2018 IL App (4th) 160646-U

NO. 4-16-0646

FILED
November 7, 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.	)	Sangamon County
DION L. GREEN,	)	No. 11CF459
Defendant-Appellant.	)	
	)	Honorable
	)	John P. Schmidt,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: We grant the office of the State Appellate Defender's motion to withdraw as appellate counsel and affirm the trial court's judgment where no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel asserting no meritorious issues can be raised in this case. Specifically, OSAD asserts it can make no meritorious argument that (1) defendant's fully negotiated guilty plea leading to a conviction for armed habitual criminal is void and (2) procedural error occurred in the trial court's dismissal of defendant's *pro se* petition for relief from judgment. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 2011, the State charged defendant, Dion Green, by information with armed habitual criminal (AHC), a Class X felony (count I) (720 ILCS 5/24-1.7(a), (b) (West

2010)), alleging he "knowingly possessed a firearm after having been previously convicted of the offenses of Aggravated Unlawful Use of a Weapon and Unlawful Manufacture/Delivery of a Controlled Substance." The State also charged defendant with aggravated assault, a Class 4 felony (count II) (720 ILCS 5/12-2(a)(6), (b) (West 2010)) and aggravated unlawful use of a weapon (AUUW), a Class 2 felony (count III) (720 ILCS 5/24-1.6(a)(1), (a)(3)(C), (d) (West 2010)).

¶ 5 In August 2011, pursuant to a fully negotiated plea agreement, defendant pleaded guilty to AHC (count I) in exchange for a 10-year prison sentence, followed by a 3-year period of mandatory supervised release (MSR). As part of the plea, the State agreed to dismiss counts II and III. At the plea hearing, defendant stipulated to a previous conviction for AUUW, a Class 2 felony, and a conviction for manufacture and delivery of a controlled substance, a Class 1 felony. Finding the plea knowing, voluntary, and supported by a factual basis, the trial court accepted the plea and sentenced defendant as agreed. Defendant took no direct appeal.

¶ 6 In January 2012, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). In the petition, defendant argued his three-year MSR term violated double jeopardy and due process. He further asserted that he received ineffective assistance of counsel because he lacked *three* prior Class X felony convictions as required under the AHC statute (720 ILCS 5/24-1.7(a) (West 2010)). In April 2012, the trial court dismissed defendant's petition, finding it frivolous and without constitutional merit.

¶ 7 On appeal, defendant argued his AHC conviction was void following our supreme court's decision in *People v. Aguilar*, 2013 IL 112116, ¶ 22. This court rejected defendant's argument and affirmed his conviction. *People v. Green*, 2014 IL App (4th) 120454, ¶ 17.

¶ 8 On April 8, 2016, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2014)). In his petition, defendant argued his AHC conviction was void because one of the underlying offenses used to satisfy the statute, namely, AUUW, was found facially unconstitutional, without limitation, by our supreme court in *People v. Burns*, 2015 IL 117387, ¶ 32.

¶ 9 On July 12, 2016, the trial court denied defendant's petition for relief from judgment. Defendant filed a timely notice of appeal, and OSAD was appointed to represent defendant on appeal. In June 2018, OSAD filed a motion for leave to withdraw as counsel on appeal. OSAD filed proof of service indicating it mailed a copy of the motion to defendant by United States mail, with postage prepaid. On its own motion, this court granted defendant leave to respond to the motion for leave to withdraw on or before July 23, 2018. Defendant did not do so. After examining the record we grant OSAD's motion and affirm the trial court's judgment.

¶ 10 II. ANALYSIS

¶ 11 OSAD outlines the following potential issues for review in its motion to withdraw: (1) whether defendant raised a meritorious claim that his fully negotiated guilty plea leading to a conviction for AHC was void where one of the underlying offenses used to satisfy the AHC statute, specifically, AUUW, is facially unconstitutional and (2) whether procedural error occurred in the trial court's dismissal of the section 2-1401 petition.

¶ 12 A. Standard of Review

¶ 13 The purpose of a petition for relief from judgment pursuant to section 2-1401 of the Civil Code (735 ILCS 5/2-1401 (West 2014)) is "to bring before the trial court facts not appearing in the record that, if known at the time the court entered judgment, would have

prevented the judgment's entry." *People v. Bramlett*, 347 Ill. App. 3d 468, 473 (2004). In order to be entitled to relief, defendant must set forth factual allegations supporting (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. A section 2-1401 petition is "subject to dismissal for want of legal or factual sufficiency." *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). Dismissal of a petition for relief under section 2-1401 of the Civil Code is subject to *de novo* review. *Id*. at 13.

¶ 14 B. Whether the Petition Set Forth a Meritorious Claim That Defendant's Conviction for Armed Habitual Criminal Was Void

¶ 15 OSAD asserts that defendant's claim that his AHC conviction is void is without merit because this court previously considered this issue and declined to grant relief. See *Green*, 2014 IL App (4th) 120454, ¶ 11. We agree.

¶ 16 A section 2-1401 petition is not a mechanism to relitigate matters previously adjudicated. *Hirsch v. Optima, Inc.*, 397 Ill. App. 3d 102, 110 (2009). Any issue previously resolved by the reviewing court is barred by *res judicata*. *People v. Lacy*, 407 Ill. App. 3d 442, 460 (2011). "Under *res judicata*, a final judgment on the merits bars a similar suit involving the same parties and the same cause of action." *People v. LaPointe*, 2018 IL App (2d) 160432, ¶ 22.

¶ 17 Defendant's claim is barred by this court's final judgment in *Green*. See *Green*, 2014 IL App (4th) 120454, ¶ 11. There, as here, defendant argued "his fully negotiated guilty plea leading to a conviction for armed habitual criminal [was] void because one of the underlying offenses used to satisfy the [AHC] statute, *i.e.*, [AUUW], was found unconstitutional by our supreme court." *Id*. We rejected defendant's argument for the following two reasons.

¶ 18 First, it was unclear from the record whether defendant's prior AUUW conviction was under the unconstitutional provision of the statute. *Id*. ¶ 13. The supreme court in *Aguilar*

held that section 24-1.6(a)(1), (a)(3)(A), (d) of the Criminal Code of 1961 (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2008)), *i.e.*, the offense of AUUW, was facially unconstitutional under the second amendment to the United States Constitution. *Aguilar*, 2013 IL 112116, ¶ 22; see also *Burns*, 2015 IL 117387, ¶ 21. However, the sentencing judgment from defendant's prior AUUW conviction simply listed the applicable statute as "720 [ILCS] 5/24-1.6(a)(1), (3)." *Green*, 2014 IL App (4th) 120454, ¶ 13 Without the corresponding "A" on the sentencing judgment, "this court [was] unable to determine whether defendant was convicted under the unconstitutional section of the statute."*Id.* See also *In re N.G.*, 2018 IL 121939, ¶ 64 ("Without evidence that defendant had actually been convicted for violating that particular subsection, any claim that defendant's subsequent *** conviction was premised on a void prior conviction was, of course, completely untenable."). Thus, we rejected defendant's argument from the outset because he failed to provide any evidence that his AHC conviction was in fact premised on a void prior conviction.

¶ 19 Second, "defendant clearly [had] *at least* two prior felonies—other than the conviction for [AUUW]—that would satisfy the [AHC] statute." (Emphasis added.) *Green*, 2014 IL App (4th) 120454, ¶ 14. In *Green*, we noted that, even if defendant's prior AUUW conviction was void, "we would not find his fully negotiated plea agreement invalid or his conviction for [AHC] void." *Id*. In the same proceedings as defendant's prior AUUW conviction, he was also convicted of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1 (West 2000)) and aggravated battery with great bodily harm (720 ILCS 5/12-4 (West 2000)), both of which are qualifying offenses. Further, he stipulated at the plea-hearing to a felony conviction for manufacture and delivery of a controlled substance, another qualifying offense. *Green*, 2014 IL App (4th) 120454, ¶ 14; see also 720 ILCS 5/24-1.7(a)(1)-(3) (West 2010). Thus, even if

defendant had been able to demonstrate that his AHC conviction was premised on a void prior conviction, his argument still fails.

¶ 20 As this issue has already been resolved on the merits, we agree with OSAD that no colorable argument can be made on appeal that defendant's conviction for AHC is void.

¶ 21 Given we agree with OSAD that defendant's claim is barred by *res judicata*, we need not address OSAD's alternative basis for withdrawal. OSAD relies on our supreme court's decision in *People v. McFadden*, 2016 IL 117424, but that decision has been overruled. See *In re N.G.*, 2018 IL 121939, ¶ 84.

¶ 22 C. Whether There Was Procedural Error in the Trial Court's Dismissal of Defendant's Petition

¶ 23 OSAD argues there is an absence of procedural error in the trial court's dismissal of the petition. Specifically, OSAD asserts (1) dismissal was not premature or improper due to defective service on the State, (2) no procedural error occurred in the hearing on defendant's petition, and (3) the trial court correctly concluded that it lacked jurisdiction to consider defendant's motion to reconsider.

¶ 24 *1. Defective Service on the State*

¶ 25 Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985) provides that notice of the filing of a section 2-1401 petition shall be given by the methods provided in Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). Rule 105(b) states notice may be served by prepaid certified or registered mail. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989).

¶ 26 The record indicates defendant served the State by placing his petition in institutional mail at Dixon Correctional Center for mailing through the United States Postal Service. Although this manner of service fails to comply with Rule 105(b), our supreme court has held that a "defendant cannot challenge the trial court order based on his own failure to

properly serve the State." *People v. Matthews*, 2016 IL 118114, ¶ 15. "If we were to accept defendant's rationale, a prisoner who uses regular mail to effect service upon the State will—upon appeal—be rewarded with a second bite of the apple if the court denies his petition on the merits." *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 46. Thus, defendant cannot rely on his improper service on the State.

¶ 27 *2. The Trial Court's* Sua Sponte *Dismissal*

¶ 28 Pursuant to Illinois Supreme Court Rule 101(d) (eff. Jan. 1, 2016), which governs section 2-1401 of the Civil Code, once a party files a petition for relief from judgment, the opposing party has 30 days to answer the petition or otherwise plead. See also *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). After 30 days, the petition is ripe for adjudication. *Id.*

¶ 29 In the present case, defendant filed his petition on April 8, 2016. The State filed its motion to dismiss within 30 days, on May 3, 2016. The trial court held a hearing on July 12, 2016, at which it dismissed defendant's petition, after more than 30 days had passed. Once the petition became ripe for adjudication, the court exercised its authority to dismiss the case on the grounds that the petition failed, on its face, to state a claim upon which relief could be granted or failed to state a cause of action. *Vincent*, 226 Ill. 2d at 8. Thus, we find no procedural error in the trial court's dismissal of defendant's petition.

¶ 30 *3. The Trial Court's Jurisdiction to Rule on the Motion to Reconsider*

¶ 31 "[A]n appeal from the denial or dismissal of a [post-trial] petition is only perfected through the filing of a notice of appeal." *People v. Bounds*, 182 Ill. 2d 1, 3 (1998). "When the notice of appeal is filed, the appellate court's jurisdiction attaches *instanter*, and the cause is beyond the jurisdiction of the trial court." *Id.*

¶ 32 Here, the trial court dismissed defendant's petition on July 12, 2016. Defendant's appeal from the dismissal was perfected on August 8, 2016, the date on which he filed the notice of appeal. This court's jurisdiction attached *instanter*. Thus, the trial court correctly stated it lacked jurisdiction over the motion to reconsider filed on September 6, 2016, nearly a month after it lost jurisdiction.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 35 Affirmed.