant's motion. After hearing argument, that judge denied defendant's motion to substitution of judge and returned the case to the original judge, and finding that there was no *ex parte* communication between the trial judge and the State regarding the State's request for an extension of time to respond to defendant's 2-1401 petition. Once the case was back before the trial court, the trial court denied defendant's motion for default judgment, denied

defendant's motion to vacate the ruling on the State's motion for an extension of time to file a response to defendant's 2-1401 petition. After hearing argument on the State's motion to dismiss defendant's 2-1401 petition, the trial court dismissed that petition as well. Finally, the court denied defendant's oral motion to reconsider and his motion for summary judgment.

¶ 12 Defendant now appeals from the denial of his motion to vacate the order granting the State an extension of time to file a response to his 2-1401 petition, as well as from the dismissal of the petition.

¶ 13 ANALYSIS

¶ 14 Defendant argues that the trial court violated his procedural due process rights by depriving him of fair and impartial proceedings in court when the court had *ex parte* communications with an assistant state's attorney regarding his 2-1401 petition, informed the assistant state's attorney about the allegations in defendant's 2-1401 petition and the relevant case law, and allowed the State an extension of time to respond to defendant's petition rather than ruling on the 2-1401 petition or defendant's pending motion for default judgment.

¶ 15 The purpose of a section 2-1401 petition is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry. *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). Section 2-1401 allows for final judgments to be vacated more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2012). To obtain relief under this section, defendant must file a petition no later than two years after the entry of the order of judgment (735 ILCS 5/2-1401 (West 2012)), and set forth a meritorious defense or claim, due diligence in presenting that defense or claim to the circuit court, and due diligence in filing the petition (*People v. Glowaki*, 404 Ill. App. 3d 169, 171 (2010)). Where a section 2-1401 petition is

dismissed on the pleadings, we review the dismissal of such a petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 12, 17-18 (2007).

¶ 16 The trial court did briefly discuss the contents of defendant's 2-1401 petition on the record, without defendant present, but it did so only after the case appeared on his call, and only gave a brief summary of the allegations. The prosecutor did not respond other than to say that she did "not have anything" on the case. The court then explained that because there appeared to be some question about the application of new case law to defendant's claim, it was instructing the State to respond to defendant's petition and set a continuance date. The court was not required to notify defendant before making such a ruling. There is no requirement that notice and the opportunity to be heard are required before a court may act on its own. *Id.* at 12.

¶ 17 Furthermore, we cannot find that the court's discussion of defendant's allegations and the conflicting case law applicable to defendant's claims on the record, as a stated basis for instructing the State to respond to defendant's petition, can be construed as giving the State advice on how to proceed. Defendant's procedural due process rights were not violated.

¶ 18 Thereafter, several continuances were granted for the State to obtain the record of defendant's trial to be able to properly respond to defendant's claims. We are not aware of any case law, nor does defendant cite to any, to suggest that a court may not, at its discretion, give a party an extension of time to answer or otherwise plead in response to a 2-1401 petition.

¶ 19 Even if the court improperly ordered the State to respond to the petition, and later improperly allowed the State an extension of time to file the response, and should have taken the State's failure to respond within 30 days as an admission of all well-pleaded facts, the court would have had to resolve the petition on its merits and our result here would be the same. See

Vincent, 226 Ill. 2d at 10 (“if the respondent does not answer the petition, this constitutes an admission of all well-pleaded facts and the court may decide the case on the documents and record before it”).

¶ 20 Defendant next argues that *People v. Smith*, 233 Ill. 2d 1 (2009) and *People v. Bailey*, 2013 IL 113690, announced new substantive rules which apply retroactively to his case, thereby acquitting him of intentional and knowing murder. In *Smith*, 233 Ill. 2d 1 (2009), our supreme court held the denial of a defendant's request for separate verdict forms was an abuse of discretion “where * * * specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, favorable to the defendant.” In *Bailey*, 2013 IL 113690, ¶ 18, our supreme court held that this it was error for the trial court to refuse a defendant’s request for separate verdict forms for the murder counts, where the various forms of murder carried different sentencing consequences. The court further found the rule in *Smith* is applicable only where: (1) the defendant has requested separate verdict forms, (2) the lack of separate verdict forms could have adverse sentencing consequences, and (3) the trial court denies the request. *Id.* ¶ 39.

¶ 21 In accordance with *Bailey*, *Smith* is inapplicable here where there is no evidence, other than defendant’s most recent affidavit, that he requested separate verdict forms. The record on appeal filed by defendant does not contain the trial record including the murder charges against defendant, the jury instruction conference, or the court’s instructions to the jury. As the appellant asserting error, defendant bears the burden of providing a sufficient record for us to assess the trial court proceedings. This principle is expressly stated in both the Supreme Court Rules and our case law. The Illinois Supreme Court “has long held that in order to support a

claim of error on appeal the appellant has the burden to present a sufficiently complete record.”

Webster v. Hartman, 195 Ill. 2d 426, 431 (2001) (quoting *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). Illinois Supreme Court Rule 321 provides that, absent a stipulation or court order to the contrary, “[t]he record on appeal shall consist of the judgment appealed from, the notice of appeal and the entire original common law record.” Ill. S.Ct. R. 321 (eff.Feb.1, 1994).

The rule explains that “[t]he common law record includes every document filed and judgment and order entered in the cause and any documentary exhibits offered and filed by any party.” *Id.*

There is simply no evidence that defendant ever requested separate verdict forms in this case.

Notwithstanding defendant’s failure to provide a complete record, neither *Smith* nor *Bailey* are applicable here where our supreme court has already determined in *People v. Reed*, 2014 IL App (1st) 122610, ¶ 92, that *Bailey* does not apply retroactively to cases on collateral review.

Accordingly, we find that the circuit court did not err in dismissing defendant’s 2-1401 petition.

¶ 22 We also reject defendant’s argument that should we find that he is not entitled to relief under *Smith* and *Bailey*, we should nevertheless find that he is entitled to relief because the trial court should be required to provide the jury with separate murder verdict forms without defendant requesting them. There is no requirement for courts to *sua sponte* tender specific verdict forms to the jury, especially where defendant did not object to the general verdict form and did not request a special verdict form. *People v. Davis*, 233 Ill. 2d 244, 273 (2009).

¶ 23 Finally, defendant argues for the first time on appeal from the dismissal of a successive 2-1401 petition, that the omission of certain jury instructions resulted in a substantial defect in the jury instructions and deprived him of his constitutional right to a fair trial. Defendant did not raise this claim in his 2-1401 petition. He cannot now raise a claim on appeal that was not

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included in his 2-1401 petition. *People v. Thompson*, 2015 IL 118151, ¶ 40. Moreover, defendant offers no explanation for failing to raise this issue in the multitude of previous cases he brought before this court thereby failing to meet the due diligence requirement of a 2-1401 petition. *Glowaki*, 404 Ill. App. 3d at 171. Consequently, defendant has forfeited this issue.

¶ 24 Based on the foregoing, the judgment of the circuit court is affirmed.

¶ 25 Affirmed.