2018 IL App (4th) 160413-U

NO. 4-16-0413

FILED
November 20, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
JACK L. WARD,	)	No. 13CF408
Defendant-Appellant.	)	
	)	Honorable
	)	Teresa K. Righter,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court granted appointed counsel's motion to withdraw and affirmed the trial court's judgment because no meritorious issue could be raised on appeal.

¶ 2 This case comes to us on a motion from the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel asserting no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2013, the State charged defendant, Jack L. Ward, by information with participation in methamphetamine manufacturing (15 grams or more but less than 100 grams) (count I) (720 ILCS 646/15(a)(1) (West 2012)), unlawful possession of methamphetamine precursor (less than 15 grams) (count II) (720 ILCS 646/20(a)(1) (West 2012)), and methamphetamine possession (less than 5 grams) (count III) (720 ILCS 646/60(a) (West 2012)). In March 2014, defendant requested but was denied admission into drug court. In May 2014, the

State charged defendant with a new count of participation in methamphetamine manufacturing (less than 15 grams) (count IV) (720 ILCS 646/15(a)(1) (West 2014)). On the same date, defendant entered an open guilty plea to count IV in exchange for the State's dismissal of counts I, II, and III.

¶ 5 During sentencing, the State presented evidence in aggravation and recommended that the trial court sentence defendant to 14 years in prison. Defendant presented evidence in mitigation and argued for a sentence to drug-court probation.

¶ 6 The trial court sentenced defendant to six years in prison with 196 days of credit for time served. The court also sentenced defendant to 36 months' drug-court probation, to be served consecutively to his prison sentence. The trial judge specifically admonished defendant, "[I]f I didn't think you could comply with probation and beat this addiction, I wouldn't have sentenced you to only six years in the Department of Corrections, but I think you can." After sentencing, defendant failed to file any posttrial motions or a notice of appeal.

¶ 7 On March 21, 2016, defendant timely filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)). In his petition, defendant argued the trial court unlawfully sentenced him to both prison and drug-court probation for a single offense, making his sentence void. Defendant asked the court to vacate his 36 months of drug-court probation.

¶ 8 On April 20, 2016, the State filed a motion to dismiss defendant's petition. The State argued that defendant's sentence was authorized by statute (730 ILCS 5/5-4.5-15 (West 2014); *Id.* § 5-6-1(a)(3)) and therefore not void. The State also argued defendant forfeited his claim because he did not file a motion to reconsider his sentence or to withdraw his plea of guilty.

¶ 9 On April 28, 2016, the trial court denied defendant's petition without a hearing. The court found defendant's sentence to be authorized by statute, and thus not void.

¶ 10 Defendant timely appealed, and the trial court appointed OSAD to represent him. In April 2018, OSAD filed a motion to withdraw as counsel, asserting an appeal would lack arguable merit. The record shows service on defendant. On its own motion, this court granted defendant until May 10, 2018, to file a response. He filed none. After reviewing the record, we grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment.

¶ 11 II. ANALYSIS

¶ 12 OSAD asserts it can present no meritorious issues on appeal because the trial court properly dismissed defendant's petition for relief from judgment. We agree.

¶ 13 A. Standard of Review

¶ 14 "A section 2-1401 petition for relief from a final judgment is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition." *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000). A defendant is entitled to relief if he demonstrates (1) a meritorious claim or defense, (2) due diligence in presenting the claim in the original action, and (3) due diligence in filing the section 2-1401 petition. *People v. Lee*, 2012 IL App (4th) 110403, ¶ 15, 979 N.E.2d 992. This court reviews the dismissal of a petition for relief from judgment under section 2-1401 *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 15 B. Forfeiture

¶ 16 OSAD first asserts the trial court properly dismissed defendant's petition because he forfeited any argument challenging his sentence. We agree.

¶ 17 The Unified Code of Corrections (Code) provides a defendant shall raise any challenge to the correctness of his sentence within 30 days of the sentencing order. 730 ILCS 5/5-4.5-50(d) (West 2014). A defendant forfeits a sentencing issue by failing to raise the issue in a motion to reconsider sentence, or to object at the sentencing hearing. *People v. McGath*, 2017 IL App (4th) 150608, ¶ 66, 83 N.E.3d 671.

¶ 18 Here, defendant failed to file a motion to reconsider sentence and did not object at the sentencing hearing. Defendant neglected to challenge the propriety of his sentence until almost two years after he was sentenced. Because defendant failed to timely challenge his sentence, he forfeited his right to raise the issue for the first time in a collateral appeal. See *People v. Rathbone*, 345 Ill. App. 3d 305, 309-10, 802 N.E.2d 333, 336-37 (2003).

¶ 19 C. Voidness

¶ 20 OSAD next asserts that even if defendant had not forfeited this issue, his sentence is not void. We agree.

¶ 21 A void judgment "may be challenged 'at any time, either directly or collaterally, and the challenge is not subject to forfeiture or other procedural restraints.' " *People v. Price*, 2016 IL 118613, ¶ 30, 76 N.E.3d 1240. "[O]nly the most fundamental defects warrant declaring a judgment void." *Id.* A voidness challenge to a final judgment under section 2-1401 is available only in two types of cases: (1) where the rendering court lacked personal or subject matter jurisdiction or (2) where the challenge is based on a facially unconstitutional statute. *People v. Thompson*, 2015 IL 118151, ¶¶ 31-32, 43 N.E.3d 984. In *People v. Castleberry*, 2015 IL 116916, ¶ 19, 43 N.E.3d 932, our supreme court held a sentence is not void where it does not conform to a statutory requirement and was entered by a court with jurisdiction.

¶ 22 Here, defendant's sentence is not void. Defendant's sole claim is the trial court improperly imposed a "mixed" sentence of both imprisonment and drug-court probation for his single offense of participation in the manufacturing of methamphetamine. Defendant fails to challenge the trial court's personal or subject matter jurisdiction to impose his sentence. Neither does defendant attack the constitutionality of any statute. Accordingly, we conclude no colorable claim can be made that the trial court erred in dismissing defendant's petition.

¶ 23 D. Defendant's Unauthorized Sentence

¶ 24 OSAD next asserts that although the trial court erred when it imposed a mixed sentence of prison and drug-court probation, appellate counsel can perceive of no means to challenge defendant's sentence in this appeal. We agree.

¶ 25 The trial court may impose both a sentence of imprisonment and a sentence of probation for a single offense under limited circumstances. Specifically, the Code permits this disposition "when the offender has been admitted into a drug-court program." 730 ILCS 5/5-4.5-15(a)(8) (West 2014); *Id.* § 5-6-1(a)(3). At the time of defendant's sentencing, the Drug Court Treatment Act (730 ILCS 166/1 to 166/50) (West 2014)) required defendant and the State to agree to his admission into a drug-court program. 730 ILCS 166/20(a) (West 2014). OSAD notes this statute was amended in 2015 to permit a sentence of drug-court probation for certain offenses without the State's approval. Pub. Act 99-480, § 5-115 (eff. Sept. 9, 2015) (amending 730 ILCS 166/20). However, defendant's offense, conviction, and sentencing all took place before the statutory amendment took effect, and the trial court was thus required to sentence defendant under the law in effect at the time. *People v. Hollins*, 51 Ill. 2d 68, 71, 280 N.E.2d 710, 712 (1972). Also, defendant was required to "execute a written agreement as to his or her participation in the program" and to "agree to all of the terms and conditions of the program,

including but not limited to the possibility of sanctions or incarceration for failing to abide or comply with the terms of the program." 730 ILCS 166/25(c) (West 2014).

¶ 26 Here, the trial court failed to follow the proper procedure because the defendant and the State did not mutually agree to the terms of defendant's admission into a drug-court program. The State specifically asked the court for the maximum sentence of 14 years in prison, citing defendant's criminal history. Defendant sought admission into a drug-court program in lieu of prison. However, even in light of the failure to follow proper procedure, defendant is not entitled to the relief he seeks—to have his drug-court probation vacated. Instead, the proper relief would be to provide defendant a new sentencing hearing. Based on the trial judge's comments, it is likely defendant would have been sentenced to a longer term in the DOC if the court had followed the proper procedure ("[I]f I didn't think you could comply with probation and beat this addiction, I wouldn't have sentenced you to only six years in the Department of Corrections ***"). Ultimately, we agree with OSAD that there are no meritorious issues that can be presented in this case.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment.

¶ 29 Affirmed.