

NOTICE

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FILED

July 3, 2018
Carla Bender
4th District Appellate
Court, IL

2018 IL App (4th) 170775-U

NOS. 4-17-0775, 4-17-0776, 4-17-0914 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
TAVARIS HUNT,)	Nos. 12CF1867
Defendant-Appellant.)	12CF1868
)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court’s dismissal of defendant’s section 2-1401 petition was proper where the petition failed to state claims for relief. The circuit court lacked jurisdiction of defendant’s motion to correct an alleged judicial error that he entitled a motion for a *nunc pro tunc* order.

¶ 2 In June 2017, defendant, Tavaris Hunt, filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2016)) in the following cases: (1) People v. Hunt, No. 12-CF-1867 (Cir. Ct. Champaign Co.) (hereinafter case No. 1867) and (2) People v. Hunt, No. 12-CF-1868 (Cir. Ct. Champaign Co.) (hereinafter case No. 1868). In his petition, defendant asserted he was denied effective assistance of counsel because counsel failed to inform him the sentences for his aggravated domestic battery convictions had to be served at 85% and incorrectly informed him the State could use a cellular telephone (cell phone) video against him. Defendant also asserted

(1) his conviction and sentence in case No. 1868 was void because he withdrew his plea in case No. 1867 and (2) his constitutional rights were violated by the State using the cell phone video as the factual basis for his guilty pleas. He later filed a supplement to his petition, contending the judgment in case No. 1868 is void because the plea agreement did not include a mandatory 60 days of imprisonment. In August 2017, the State filed a motion to dismiss defendant's section 2-1401 petition and supplemental petition. Defendant filed *pro se* a reply to the State's dismissal motion. On September 11, 2017, the Champaign County circuit court entered an order granting the State's motion to dismiss. Defendant appealed the dismissal in both cases, and this court docketed defendant's appeal in case No. 1867 as No. 4-17-0775 and docketed the appeal in case No. 1868 as 4-17-0776.

¶ 3 On October 30, 2017, defendant filed *pro se* a motion for a *nunc pro tunc* order in case No. 1868. He contended he was entitled to 352 additional days of sentencing credit based on his plea agreement, which he claimed should be doubled to 704 days based on day-for-day credit. Nine days later, the circuit court denied defendant's motion for a *nunc pro tunc* order. Defendant appealed the denial of his motion for a *nunc pro tunc* order, and this court docketed the appeal as case No. 4-17-0914.

¶ 4 In February 2018, this court granted defendant's request to consolidate the appeals in appellate court case Nos. 4-17-0775, 4-17-0776, and 4-17-0914. On appeal, defendant contends this court (1) should fix the procedural defects in case No. 1868 and vacate that conviction, (2) vacate the judgment in case Nos. 1867 and 1868 because the State failed to disclose the cell phone video, (3) vacate the judgment in case No. 1868 because his guilty plea was the result of ineffective assistance of counsel, (4) vacate the judgment in case No. 1868 because the plea agreement did not include a mandatory sentencing provision, and (5) grant him

704 days of sentencing credit in case No. 1868 because it was part of the plea agreement. In Nos. 4-17-0775 and 4-17-0776, we affirm the circuit court's judgment, and in No. 4-17-0914, we vacate the circuit court's judgment and dismiss defendant's motion for a *nunc pro tunc* order.

¶ 5

I. BACKGROUND

¶ 6

A. Case No. 1867

¶ 7

In November 2012, the State initially charged defendant by information with one count of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010) (eff. July 1, 2011)) for defendant's actions on November 12, 2012. On December 18, 2012, defendant pleaded guilty to aggravated domestic battery in case No. 1867, and the circuit court sentenced him to five years' imprisonment to run concurrently with the sentence imposed in case No. 1868. In February 2013, defendant filed a motion to withdraw his guilty plea and vacate the judgment. After a hearing on the defendant's motion, the circuit court allowed defendant to withdraw his December 2012 guilty plea and accepted defendant's guilty plea to a new charge of domestic battery with a prior domestic battery conviction (720 ILCS 5/12-3.2(a)(1) (West 2010) (eff. July 1, 2011)). The court again sentenced defendant to five years' imprisonment with a sentencing credit of 106 days. It also found defendant was eligible for impact incarceration. In May 2013, the Department of Corrections accepted defendant into the impact incarceration program.

¶ 8

In December 2015, defendant filed a joint *pro se* postconviction petition for both case Nos. 1867 and 1868. The circuit court found the petition was frivolous and patently without merit and dismissed the petition at the first stage of the proceedings. Defendant appealed the dismissal of his postconviction petition in both cases, and the appeals are still pending in this court. The appeal in case No. 1867 is docketed as No. 4-16-0097.

¶ 9

In August 2016, defendant filed an amended joint postconviction petition for both

case Nos. 1867 and 1868, and the circuit court denied the amended postconviction petition. The next month, defendant filed a joint motion for leave to file a successive postconviction petition for both case Nos. 1867 and 1868. The court denied the motion. In both cases, defendant appealed the denial of his motion for leave to file a successive postconviction petition. Those appeals are still pending in this court. The appeal in case No. 1867 is docketed as No. 4-16-0745.

¶ 10 In January 2017, defendant filed a joint petition for *mandamus* for both case Nos. 1867 and 1868, which the circuit court *sua sponte* denied. He did not appeal the denial of the *mandamus* petition in case 1867.

¶ 11 That same month, defendant also filed a joint motion for posttrial discovery for both cases Nos. 1867 and 1868, and the circuit court denied the motion. Defendant appealed the denial of his motion for posttrial discovery in case No. 1867 only, and this court docketed that appeal as No. 4-17-0150. On April 13, 2017, this court dismissed the appeal in No. 4-17-0150 on defendant's motion. *People v. Hunt*, No. 4-17-0150 (Apr. 13, 2017) (nonprecedential motion order dismissing the case on defense counsel's motion, explaining the appeal was taken from the denial of discovery motion, which is not a final order for purposes of appeal).

¶ 12 In June 2017, defendant filed a joint section 2-1401 petition for both cases Nos. 1867 and 1868, which is at issue in this appeal. Defendant alleged his decision to plead guilty was the result of ineffective assistance of counsel because trial counsel failed to inform him he had to serve 85% of his aggravated domestic battery sentence and could not receive any good-time credit. He also alleged counsel incorrectly told him the State could use the cell phone video at his trial. Defendant later filed a supplement to his section 2-1401 petition. The State filed a motion to dismiss defendant's section 2-1401 petition, which the court granted in September 11,

2017.

¶ 13 On October 10, 2017, defendant filed a timely notice of appeal from the dismissal of his section 2-1401 petition in case No. 1867, which was in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). As stated, we docket the aforementioned appeal as case No. 4-17-0775.

¶ 14 B. Case No. 1868

¶ 15 In November 2012, the State charged defendant by information with six counts of domestic battery with a prior domestic battery conviction (counts I through VI) (720 ILCS 5/12-3.2(a)(1) (West 2010) (eff. July 1, 2011)) and one count of aggravated domestic battery (count VII) (720 ILCS 5/12-3.3(a-5) (West 2010) (eff. July 1, 2011)). All seven counts related to a series of incidents occurring on September 27, 2012. In December 2012, pursuant to a plea agreement, defendant pleaded guilty to count VII, and the State dismissed the other charges and recommended defendant serve 48 months' probation. The circuit court accepted the guilty plea and sentenced defendant to the 48 months' probation.

¶ 16 In January 2014, the State filed a petition to revoke defendant's probation, alleging he violated the conditions of his probation when he consumed alcohol and committed the offenses of domestic battery and resisting a peace officer. In February 2014, defendant agreed to admit the allegations in the State's petition, and the circuit court revoked defendant's probation. The next month, the court conducted the resentencing hearing. After hearing the parties' arguments, the court resentenced defendant to seven years' imprisonment. Defense counsel filed a motion to reconsider sentence. Defendant later filed a *pro se* letter with the court, asserting ineffective assistance of trial counsel. In April 2014, the court held the hearing on

counsel's motion to reconsider sentence and defendant did not appear. Defense counsel did not add anything to the motion to reconsider based on defendant's letter. The court denied the motion to reconsider defendant's sentence.

¶ 17 Defendant appealed, asserting the circuit court erred by failing to conduct a preliminary examination into his ineffective assistance of counsel claims as required by *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). On December 1, 2015, this court entered an order, agreeing with defendant and remanding the case for the limited purpose of allowing the circuit court to perform the required preliminary investigation. *People v. Hunt*, 2015 IL App (4th) 140313-U, ¶ 16.

¶ 18 As mentioned with case No. 1867, in December 2015, defendant filed a joint *pro se* postconviction petition for both cases Nos. 1867 and 1868, and the circuit court dismissed the petition at the first stage of the proceedings. In both cases, defendant appealed the dismissal of his postconviction petition, and the appeals are still pending in this court. The appeal in case No. 1868 is docketed as No. 4-16-0098.

¶ 19 In February 2016, while the case was on remand, defendant filed a *pro se* amended ineffective assistance claim adding additional claims of ineffective assistance of counsel. On February 29, 2016, the circuit court held a *Krankel* hearing and denied defendant's claim. Defendant appealed. On October 18, 2016, this court entered an order, in which we again remanded the case for another *Krankel* hearing because the circuit court failed to address defendant's claims concerning counsel's performance at the resentencing hearing. *People v. Hunt*, 2016 IL App (4th) 160183-U, ¶ 18.

¶ 20 In September 2016, defendant filed a joint motion for leave to file a successive postconviction petition for both cases Nos. 1867 and 1868. The circuit court denied the motion.

In both cases, defendant appealed the denial of his motion for leave to file a successive postconviction petition, and the appeals are still pending in this court. This court docketed the appeal in case No. 1868 as No. 4-16-0760.

¶ 21 In January 2017, defendant filed a joint petition for *mandamus* for both cases Nos. 1867 and 1868, which the circuit court *sua sponte* denied. He appealed the denial of the *mandamus* petition in case 1868 only. This court docketed that appeal as No. 4-16-0694. On April 26, 2017, this court *sua sponte* dismissed defendant's appeal in No. 4-16-0694 because he failed to file an appellant's brief. *People v. Hunt*, No. 4-16-0694 (Apr. 26, 2017) (nonprecedential order dismissing the case).

¶ 22 On February 21, 2017, while the case was on remand, defendant again filed an amended claim of ineffective assistance of counsel. In March 2017, the circuit court held a *Krankel* hearing and again denied defendant's ineffective assistance of counsel claims. Defendant appealed, asking this court to, once again, remand this case for a new *Krankel* hearing because the circuit court did not address all of defendant's ineffective assistance of counsel claims raised in the amended motion. On February 23, 2018, we entered an order, again finding the circuit court failed to conduct an adequate inquiry into defendant's ineffective assistance of counsel claims related to the resentencing hearing. *People v. Hunt*, 2018 IL App (4th) 170213-U, ¶ 22. Thus, we once again remanded the case to the circuit court for it to conduct an adequate inquiry under *Krankel*. *Hunt*, 2018 IL App (4th) 170213-U, ¶ 22.

¶ 23 In June 2017, defendant filed the joint section 2-1401 petition for both cases Nos. 1867 and 1868 at issue in this appeal, which we previously described. The circuit court granted the State's motion to dismiss on September 11, 2017. On October 10, 2017, defendant filed a timely notice of appeal from the dismissal of his section 2-1401 petition in case No. 1868 in

sufficient compliance with Rule 303, and thus we have jurisdiction of defendant’s appeal under Rule 301. As stated, this court docketed the appeal in case No. 1868 as No. 4-17-0776.

¶ 24 On October 30, 2017, defendant filed a motion for a *nunc pro tunc* order, contending he was entitled to 352 additional days of sentencing credit based on his concurrent imprisonment in case No. 1867. He argued it was part of the plea agreement and should be doubled to 704 days based on day-for-day credit. On November 8, 2017, the circuit court entered a docket entry denying defendant’s motion.

¶ 25 On November 20, 2017, defendant filed a timely notice of appeal from the denial of his motion for a *nunc pro tunc* order in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017). The State has questioned our jurisdiction of this appeal, and thus we will address jurisdiction in the analysis section. As stated, this court docketed this appeal as case No. 4-17-0914.

¶ 26 II. ANALYSIS

¶ 27 A. Section 2-1401

¶ 28 Defendant’s first four issues relate to the dismissal of his section 2-1401 petition in both cases Nos. 1867 and 1868. To obtain relief under section 2-1401 of the Procedure Code (735 ILCS 5/2-1401 (West 2016)), the petitioner, which in this case is a criminal defendant, “must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.” *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21, 499 N.E.2d 1381, 1386 (1986). “A meritorious defense under section 2-1401 involves errors of fact, not law.” *People v. Pinkonsly*, 207 Ill. 2d 555, 565, 802 N.E.2d 236, 243 (2003).

¶ 29 With some of his claims, defendant alleges void judgments. When the petitioner seeks to vacate a final judgment as being void (735 ILCS 5/2-1401(f) (West 2016)), the void allegation “substitutes for and negates the need to allege a meritorious defense and due diligence.” *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104, 776 N.E.2d 195, 202 (2002). In *People v. Castleberry*, 2015 IL 116916, ¶¶ 11-12, 43 N.E.3d 932, our supreme court recognized a judgment is void only if the circuit court which entered the challenged judgment lacked subject matter or personal jurisdiction. “Subject matter jurisdiction refers to a court’s power to hear and determine cases of the general class to which the proceeding in question belongs.” (Internal quotation marks omitted.) *Castleberry*, 2015 IL 116916, ¶ 12 (quoting *In re M.W.*, 232 Ill. 2d 408, 415, 905 N.E.2d 757, 763 (2009)). “Personal jurisdiction refers to the court’s power to bring a person into its adjudicative process.” (Internal quotation marks omitted.) *Castleberry*, 2015 IL 116916, ¶ 12 (quoting *M.W.*, 232 Ill. 2d at 415, 905 N.E.2d at 763). “[O]nce a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired.” *People v. Davis*, 156 Ill. 2d 149, 156, 619 N.E.2d 750, 754 (1993). Moreover, a voidable judgment “ ‘is one entered erroneously by a court having jurisdiction and is not subject to collateral attack.’ ” *Castleberry*, 2015 IL 116916, ¶ 11 (quoting *Davis*, 156 Ill. 2d at 155-56, 619 N.E.2d at 754).

¶ 30 For the reasons that follow, we find the circuit court properly dismissed defendant’s section 2-1401 petition.

¶ 31 1. *Withdrawal of Guilty Plea*

¶ 32 Defendant asserts his conviction and sentence in case No. 1868 are void because, when the circuit court allowed defendant to withdraw his guilty plea in case No. 1867 in February 2013, it affected case No. 1868 and left him without a conviction in that case. In

support of this argument, defendant cites *People v. Summers*, 291 Ill. App. 3d 656, 657, 684 N.E.2d 1004, 1005 (1997), where the reviewing court noted the “[d]efendant’s negotiated pleas, and the agreed-upon sentences those pleas confer, are inseparable elements material to the plea bargain.”

¶ 33 In *Summers*, 291 Ill. App. 3d at 657, 684 N.E.2d at 1005, the defendant entered two negotiated guilty pleas for two concurrent prison terms of 60 years. On appeal, defendant claimed his sentences were required to be served consecutively. *Summers*, 291 Ill. App. 3d at 657, 684 N.E.2d at 1005. In explaining defendant’s true purpose of getting out of his guilty pleas, the reviewing court used the language quoted by defendant about the negotiated guilty pleas and their agreed-upon sentences being “inseparable elements material to the plea bargain.” *Summers*, 291 Ill. App. 3d at 657, 684 N.E.2d at 1005. The court then went onto explain the void sentencing rule (*Summers*, 291 Ill. App. 3d at 657, 684 N.E.2d at 1005), which is no longer in existence (see *Castleberry*, 2015 IL 116916, ¶ 19). The *Summers* court did not address whether the two negotiated guilty pleas were inseparable from each other. *Summers*, 291 Ill. App. 3d at 657, 684 N.E.2d at 1005. Thus, the *Summers* decision does not support defendant’s allegation.

¶ 34 Further, the record shows the circuit court had both personal jurisdiction of defendant and subject-matter jurisdiction over defendant’s criminal proceedings in case No. 1868 when it accepted defendant’s guilty plea and sentenced him. Moreover, the record indicates defendant only sought to withdraw his guilty plea in case No. 1867 to address an issue with impact incarceration. Assuming *arguendo* the court should have withdrawn the guilty plea in case No. 1868 as well, the error would have resulted in a voidable judgment, not a void one. See *Castleberry*, 2015 IL 116916, ¶¶ 11-12. Without a void judgment, defendant must meet the

elements for relief under section 2-1401. Defendant cannot plead due diligence as he would have been aware of any error, at the latest, in 2014. At that time, the circuit court revoked his probation in case No. 1868 and resentenced him to a seven-year term of imprisonment.

¶ 35 Accordingly, defendant has failed to plead a cause of action for relief from his conviction and sentence in case No. 1868 based on the withdrawal of his guilty plea in case No. 1867.

¶ 36 *2. Cell Phone Video*

¶ 37 Defendant next argues his conviction and sentence in both cases are void because the State fraudulently concealed the cell phone recording by Essence McFall, which induced him into an unconscionable agreement with the State. He contends that, without the cell phone video, the State would not have had evidence to support his conviction in case No. 1868. Defendant's argument overlooks the fact both McFall and the victim could have testified to defendant's actions depicted in the cell phone video.

¶ 38 Additionally, as with the previous issue, even if the evidence was concealed by the State and inadmissible against defendant, the circuit court had personal and subject-matter jurisdiction when he pleaded guilty. Thus, any error would result in a voidable judgment, not a void one. See *Castleberry*, 2015 IL 116916, ¶¶ 11-12. Without a void judgment, defendant must meet the elements for relief under section 2-1401. Defendant cannot plead due diligence because he would have been aware of the cell phone video at the latest when the State's Attorney mentioned it in the postplea statement filed on December 21, 2012.

¶ 39 Thus, we find defendant has failed to plead a cause of action for relief from his conviction and sentence in both cases based on the State's alleged concealment of the cell phone video.

¶ 40

3. *Ineffective Assistance of Counsel*

¶ 41 Defendant next argues this court should allow him to withdraw his guilty plea in both cases because they were the result of ineffective assistance of counsel. As the State points out, “[a] meritorious defense under section 2-1401 involves errors of fact, not law.” *Pinkonsly*, 207 Ill. 2d at 565, 802 N.E.2d at 243. Accordingly, our supreme court has “long held that section 2-1401 proceedings are not an appropriate forum for ineffective-assistance claims because such claims do not challenge the factual basis for the judgment.” *Pinkonsly*, 207 Ill. 2d at 567, 802 N.E.2d at 244. Thus, defendant has again failed to plead a valid basis for relief.

¶ 42

4. *Mandatory Sentencing Provision*

¶ 43 Defendant further contends his judgment in case No. 1868 is void because the State failed to include a mandatory sentencing requirement as part of the negotiated plea. However, in *Castleberry*, our supreme court abolished the void sentencing rule, which had provided a sentence that did not conform to a statutory requirement was void. *Castleberry*, 2015 IL 116916, ¶¶ 13, 19. As previously stated, a judgment is void only if the circuit court which entered the challenged judgment lacked subject-matter or personal jurisdiction (*Castleberry*, 2015 IL 116916, ¶¶ 11-12). Here, the circuit court had personal and subject-matter jurisdiction when it entered its December 18, 2012, judgment in case No. 1868. Accordingly, defendant again failed to plead a void judgment.

¶ 44

B. *Nunc Pro Tunc*

¶ 45 Last, defendant contends the circuit court erred by denying his motion for a *nunc pro tunc* order in which he sought 352 additional days of sentencing credit in case No. 1868 because his probation sentence ran concurrently to his prison sentence in case No. 1867. He then argues the number of days should be doubled to 704 based on day-for-day sentencing credit.

The State questions our jurisdiction of defendant's appeal from the denial of his motion for a *nunc pro tunc* order. Thus, we examine jurisdiction.

¶ 46 Under supreme court rules, a circuit court loses jurisdiction to hear a cause after the expiration of the 30-day period following the entry of a final judgment. *People v. Bailey*, 2014 IL 115459, ¶ 8, 4 N.E.3d 474. However, the circuit “court retains jurisdiction to correct clerical errors or matters of form at any time after judgment, so as to make the record conform to the actual judgment entered by the court.” *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 12, 82 N.E.3d 186, *appeal allowed*, No. 122549 (Ill. Nov. 22, 2017), 93 N.E.3d 1087. Clerical errors are corrected with a *nunc pro tunc* order. *Peraino v. County of Winnebago*, 2018 IL App (2d) 170368, ¶ 16. The use of *nunc pro tunc* orders is limited to incorporating into the record something that the circuit court actually did but inadvertently was omitted by clerical error. *People v. Melchor*, 226 Ill. 2d 24, 32, 871 N.E.2d 32, 36 (2007). “It may not be used for supplying omitted judicial action, or correcting judicial errors under the pretense of correcting clerical errors.” *Melchor*, 226 Ill. 2d at 32-33, 871 N.E.2d at 36.

¶ 47 Here, plaintiff did not seek to correct a clerical error in the circuit court's judgment, rather he alleges a judicial error in calculating his sentence credit. Accordingly, defendant's October 30, 2017, motion could not be resolved on a *nunc pro tunc* basis. Thus, the circuit court lacked jurisdiction to address defendant's motion.

¶ 48 While an appellate court has no authority to address the substantive merits of a judgment entered by a circuit court without jurisdiction, the appellate court does not completely lack jurisdiction. *Bailey*, 2014 IL 115459, ¶ 29. In such cases, “the appellate court is limited to considering the issue of jurisdiction below.” *Bailey*, 2014 IL 115459, ¶ 29. When a reviewing court has concluded the circuit court lacked jurisdiction to address the merits of the defendant's

motion, the reviewing court vacates the circuit court's judgment and orders the defendant's motion be dismissed. *Bailey*, 2014 IL 115459, ¶ 29. Accordingly, we vacate the circuit court's November 8, 2017, denial of defendant's *nunc pro tunc* motion and dismiss defendant's October 30, 2017, motion for a *nunc pro tunc* order. See *Peraino*, 2018 IL App (2d) 170368, ¶ 1.

¶ 49

III. CONCLUSION

¶ 50 For the reasons stated, in appeal Nos. 4-17-0775 and 4-17-0776, we affirm the Champaign County circuit court's September 11, 2017, dismissal of defendant's section 2-1401 petition. In appeal No. 4-17-0914, we vacate the court's November 8, 2017, denial of defendant's motion for a *nunc pro tunc* order, and dismiss defendant's October 30, 2017, motion for a *nunc pro tunc* order.

¶ 51 Appeal Nos. 4-17-0775 and 4-17-0776, Affirmed.

¶ 52 Appeal No. 4-17-0914, Order vacated; motion dismissed.