2019 IL App (2d) 160553-U
No. 2-16-0553
Order filed June 20, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LAVERTIS STEWART, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 84-CF-1029 Honorable Fernando L. Engelsma, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justice Spence concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's section 2-1401 petition, as his motion for substitution of judge at trial was withdrawn and thus did not make his conviction void, and properly dismissed his motion to reconsider his sentence, which was untimely despite the trial court's recent addition of a mandatory fee.

¶ 2 Defendant, Lavertis Stewart, appeals from an order of the circuit court of Winnebago County dismissing his *pro se* petition under section 2-1401(f) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(f) (West 2014)), seeking relief from his "void" 1985 conviction and

sentence for murder, attempted murder, and armed robbery. He also appeals from the trial court's dismissal of his subsequently filed motion for reduction of sentence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 9, 1984, defendant was charged by information with two counts of murder (Ill. Rev. Stat. 1983, ch. 38, ¶ 9-1), one count of attempted murder (*id.* ¶¶ 8-4, 9-1), and one count of armed robbery (*id.* ¶ 18-2), stemming from events that occurred on August 28, 1983.

¶ 5 On November 19, 1984, defendant filed a motion for substitution of judge, alleging that Judge David F. Smith and Judge Robert C. Gill were prejudiced against him. At the next court appearance, on November 30, 1984, with defendant present, defense counsel informed Judge Smith: "We have previously filed a motion to substitute two judges. We are withdrawing that motion this morning." The proceedings continued.

¶ 6 On March 26, 1985, a jury found defendant guilty of murder, attempted murder, and armed robbery. On May 23, 1985, the trial court sentenced defendant to 75 years in prison for murder and to 30 years in prison for attempted murder, to be served concurrently. He was not sentenced on the armed robbery conviction. For the offense of murder, the trial court found that defendant's actions were "accompanied by exceptionally heinous and brutal behavior" following the shooting of the victim. The court also stated: "Be whatever statutory fine has to be imposed and court costs." Defendant appealed. We affirmed. *People v. Stewart*, 161 Ill. App. 3d 99 (1987).

¶ 7 On July 7, 2015, defendant filed a *pro se* petition for relief from judgment under section 2-1401(f) of the Code (735 ILCS 5/2-1401(f) (West 2014)). He alleged: (1) because the trial court was required to grant his timely motion to substitute judge, but failed to do so, the motion was still pending, and therefore all subsequent orders entered by the judge, including his

sentence, were void, and (2) his sentence was void, because the trial court failed to impose a mandatory Violent Crime Victims Assistance Fund fee (see Pub. Act 83-908, § 10 (eff. Jan. 1, 1984)). In his prayer for relief, he asked that the trial court find his conviction and sentence void or, in the alternative, "finalize" his sentence by imposing the mandatory fee.

¶ 8 The State filed a motion to dismiss the petition, and, on May 5, 2016, the trial court granted it. With respect to defendant's claim concerning the trial judge's failure to transfer the case after defendant filed a motion to substitute judge, the court found that "the record clearly shows that the motion to substitute judge was withdrawn by counsel." With respect to defendant's claim concerning the trial court's failure to impose the Violent Crime Victim Assistance Fund fee, the court found that the fee should have been imposed.[1] The court further found that the comments by the sentencing judge showed that he "meant to impose all statutory mandated fines and costs" but simply failed to delineate them. Thus, the court concluded that the sentence was not void, and it imposed the $25 fee.

¶ 9 On June 6, 2016, defendant filed a *pro se* "Motion for Reduction of Sentence," attacking the validity of the trial court's order dismissing his *pro se* petition. In addition to restating the arguments raised in his petition, defendant argued that "the extended-term portion of his sentence, based on the judge's finding that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, is in violation of *** Apprendi v. New Jersey, [386 U.S. 738 (2000)]." In addition, he argued that his sentence should otherwise be reduced because "he is not the same person he was in 1984."

[1] The trial court found that the fee should have been imposed because the statute was effective as of January 1, 1984, before the crime took place. However, the crime took place in August 1983.

¶ 10 On June 20, 2016, the trial court found that the motion was untimely, as it was filed more than 30 days since the imposition of sentence. The court further noted that, although it imposed the Violent Crime Victims Assistance Fund fee, doing so did not trigger the court's jurisdiction to reconsider the sentence in general.

¶ 11 Defendant appealed.

¶ 12 II. ANALYSIS

¶ 13 Defendant makes two challenges on appeal. First, defendant challenges the dismissal of his section 2-1401 petition only as it related to his motion for substitution of judge, and he asks that we reverse and remand for a new trial. In the alternative, he challenges the dismissal of his motion for reduction of sentence in light of *Apprendi* and new mitigating factors, and he asks that we remand the cause for a new sentencing hearing.

¶ 14 We first consider defendant's challenge to the trial court's dismissal of his *pro se* petition. Section 2-1401 of the Code provides a mechanism to collaterally attack a "final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007) (citing 735 ILCS 5/2-1401 (West 2002)). Generally, the petition must be filed not later than two years after the entry of the judgment. 735 ILCS 5/2-1401(c) (West 2014). But the two-year limitations period does not apply where the defendant alleges that the judgment is void. *Id.* § 2-1401(f). This court reviews the dismissal of a section 2-1401 petition *de novo*. *People v. Bradley*, 2017 IL App (4th) 150527, ¶ 13.

¶ 15 Defendant argues that his conviction and sentence are void, because the judge had no authority to act once defendant filed the motion for substitution of judge. Defendant's argument must fail. As the trial court noted, the record clearly reflects that, on November 30, 1984, before the judge had the chance to address any pending motions, defense counsel withdrew the motion

with defendant present. Thus, the trial court properly concluded that defendant's conviction and sentence were not void on this basis.

¶ 16 We next consider defendant's argument that the trial court erred in denying as untimely his motion for reduction of sentence. According to defendant, when the trial court imposed the Violent Crime Victims Assistance Fund fee, it "finalized" the sentence imposed in 1985, and therefore the court had jurisdiction to consider the validity of his original sentence, specifically his claims that the sentence violated *Apprendi* and that it should otherwise be reduced because "he is not the same person he was in 1984."

¶ 17 First, we note that, to the extent that defendant's motion for reduction of sentence challenged the trial court's dismissal of his section 2-1401 petition or the imposition of the Violent Crime Victims Assistance Fund fee, the motion was timely. As the State notes, defendant had until June 4, 2016, to file a motion to reconsider the trial court's ruling on his section 2-1401 petition. But because June 4, 2016, was a Saturday, the motion filed on Monday, June 6, 2016, was timely. See 5 ILCS 70/1.11 (West 2016). Nevertheless, we may affirm the trial court's dismissal of the motion on any basis appearing in the record, whether or not the trial court relied on that basis and even if the trial court's reasoning was incorrect. *Bank of New York v. Langman*, 2013 IL App (2d) 120609, ¶ 31.

¶ 18 Defendant makes clear on appeal that he challenges the dismissal of his petition only as it relates to his motion for substitution of judge. To the extent that defendant's motion for reduction of sentence sought reconsideration of that argument, it was without merit as noted above. Defendant also makes clear on appeal that he made no challenge in his motion to the

imposition of the Violent Crime Victims Assistance Fund fee and that he makes no challenge on appeal.[2] Thus, we do not consider it.

¶ 19 To the extent that defendant's motion for reduction of sentence challenged the validity of his 1985 sentence (premised on his argument that the court's imposition of the Violent Crime Victims Assistance Fund fee "finalized" his sentence), the trial court properly dismissed it as untimely. Defendant's sentence was final on May 23, 1985, regardless of whether the Violent Crime Victims Assistance Fund fee should have been imposed at that time. A judgment does not have to be correct in order to be final. See *People v. Hayes*, 2015 IL App (2d) 141211, ¶ 9 (the finality of a defendant's sentence, specifically his term of imprisonment, is not affected by the defect of a missing fine); *People v. Langston*, 342 Ill. App. 3d 1100, 1103-04 (2001) (finding that the limitations period for a postconviction petition is triggered by the initial sentencing date even if that sentence is later found to be invalid). Thus, given that defendant's sentence was final on May 23, 1985, the trial court's later imposition of the fee did not change the sentencing date for purposes of challenging any other aspect of the sentence.

¶ 20 III. CONCLUSION

[2] The State argues that the fee should not have been imposed, either in 1985 or in 2016, and asks that we vacate it. In reply, defendant reiterates that he makes no challenge to the trial court's imposition of the fee and maintains that the State does not have a right to challenge it. Given defendant's request that the trial court impose the fee and his arguments on appeal, we will not consider the propriety of the fee, as any error has been expressly invited by defendant. See *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17 ("under the doctrine of invited error, a defendant may not request to proceed in one manner and later contend on appeal that the course of action was in error").

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County. The State has requested that defendant be assessed $50 as costs for this appeal pursuant to section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2016)) and *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978). The statute authorizing the fee has been repealed effective July 1, 2019. Given this and as noted in *Nicholls*, the fee is a "relic of another era." *Id*. at 179. However, we remain bound to follow the statute and *Nicholls*. See *People v. Knapp*, 2019 IL App (2d) 160162, ¶¶ 49-50. Thus, we determine that the State is entitled to the $50 fee.

¶ 22 Affirmed.

¶ 23 Justice McLAREN, concurring in part and dissenting in part.

¶ 24 I concur with the majority's affirmance of the trial court. However, I dissent from the assessment of the $50 appellate fee contained in section 4-2002 of the Counties Code (55 ILCS 5/4-2002 (West 2016)). In *Nicholls*, the supreme court affirmed the appellate court's assessment of the fee against defendant Nicholls, who had appealed from the dismissal of his postconviction petition; the supreme court recognized "a legislative scheme which authorizes the assessment of State's Attorney's fees as costs in the appellate court against an unsuccessful *criminal* appellant upon affirmance of his conviction." (Emphasis added.) *Nicholls*, 71 Ill. 2d at 174.

¶ 25 However, as I have demonstrated in *Knapp*, *Nicholls* was "based on the false premise that a postconviction petition is a criminal case." *Knapp*, 2019 IL App (2d) 160162, ¶ 97 (McLaren, J., dissenting). Postconviction proceedings are not criminal proceedings; they are civil, collateral proceedings. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). This well-established fact was recently reaffirmed in *People v. Johnson*, 2013 IL 114639, where all of the participants, including the State and the supreme court, recognized this fact. See, *i.e.*, *id*. at ¶ 12 ("The statutory provision that allows imposition of the $50 [*habeas corpus*] fee first appeared in the statute in a 1907

amendment, and has remained unchanged, despite the creation of *additional collateral proceedings* such as a section 2–1401 petition and a postconviction petition" (emphasis added); *Knapp*, 2016 IL App (2d) 160162, ¶ 133.

¶ 26 My dissent in *Knapp* provides a full exposition of the faulty premise of *Nicholls*, the illogic of its application to appeals from civil collateral proceedings, and the absurd results that may obtain from such application. The majority in *Knapp* declined to address *Nicholls*' faulty premise. The majority here now cites *Knapp* as support for its claim that we are "bound" to follow *Nicholls*, again without addressing *Nicholl*s' lack of a solid foundation. The majority seems content to allow the repeal of the statute to end the misapplication of *Nicholls* rather than address, let alone attempt to refute, the *Nicholls* counterfactual. Suffice to say, the conclusion that appellate fees are collectible in collateral civil proceedings, such as postconviction proceedings, is not based in reality. *Nicholls* has no application to civil collateral proceedings since, by its own terms, it was adjudicating *criminal* proceedings, and it has been wrongly cited as support for the assessment of this fee for too long. As there is no basis for the assessment of the fee in this case, I dissent from its imposition.