

2020 IL App (2d) 180927-U
Nos. 2-18-0927 & 2-18-0928 cons.
Order filed December 21, 2020

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,)	
v.)	Nos. 00-CF-305
)	00-CF-3913
EDWARD S. SLAVIN,)	Honorable
Defendant-Appellant.)	James K. Booras, Judge, Presiding.

JUSTICE BRENNAN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's due process rights were violated when the trial court granted the State's motion to dismiss defendant's petition without giving defendant an opportunity to respond, but the error was harmless.

¶ 2 Defendant, Edward S. Slavin, pled guilty to attempted murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2000)) and solicitation of murder for hire (*id.* § 8/1.2(a)). Defendant thereafter filed successive post-conviction petitions challenging his sentence and alleging ineffective assistance of counsel, each of which was rejected. Subsequently, 17 years after his conviction, defendant 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 2018)), again challenging his sentence and alleging ineffective assistance of counsel. The State moved to dismiss the petition. The trial court granted the State's motion to dismiss the petition without providing defendant with an opportunity to respond to the motion. We conclude that the trial court committed a procedural error, but the error was harmless, and thus we affirm.

¶ 3

I. BACKGROUND

¶ 4 In 2001, defendant simultaneously pled guilty to attempted murder in 00-CF-305 and solicitation of murder for hire in 00-CF-3913. Defendant was sentenced to 6 years' imprisonment with a 25-year firearm enhancement (see 720 ILCS 5/8-4(c)(1)(D) (West 2000)) for the attempt murder, consecutive to 29 years' imprisonment on the solicitation of murder for hire, for a cumulative sentence of 60 years' imprisonment, plus 3 years mandatory supervised release (MSR). Defendant did not file a direct appeal.

¶ 5 In 2005, defendant filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) arguing that the firearm enhancement from his attempted murder conviction was void *ab initio* because the statute violated the Illinois Constitution of 1970, citing *People v. Morgan*, 203 Ill. 2d 470, 491 (2003) (holding that mandatory firearm-enhancement for first-degree murder conviction violated the proportionate penalties clause), *overruled by People v. Sharpe*, 216 Ill. 2d 481, 518 (2005) (overruling *Morgan's* proportionate penalties analysis). The trial court dismissed the petition on the basis that *Morgan* had been overruled by *Sharpe*. This court affirmed. *People v. Slavin*, No. 2-07-0261 (2008) (unpublished order under Illinois Supreme Court Rule 23).

¶ 6 In 2008, defendant sought leave to file a successive petition under the Act alleging that he was not advised that he would have to serve his term of MSR after being released from his 60-year

term of imprisonment. The trial court denied leave to file on the basis that defendant failed to show prejudice because he was advised during the sentencing hearing that a term of MSR would apply to each charge. This court affirmed. *People v. Slavin*, No. 2-08-1129 (2010) (unpublished order under Illinois Supreme Court Rule 23).

¶ 7 In 2016, defendant sought leave to file a third petition under the Act arguing that he did not waive his right to trial knowingly, his guilty plea was made under duress, and his cumulative sentence was unconstitutional. The trial court denied leave to file on the basis that defendant neither professed actual innocence nor demonstrated cause for his failure to bring the claims in his initial post-conviction petition. This court affirmed. *People v. Slavin*, Nos. 2-16-0675 & 2-16-0676 (2018) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 8 On June 6, 2018, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure in both 00-CF-305 and 00-CF-3913. 735 ILCS 5/2-1401 (West 2018). In his petition, defendant alleged ineffective assistance of counsel due to defense counsel's failure: (1) to fully inform defendant of the consequences of a guilty plea and of his rights to withdraw his guilty plea and to file a direct appeal; (2) to file a direct appeal; and (3) to initiate a fitness hearing. Defendant also made the following additional claims: (1) “[a]ttempted murder with [the 25-year-to-natural-life enhancement] violates the proportionate penalties clause of the Illinois constitution, article 1 section 2, in that an armed violence conviction or battery with a firearm conviction carries a lesser degree of penalty with the same identical elements”; and (2) sections 730 ILCS 5/5-8-1(d) (West 2000) and 730 ILCS 5/3-3-3(c) (West 2000), imposing mandatory supervised release, “and any other relevant statute providing for after sentencing custodial care” are “facially unconstitutional and void ab-initio.”

¶ 9 On June 22, 2018, the trial court held a status hearing at which the State tendered a motion to dismiss defendant's petition. Defendant was not present. In its motion, the State argued that the section 2-1401 petition should be dismissed because (1) the petition was filed more than two years after entry of the judgment sought to be vacated, (2) defendant's claim that the prior judgment is void was already denied, (3) defendant's successive claim that the prior judgment is void is barred by *res judicata*, and (4) defendant's failure to support his petition with an affidavit or other appropriate materials violated the pleading requirements of section 2-1401, rendering his petition meritless.

¶ 10 At a status hearing on defendant's section 2-1401 petition, the State asked the trial court whether it should "writ the defendant in." The court replied: "This is not a situation where you have to writ the defendant in. It's a civil action."

¶ 11 On July 13, 2018, the trial court held a hearing on the State's motion to dismiss defendant's section 2-1401 petition. Defendant was not present. Although the State indicated that it was prepared for a hearing on the motion, the trial court responded as follows: "Based on your motion and the independent assessment of the case and research, I will for the reasons stated in my order deny the defendant's petition." The trial court entered an order denying defendant's section 2-1401 petition. In its order, the court noted that a section 2-1401 petition must be filed within two years after entry of the challenged judgment unless the judgment is found to be void because (1) the court that entered it lacked jurisdiction or (2) the statute supporting the judgment was unconstitutional on its face. The court then stated that defendant was not entitled to relief because he did not allege that the prior judgment was void due to a lack of jurisdiction or a facially unconstitutional statute.

¶ 12 Defendant timely appealed and moved to consolidate his appeals. We granted defendant's motion and consolidated the appeals from cases 00-CF-305 and 00-CF-3913.

¶ 13 II. ANALYSIS

¶ 14 At issue in this appeal is whether the dismissal of defendant's section 2-1401 petition pursuant to the State's motion to dismiss was proper where defendant was not given notice and the opportunity to respond. Specifically, we must decide whether the trial court's disposition of defendant's petition violated his procedural due process rights. If we determine that dismissal was improper, we must further decide whether remand is required.

¶ 15 We review procedural due process claims *de novo*. *People v. Stoecker*, 2020 IL 124807, ¶ 17. The United States and Illinois Constitutions guarantee individuals the meaningful opportunity to respond in both time and manner. *Id.*; see also U.S. Const., amend. XIV, § 1; Ill. Const. 1970, art. I, § 2. In the context of a section 2-1401 petition, this guarantee requires that a petitioner be given notice of a motion to dismiss and an opportunity to respond before the court can rule on the motion. *Stoecker*, 2020 IL 124807, ¶ 22. Failure to provide notice is a violation of due process. *Id.* ¶¶ 22-23.

¶ 16 Where a procedural error has occurred, automatic reversal is required only if the error is "structural," meaning it undermines the fairness of the proceedings or erodes the integrity of the judicial process. *Id.* Our supreme court recently held that a trial court's denial of a petitioner's "reasonable opportunity to respond to a dispositive motion in a collateral civil proceeding and lack of notice before it was dismissed as a matter of law" did not qualify as a structural error. *Id.* ¶ 25 (concluding trial court's dismissal of a section 2-1401 petition pursuant to State's motion to dismiss four days after it was filed and served, without giving petitioner notice of the proceeding at which the court ruled on the motion, did not constitute structural error warranting automatic

reversal). Accordingly, a court's failure to provide a petitioner with the reasonable opportunity to respond to a motion to dismiss is subject to harmless error review. *Id.* ¶ 23.

¶ 17 Thus, while we conclude that the trial court's dismissal of defendant's petition pursuant to the State's motion, without providing defendant notice or the opportunity to respond, was a violation of procedural due process, we must consider whether this non-structural error was otherwise harmless.

¶ 18 An error is harmless if a petitioner's claims were procedurally defaulted but no additional proceedings would enable the petitioner to prevail on his claim for relief. *Id.* ¶ 26. In such a circumstance, reversal is inappropriate. *Id.* ¶ 33. To determine whether defendant could prevail with additional proceedings, we necessarily consider his claim for relief.

¶ 19 Defendant filed a section 2-1401 petition, which must be brought within two years of entry of the judgment sought to be reversed. 735 ILCS 5/2-1401(c) (West 2018). An exception exists when the petition challenges a void judgment. See *id.* § 2-1401(f); *Stoecker*, 2020 IL 124807, ¶ 28. A judgment will be considered void if (1) it was entered by a court lacking personal or subject-matter jurisdiction or (2) it was based on a facially unconstitutional statute. *Id.* *Stoecker* guides our analysis.

¶ 20 Here, defendant's brief, filed *pro se*, focuses on his trial counsel's failure to initiate a fitness hearing despite defendant's contentions that, during the period between his arrest and his guilty plea, he was diagnosed with acute psychosis, he was heavily medicated, and he was placed on suicide watch. To the extent defendant argues that trial counsel was ineffective for, *inter alia*, failing to initiate a fitness hearing prior to defendant's guilty plea, those claims are barred as untimely by section 2-1401 as a matter of law.

¶ 21 Defendant further contends that the firearms-enhancement and the imposition of MSR were

unconstitutional. The trial court concluded that neither of these claims alleged that the judgment was facially unconstitutional and that these claims were thus also time-barred.

¶ 22 Moreover, even if we were to construe defendant's claims as alleging that his sentence, including the firearms enhancement and MSR term, was facially unconstitutional, defendant would be unable to prevail on these claims in his section 2-1401 petition because defendant has already litigated those issues. Under the doctrine of *res judicata*, a defendant is barred from raising a claim brought in a prior suit when (1) a court of competent jurisdiction rendered a final judgment on the merits, (2) the suit was between the same parties, and (3) the suit involved the same cause of action. *People v. Kines*, 2015 IL App (2d) 140518, ¶ 21. *Res judicata* bars claims that could have been decided as well as those actually decided. *Id.* ¶ 20.

¶ 23 In his 2005 post-conviction petition, defendant argued that the firearm-enhancement was unconstitutional and void *ab initio*. The trial court dismissed the petition on the merits and this court affirmed. *People v. Slavin*, No. 2-07-0261 (2008) (unpublished order under Illinois Supreme Court Rule 23).

¶ 24 Notably, defendant waived his MSR argument by not raising the issue in that petition. See *People v. Fields*, 2020 IL App (1st) 151735, ¶ 31. Regardless, in 2008, defendant sought leave to file a successive post-conviction petition challenging his term of MSR. The trial court denied leave to file on the basis that defendant failed to show prejudice and this court affirmed. *People v. Slavin*, No. 2-08-1129 (2010) (unpublished order under Illinois Supreme Court Rule 23). Although defendant did not argue that the term of MSR imposed was void, defendant certainly could have done so at that time. Thus, defendant's claims pertaining to his sentence are barred by *res judicata*.

¶ 25 Because defendant's claims alleging ineffective assistance of counsel are time-barred by section 2-1401 and his claims challenging his sentence are barred by *res judicata*, we conclude

that no further proceedings would enable defendant to prevail on his claims. Thus, the trial court's procedural error was harmless.

¶ 26

III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 28 Affirmed.