2018 IL App (4th) 160149-U

NO. 4-16-0149

FILED
August 13, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
TORREY L. SIMPSON,	)	No. 05CF1424
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw and affirm the trial court's dismissal of defendant's section 2-1401 petition.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on the ground no meritorious issue can be raised on appeal. We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In October 2005, the State charged defendant, Torrey L. Simpson, by information with armed robbery (720 ILCS 5/18-2(a)(2) (West 2004)), attempt (first-degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2004)), and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2004)) of Dean Richardson, who was defendant's friend, on the night of October 11, 2005.

¶ 5 On October 11, 2005, defendant and Richardson drove from Decatur to Springfield, went to Deja Vu strip club and several bars, and went to Kroger in Decatur. On the way back to Decatur, defendant invited another man into his car to purchase marijuana from Richardson. The other man used a gun to rob and shoot Richardson. Prior to trial and at trial, defendant denied colluding with the man to rob and shoot Richardson.

¶ 6 In April 2007, defendant's jury trial took place. Richardson testified defendant picked him up at 6:45 pm on October 11, 2005, to go to White Oaks Mall in Springfield to shop for Christmas. Richardson had $790 in cash and loaned defendant $20. Upon arriving in Springfield, Richardson and defendant went to Deja Vu. Afterward Richardson and defendant drove back to Decatur. While driving back, a man called defendant to ask where the man could buy marijuana. Richardson stated he would sell the man marijuana.

¶ 7 Defendant and Richardson drove to Kroger in Decatur, bought groceries, and waited in defendant's car for the man. The man entered from the left passenger door and negotiated purchasing marijuana from Richardson. Richardson stated he would need to obtain the marijuana from his home. The man pulled out a black .22 caliber revolver and told Richardson to give him all of his money, shot Richardson once with the bullet going through Richardson's arm and back, and ran away. Richardson used defendant's phone to call 911. Defendant began to drive Richardson to the hospital but drove to Walgreens. Defendant told Richardson to get out of the car while defendant went inside Walgreens to use the phone.

¶ 8 Richardson was shown a photo array after the shooting. Richardson identified John Lavell Ward as the shooter with 90% confidence.

¶ 9 The officers who spoke to defendant on October 11, 2005, testified at trial. When the police arrived at Walgreens, defendant claimed he and Richardson visited Deja Vu and two

other bars and Richardson won money in a pool game. Defendant stated he and Richardson then went to Kroger. According to defendant, as defendant and Richardson were leaving Kroger, a black man approached and Richardson stated, "let the brother in" defendant's car. Upon entering defendant's car, the man pulled out a revolver, pointed the revolver at defendant and Richardson, and demanded money. The man took $80 from defendant's wallet and Richardson gave the man his wallet. Richardson then grabbed for the man's gun. A loud bang followed. Defendant ran from the car. Defendant saw the man run from defendant's car in a different direction. Defendant returned to his car and saw Richardson soaked in blood. Defendant drove toward the hospital but stopped at Walgreens to ask for help.

¶ 10 In defendant's interview at the police station following the robbery and shooting, defendant claimed he had $600 in cash from a recent car insurance settlement and suggested he and Richardson visit Deja Vu. Defendant told officers he intended to take Richardson to the hospital but became flustered and went to Walgreens to ask for help. Defendant claimed he did not know the shooter. During the interview, defendant produced Richardson's wallet, which had no money inside. The officers asked defendant how he obtained Richardson's wallet.

¶ 11 The officers asked defendant about the calls from his cell phone to "Vell" near the time of the robbery and shooting. When officers asked defendant what happened to defendant's money, defendant produced $701. Defendant claimed he and Richardson were partners, who made the money robbing slot machines at bars. Defendant continued to claim he did not know the man who robbed and shot Richardson and Richardson set up the meeting with the man.

¶ 12 On October 13, 2005, defendant asked to speak with the officers again. Defendant confessed the shooter was John Lavell Ward. Ward called defendant while defendant and Richardson were in Springfield and asked to purchase marijuana. Richardson overheard the

conversation and offered to sell Ward marijuana. Defendant and Richardson met Ward in the Kroger parking lot. Ward entered defendant's car. Defendant, Ward, and Richardson proceeded to Richardson's home for the marijuana. When defendant pulled over down the street from defendant's home, Ward produced a gun. Defendant and Richardson gave Ward money from their wallets. Ward took defendant's wallet. Richardson attempted to grab Ward's gun. Then, Ward shot Richardson.

¶ 13 Ward's friend, Marlon Williams, testified he was with Ward earlier in the day on October 11, 2005. Williams testified Ward received several calls on October 11, 2005, and Ward told Williams he would "go get up with this guy and that he was going to hit a lick." Defense counsel raised a hearsay objection. The trial court admitted Williams's testimony under the coconspirator hearsay exception and denied defendant's motion for a mistrial.

¶ 14 The jury found defendant guilty of armed robbery and aggravated battery with a firearm but acquitted defendant of attempt (first-degree murder).

¶ 15 At defendant's sentencing hearing on June 7, 2007, the State requested the trial court to find the armed robbery resulted in great bodily harm, so the sentence would be served at 85% under sections 3-6-3(a)(2)(iii) and 5-4-1(c-1) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/3-6-3(a)(2)(iii), 5-4-1(c-1) (West 2004)). The State requested the court consider mandatory consecutive sentences under section 5/5-8-4(a)(i) of the Unified Code 730 ILCS (a)(i) (West 2004) contending defendant inflicted severe bodily injury to Richardson. The State suggested a 40-year sentence for armed robbery, which included an additional 15-year sentence for the firearm, and a 25-year sentence for aggravated battery with a firearm. Defense counsel contended the 65-year sentence would be excessive, the two offenses were the same act, and the 15-year add-on for use of a gun in the armed robbery would be improper double

enhancement.

¶ 16 The trial court made a finding of great bodily harm and held defendant's sentences must run consecutively. The court sentenced defendant to 15 years for armed robbery with a 15-year firearm add-on and a consecutive 15 years for aggravated battery with a firearm.

¶ 17 Defendant filed a motion to reconsider his sentence, alleging the 15-year firearm add-on to his armed robbery conviction was statutorily impermissible. The trial court agreed with defendant, granted defendant's motion to reconsider his sentence, and conducted a new sentencing hearing.

¶ 18 At defendant's resentencing hearing, the court sentenced defendant to 15 years for armed robbery and a consecutive 15 years for aggravated battery with a firearm.

¶ 19 On direct appeal, defendant argued (1) his trial counsel was ineffective for failing to suppress defendant's statements to police officers and (2) the trial court erred in admitting Williams's testimony as to Ward's statements under the coconspirator hearsay exception. This court disagreed with defendant's first argument and held defendant's second argument was forfeited due to omission from the posttrial motion. This court affirmed defendant's conviction. *People v. Simpson*, 2011 IL App (4th) 100579-U, ¶ 84.

¶ 20 In his postconviction petition, defendant argued his trial counsel was ineffective for failing to raise the hearsay issue in his posttrial motion. The trial court dismissed the appeal at the first stage, but this court reversed and held there was possible merit to the hearsay claim and possible prejudice from the appellate court not hearing the hearsay claim on direct appeal. *Id.*, ¶¶ 96-112. Following a third stage postconviction petition hearing, the trial court dismissed defendant's postconviction petition and held the evidence, aside from Williams' statement, was sufficient to convict defendant and any hearsay statement would not undermine the validity of

the guilty verdict. This court affirmed dismissal. *Id.*, ¶ 84.

¶ 21 In December 2015, defendant filed the underlying petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). Defendant raised two issues. The first issue defendant argued was the dual convictions were improperly premised on the same physical act, and as a result, defendant's aggravated battery with a firearm conviction must be vacated. The second issue defendant argued was his consecutive sentences for his two convictions were void because his acts were committed in a single course of conduct.

¶ 22 In February 2016, the trial court dismissed defendant's section 2-1401 petition. The court held the petition "attempts to relitigate sentencing issues which were raised at trial and could have been raised on appeal or by post-conviction petition."

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 OSAD asserts it thoroughly reviewed the record and considered raising three issues but concluded the issues would be without arguable merit.

¶ 26 A. Whether the Trial Court Complied With the Procedural Requirements of Section 2-1401 In Dismissing Defendant's Petition

¶ 27 Section 2-1401 provides, "Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section." 735 ILCS 5/2-1401(a) (West 2014). The Illinois Supreme Court holds, "Section 2–1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7, 871 N.E.2d 17, 22 (2007).

¶ 28 This court has held a section 2-1401 petition is only ripe for adjudication 30 days after entry. *People v. Garry*, 2017 IL App (4th) 150373, ¶ 24, 83 N.E.3d 627; *People v. Lee*, 2012 IL App (4th) 110403, ¶ 15, 979 N.E.2d 992. The Illinois Supreme Court holds a section

2-1401 petition is only ripe for adjudication after the opposing party has had 30 days to answer. *People v. Carter*, 2015 IL 117709, ¶ 16, 43 N.E.3d 972; *People v. Laugharn*, 233 Ill. 2d 318, 322, 909 N.E.2d 802, 804-05 (2009); *People v. Haynes*, 192 Ill. 2d 437, 460, 737 N.E.2d 169, 182 (2000); *Vincent*, 226 Ill. 2d at 7. A trial judge may not dismiss a section 2-1401 petition before 30 days pass. *Laugharn*, 233 Ill. 2d at 323; *Vincent*, 226 Ill. 2d at 5.

¶ 29 Defendant dated the proof of service for his section 2-1401 petition on December 8, 2015, which included an affidavit certifying the date of service. The trial judge ruled on defendant's section 2-1401 petition on February 5, 2016, which was 59 days after defendant's section 2-1401 petition was entered. Defendant's section 2-1401 petition was ripe for adjudication. We hold the trial court complied with the procedural requirements of section 2-1401 in dismissing defendant's petition.

¶ 30 B. Whether Defendant's Sentencing Claims Are Cognizable Under Section 2-1401

¶ 31 Defendant argues his sentences are void. OSAD responds defendant's claims his sentences are void are no longer cognizable under section 2-1401. We agree with OSAD.

¶ 32 The Illinois Supreme Court holds a "voidness challenge to a final judgment under section 2-1401 recognized by this court is a challenge to a sentence that does not conform to the applicable sentencing statute *** is no longer valid." *People v. Thompson*, 2015 IL 118151, ¶ 33, 43 N.E.3d 984. The Illinois Supreme Court held the abolition of the void sentencing rule applies to all pending petitions and cases. *People v. Price*, 2016 IL 118613, ¶ 35, 76 N.E.3d 1240. Thus, the Illinois Supreme Court's abolition of the void sentencing rule "applies to defendant's section 2-1401 petition." *Id.* "[D]efendant cannot rely on the void sentence rule." *Id.* We hold defendant's claims are not cognizable under section 2-1401.

¶ 33 C. Whether Defendant's Sentencing Claims Are Meritorious

¶ 34 Defendant argues his dual convictions were improperly premised on the same physical act, and as a result, defendant's aggravated battery with a firearm conviction must be vacated. OSAD contends defendant's sentencing claims do not have merit because defendant's armed robbery charge and aggravated battery with a firearm charge were not based on the same physical act. OSAD also argues the sentences for defendant's armed robbery conviction and aggravated battery with a firearm conviction were permissible. We agree with OSAD.

¶ 35 Defendant's charge for armed robbery was premised upon taking property from Richardson by threat of the imminent use of force. Defendant's charge for aggravated battery with a firearm was premised upon the use of firearm to shoot Richardson once with the bullet going through Richardson's arm and back. The armed robbery charge was premised on taking property from Richardson and aggravated battery with a firearm charge was premised on shooting a firearm to injure Richardson, which makes the charges distinct, not based on the same physical act, and not void.

¶ 36 Defendant argues the armed robbery and aggravated battery with a firearm were committed in a single course of conduct. Defendant's argument has no merit. For defendant's armed robbery conviction, Ward entered defendant's car, pointed his gun at Richardson and defendant, and took Richardson's and defendant's property by the threat of force. For defendant's aggravated battery with a firearm conviction, after Richardson attempted to take Ward's gun, Ward shot Richardson once with the bullet going through Richardson's arm and back. We hold the consecutive sentences for defendant's robbery conviction and aggravated battery with a firearm conviction were permissible.

¶ 37 III. CONCLUSION

¶ 38 We grant OSAD's motion to withdraw and affirm the trial court's dismissal of

defendant's section 2-1401 petition.

¶ 39 Affirmed.