

NOTICE

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FILED
April 25, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 170295-U
NO. 4-17-0295

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
BOBBY TATUM,)	No. 07CF968
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Holder White and Justice DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err by requiring defendant, who was *pro se*, to file an individual petition for each statutory provision under which he was seeking postjudgment relief.

¶ 2 In June 2016, defendant, Bobby Tatum, filed a *pro se* petition for relief from judgment, which listed both section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2016)) and the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) in its title. The petition asserted his trial counsel had a *per se* conflict of interest because counsel simultaneously represented him and two of the State’s witnesses, Latasha Sheets and Diane Miller. The Champaign County circuit court informed defendant it did not recognize hybrid petitions and defendant would need to file separate petitions for each statutory provision. Defendant withdrew his June 2016 petition and filed a petition under only section 2-1401, which raised the claim of a *per se* conflict of interest.

Defendant later filed two amended section 2-1401 petitions. In October 2016, the State filed two motions to dismiss defendant's section 2-1401 petitions. On March 28, 2017, the court entered a written order dismissing defendant's section 2-1401 petitions, finding, *inter alia*, they were untimely and defendant did not exercise due diligence in bringing his claims to the court.

¶ 3 Defendant appeals, contending the circuit court erred by not treating his petition as a request for leave to file a successive postconviction petition and the petition should be remanded for second-stage proceedings under the Postconviction Act. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In August 2007, a jury found defendant guilty of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2006)). After a December 2007 hearing, the circuit court sentenced defendant to 24 years in prison. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Tatum*, No. 4-08-0078 (Aug. 20, 2009) (unpublished order under Illinois Supreme Court Rule 23).

¶ 6 In April 2010, defendant filed a *pro se* petition for relief pursuant to the Postconviction Act (725 ILCS 5/122-1 *et seq.* (West 2010)), which set forth claims of ineffective assistance of trial and appellate counsel. In June 2010, the circuit court summarily dismissed defendant's postconviction petition, finding it frivolous and patently without merit. Defendant appealed, and this court affirmed the dismissal of defendant's postconviction petition but vacated a \$200 deoxyribonucleic acid fee. *People v. Tatum*, 2011 IL App (4th) 100562-U, ¶ 12.

¶ 7 Defendant next filed a March 2013 *pro se* petition for relief from judgment under section 2-1401 of the Procedure Code (735 ILCS 5/2-1401 (West 2012)). Defendant argued his three-year term of mandatory supervised release must be vacated because it was never expressly imposed by the circuit court. The State filed a motion to dismiss defendant's petition. In June

2013, the circuit court dismissed the petition and ordered defendant to pay \$40 for the filing fees and court costs. The court also directed the Department of Corrections to withhold and collect the \$40 from defendant's prisoner trust account. Defendant appealed and asserted the \$40 fee imposed by the circuit court should be vacated and the amount refunded to his account. This court affirmed the dismissal of defendant's section 2-1401 petition but agreed with defendant's argument regarding the \$40 fee. *People v. Tatum*, 2015 IL App (4th) 130561-U, ¶ 19.

¶ 8 In February 2014, defendant filed a motion for leave to file a successive postconviction petition under section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2014)). The circuit court denied defendant's motion in June 2014. Defendant appealed, and the Office of the State Appellate Defender (OSAD) moved to withdraw its representation of defendant on appeal, contending no colorable claim of actual innocence could be raised and defendant's petition failed to meet the cause-and-prejudice test. We agreed with OSAD and thus granted OSAD's motion to withdraw as counsel and affirmed the circuit court's judgment. *People v. Tatum*, No. 4-14-0579 (Apr. 18, 2016) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 9 Defendant filed the petition that initiated the proceedings at issue in this appeal on June 1, 2016. Defendant's petition was entitled, "Petition For Relief From Judgment Pursuant to 735 ILCS 5/2-1401 Section C-F and 725 ILCS 5/122-1 ect [*sic*] seq." Along with the petition, defendant filed (1) a 30-day notice to respond to defendant's petition for relief from judgment, (2) a motion to proceed *in forma pauperis* and for the appointment of counsel on his petition for "postjudgment relief," (3) a letter to the Champaign County circuit clerk asking her to make sure the State was aware of the petition and notice of 30 days to respond. In the petition, defendant asserted the two-year limitations period should be excused because the grounds and facts raised

in the petition were fraudulently concealed from him. In paragraph eight of the petition, defendant stated relief under the Postconviction Act was unavailable to him at the present time due to his successive postconviction petition being on appeal. Defendant raised a claim of a *per se* conflict of interest with his public defender because the public defender simultaneously represented him as well as Sheets and Miller, two of the State's witnesses. Defendant included several attachments to the petition, which supported his claim. The petition also noted the 30-day notice to respond to the petition.

¶ 10 In a July 14, 2016, letter, the circuit court informed defendant as follows:

“The Court has reviewed your ‘Petition For Relief From Judgment Pursuant to 735 ILCS 5/2-1401 Section C-F and 725 ILCS 5/122-1 ect [sic] seq.’ ” The Court does not recognize hybrid pleadings. You may file under only one section for each individual petition and must specify the section you are seeking relief under. Further, because you filed for relief under 725 ILCS 5/122-1 previously, you must file a request for leave to file a subsequent petition.”

¶ 11 On August 9, 2016, defendant filed a letter with the circuit clerk asking the clerk to withdraw his June 1, 2016, petition because the judge told him it was filed “wrong.” In the letter, defendant noted he was filing a new petition for postjudgment relief. On that same day, defendant filed (1) a petition for postjudgment relief under section 2-1401 of the Procedure Code, (2) a 30-day notice to respond to defendant's petition for relief from judgment, and (3) a motion to proceed *in forma pauperis* and for the appointment of counsel on his petition for “postjudgment relief.” Defendant filed amended section 2-1401 petitions on August 29, 2016, and September 21, 2016.

¶ 12 In October 2016, the State filed a motion to dismiss defendant's August 9, 2016, section 2-1401 petition and the August 29, 2016, amendment, asserting defendant's petition was untimely, defendant failed to assert any facts showing due diligence in presenting his concerns to the circuit court or in filing his section 2-1401 petition, and defendant's claim is barred by the doctrines of *res judicata* and waiver. The State later filed a second motion to dismiss addressing defendant's September 2017 amended section 2-1401 petition. Defendant filed replies to both motions to dismiss.

¶ 13 On March 28, 2017, the circuit court entered a written order granting the State's motion to dismiss defendant's August 2016 section 2-1401 petition and the subsequent amended petitions. The court found defendant's petition was untimely, defendant failed to exercise due diligence in filing his section 2-1401 petition, and the petition failed to allege a meritorious claim.

¶ 14 On April 10, 2017, defendant filed a timely notice of appeal from the dismissal of his section 2-1401 petition, which was in sufficient compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015). Accordingly, this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 15 II. ANALYSIS

¶ 16 The initial issue this court needs to address is whether the circuit court erred by not recognizing a "hybrid" pleading and instead, requiring defendant to raise his claims under the Postconviction Act and section 2-1401 in separate petitions. We find no error.

¶ 17 Our supreme court has stressed the Postconviction Act provides a different form of statutory relief than does section 2-1401. *People v. Vincent*, 226 Ill. 2d 1, 11, 871 N.E.2d 17, 24 (2007). "Relief under section 2-1401 is predicated upon proof, by a preponderance of

evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition.”

Vincent, 226 Ill. 2d at 7-8, 871 N.E.2d at 22. Section 2-1401 is a civil remedy that has been extended to criminal cases. *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 22-23. The usual rules of civil practice apply to actions brought under section 2-1401. *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23. Moreover, a section 2-1401 petition invites a responsive pleading. *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23.

¶ 18 On the other hand, the Postconviction Act provides collateral relief only in criminal cases for constitutional violations. *Vincent*, 226 Ill. 2d at 11, 871 N.E.2d at 24. When an initial petition is filed under the Postconviction Act, our supreme court has held the proceedings are divided into three stages. *People v. Bailey*, 2017 IL 121450, ¶ 18, 102 N.E.3d 114. “At the first stage, the circuit court must review the petition within 90 days of its filing and determine whether the petition states the gist of a constitutional violation or is either frivolous or patently without merit.” *Bailey*, 2017 IL 121450, ¶ 18. At that stage, the Postconviction Act “ ‘does not permit any further pleadings from the defendant or any motions or responsive pleadings from the State. Instead, the circuit court considers the petition independently, without any input from either side.’ ” *Bailey*, 2017 IL 121450, ¶ 19 (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)). Moreover, when, as in this case, the defendant is seeking leave to file a successive postconviction under section 122-1(f) of the Postconviction Act (725 ILCS 5/122-1(f) (West 2016)), the State is not permitted to participate in determining whether the defendant has established cause and prejudice for allowing the filing of the successive postconviction petition. *Bailey*, 2017 IL 121450, ¶ 24. Thus, unlike section 2-1401 proceedings, a postconviction petition does not initially invite a responsive pleading. Moreover,

if a postconviction petition proceeds beyond the first stage, the defendant is entitled to the appointment of counsel. 725 ILCS 5/122-4 (West 2016).

¶ 19 Since the proceedings under the two acts are different, we find the circuit court has discretion to require a defendant to file two separate petitions, which would assist the court in efficiently managing the two different proceedings. See *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 24, 992 N.E.2d 1266 (recognizing “[t]he circuit court has the discretion to manage its docket to ensure that there is no undue delay in the resolution of the proceedings before it”). We note that, in two of the three cases cited by defendant in support of allowing hybrid motions, the defendants filed two separate documents, each of which raised a claim under only one of the two acts. See *People v. Cihlar*, 111 Ill. 2d 212, 214, 489 N.E.2d 859, 860 (1986); *People v. Escobedo*, 377 Ill. App. 3d 82, 83, 878 N.E.2d 767, 769 (2007). Moreover, in the third case, the reviewing court did not address the propriety of the circuit court considering the merits of the hybrid motion or declare the circuit court had to address the merits under the appropriate statute as defendant suggests. See *People v. Ford*, 2014 IL App (1st) 130147, ¶¶ 1-4, 18 N.E.3d 88.

¶ 20 Additionally, we disagree with defendant our decision in *People v. Bland*, 2011 IL App (4th) 100624, 961 N.E.2d 953, does not apply to his case. There, the defendant filed *pro se* a “ ‘Motion to Vacate Judgment,’ ” which cited both section 2-1401 of the Procedure Code and the Postconviction Act. *Bland*, 2011 IL App (4th) 100624, ¶ 6. At the circuit court’s urging, the State filed a motion to dismiss, noting it was unclear from defendant’s pleading whether he wished to proceed under the Postconviction Act or section 2-1401 and dismissal was warranted under either provision because the defendant’s pleading was untimely and baseless. *Bland*, 2011 IL App (4th) 100624, ¶ 6. Thereafter, the court held a hearing at which it asked the

defendant to clarify whether he wished to proceed under the Postconviction Act or section 2-1401. *Bland*, 2011 IL App (4th) 100624, ¶ 8. In doing so, the court noted the defendant made reference to the Postconviction Act in the body of his motion. *Bland*, 2011 IL App (4th) 100624, ¶ 8. The defendant stated he was bringing his claim under the Postconviction Act. *Bland*, 2011 IL App (4th) 100624, ¶ 9. On appeal, the defendant argued the court erred by failing to properly admonish him prior to recharacterizing his pleading as a postconviction petition. *Bland*, 2011 IL App (4th) 100624, ¶ 15. This court found the circuit court was not required to admonish the defendant because it did not *sua sponte* recharacterize the defendant's pleading. *Bland*, 2011 IL App (4th) 100624, ¶ 24.

¶ 21 While *Bland* is factually distinguishable from the case before us, the case demonstrates the importance of the circuit court's clarification of the statutory provisions under which the defendant is seeking relief. Moreover, the *Bland* case demonstrates one method a court may utilize in exercising its discretion to manage the cases before it. We disagree with defendant clarification in *Bland* was only warranted because the defendant's claim was cognizable under either statutory provision. The circuit court in *Bland* simply noted the body of the defendant's motion mentioned both statutes. *Bland*, 2011 IL App (4th) 100624, ¶ 8. Here, if defendant truly wanted to proceed under the Postconviction Act, the circuit court was helpful to defendant in characterizing the petition as a hybrid because a review of the body of the petition suggests defendant was only raising a claim under section 2-1401. In paragraph eight, defendant stated the Postconviction Act was currently unavailable to him because his successive postconviction petition was on appeal. In paragraph 14, defendant made reference to providing the State with notice to respond within 30 days. He also did not specifically argue his petition met the cause and prejudice test for filing a successive postconviction petition (see 725 ILCS

5/122-1(f) (West 2016)), which he did in his prior motion for leave to file a successive postconviction petition.

¶ 22 Accordingly, we find the circuit court did not err by requiring defendant, who was *pro se*, to file separate petitions, one under each statutory provision. Defendant's June 2016 petition listed both acts in its title but did not make separate claims under each statutory provision in the body of the petition. Additionally, contrary to the title of the petition, defendant stated in the body of the petition the Postconviction Act was currently unavailable to him, thus creating additional confusion about under what statutory provision defendant sought relief. Moreover, we disagree with defendant the circuit court had the burden of scrutinizing defendant's petition and determining under what statutory provision his claim was cognizable when the petition was unclear about what statutory provision the defendant wished to proceed under.

¶ 23 We also do not find the circuit court interfered with defendant's ability to raise a claim under the Postconviction Act. The court explained to defendant in a letter he needed to file separate petitions. Further, defendant had previously filed both a section 2-1401 petition and a motion for leave to file a successive postconviction petition and thus had knowledge of how to seek relief under both statutory provisions. Defendant chose only to file a petition under section 2-1401. Accordingly, defendant himself chose not to seek relief under the Postconviction Act. Since defendant does not challenge the circuit court's dismissal of his petition under section 2-1401 of the Procedure Code, we do not address the merits of the court's dismissal of defendant's petition.

¶ 24

III. CONCLUSION

¶ 25 For the reasons stated, we affirm the Champaign County circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 26 Affirmed.