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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Respondent-Appellee,)	
)	
v.)	No. 03-CF-1688
)	
JERMAINE SMITH,)	Honorable
)	Linda Abrahamson,
Petitioner-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Where inmate requested counsel to assist with his section 2-1401 petition for relief from sentencing judgment, the trial court erred in denying request on ground that there is no statutory basis for the appointment of counsel; the trial court has the discretion to appoint counsel to represent indigent criminal defendants in civil actions. Order denying the appointment of counsel vacated; remanded for further proceedings.

¶ 2 Petitioner, Jermaine Smith, appeals from the denial of his petition for relief from judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2016). Petitioner raises a single issue on appeal: whether the trial court improperly denied his request for the appointment of counsel solely because the request lacked a “statutory

basis.” For the reasons that follow, we vacate the trial court’s order denying the appointment of counsel and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4 Following a bench trial, petitioner was convicted of one count of murder (720 ILCS 5/9-1(a)(1) (West 2002)) and, in 2006, sentenced to a term of 50 years in prison. Because the trial court found that petitioner had personally discharged a firearm, proximately causing his victim’s death, the sentence included the mandatory 25-year add-on under 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2003). Petitioner filed a motion to reconsider the sentence, arguing that the trial court incorrectly weighed factors in aggravation and mitigation. The trial court denied the motion.

¶ 5 Petitioner appealed his conviction to this court, arguing that the trial court erred by not suppressing his statements to the police. We rejected petitioner’s argument and affirmed the judgment of the trial court. *People v. Smith*, 382 Ill.App.3d 1216 (2008) (table) (unpublished order under Supreme Court Rule 23).

¶ 6 On March 14, 2016, petitioner filed his *pro se* section 2-1401 petition for relief from judgment. Petitioner alleged, *Inter alia*, that the underlying sentencing judgment was void on constitutional grounds. He also filed a motion requesting that the trial court appoint counsel to represent him on the petition. Following briefing, the trial court entered a written order denying the petition and specifically rejecting petitioner’s argument that section 5-8-1(a)(1)(d)(iii) was unconstitutional at the time he committed his offense. As for petitioner’s request for counsel, the court wrote:

“1. A request for relief pursuant to 735 ILCS 5/2-1401 is civil in nature, although its remedial powers extend to criminal cases. *People v. Harvey*, 196 Ill. 2d 444 (2001).

2. As such, there is no statutory basis for the appointment of counsel. *People v. Gains*, 335 Ill. App. 3d 292 (2nd Dist. 2002).”

¶ 7 Petitioner filed this appeal, challenging only the trial court’s ruling on his request for counsel.

¶ 8 II. ANALYSIS

¶ 9 Petitioner contends that the trial court’s statement “there is no statutory basis for the appointment of counsel” shows it failed to realize it had discretion to grant petitioner’s request for counsel, and the court’s failure to exercise its discretion requires reversal. The State responds that the trial court simply made a correct statement of the law; any error in the court’s failure to exercise its discretion was not structural and, therefore, harmless; and the lack of merit in the petition supports the denial of petitioner’s request for appointed counsel.

¶ 10 Section 2–1401 of the Code of Civil Procedure provides a mechanism for the vacatur of a final judgment older than 30 days. 735 ILCS 5/1–1401(a) (West 2016); *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 9. Ordinarily, the petition must be filed no later than two years after the entry of the order or judgment. 735 ILCS 5/2–1401(c) (West 2016); *Hubbard*, 2012 IL App (2d) 101158, ¶ 13. The two-year limitations period does not apply to petitions under section 2–1401(f), however, which allows for relief from void orders or judgments. 735 ILCS 5/2–1401(f) (West 2016); *Hubbard*, 2012 IL App (2d) 101158, ¶ 13. When a section 2–1401 petition is based on a claim that a judgment is void and no facts are in dispute, our review of the court’s disposition of the petition is *de novo*. *Hubbard*, 2012 IL App (2d) 101158, ¶ 14).

¶ 11 There is no explicit right to the assistance of counsel in connection with a section 2–1401 petition. See *People v. Pinkonsly*, 207 Ill. 2d 555, 568 (2003) (section 2–1401 of the Code does not specify any level of assistance by counsel). However, the Illinois Supreme Court determined

nearly 40 years ago that the trial court has the discretion to appoint counsel to represent indigent criminal defendants in civil actions. *Tedder v. Fairman*, 92 Ill. 2d 216, 226-27 (1982) (the trial court did not abuse its discretion in appointing counsel to assist *pro se* defendants in amending their *mandamus* petitions). Since *Tedder*, numerous Illinois courts, including the supreme court, have addressed the standard of performance for counsel appointed in section 2-1401 proceedings. See, e.g., *Pinkonsly*, 207 Ill. 2d at 560-68; *People v. Walker*, 2018 IL App (3d) 150527, ¶¶ 24-28; *People v. Welch*, 392 Ill. App. 3d 948, 952 (2009). Our supreme court has held: “There is error when a trial court refuses to exercise its discretion in the erroneous belief that it has no discretion as to the question presented.” *People v. Queen*, 56 Ill. 2d 560, 565 (1974). See also *People v. Partee*, 268 Ill. App. 3d 857, 869 (1994) (“where a circuit court erroneously believes that it has no discretion in a matter, its ruling on a matter requiring the exercise of discretion must be reversed on appeal where it palpably fails to exercise that discretion”).

¶ 12 In *Queen*, the jury, while deliberating, requested a review of the defendant’s testimony. 56 Ill. 2d at 565. The trial court sent back a note stating, “You must decide on the basis of the testimony heard in the courtroom. I cannot have any testimony of any witnesses read to you.” *Id.* Noting that whether to allow a jury’s request for a review of testimony is within the trial court’s discretion, the supreme court interpreted the trial court’s reply to the jury as a statement that it did not have discretion to consider the jury’s request. *Id.* The supreme court reversed the judgments of the appellate and circuit courts and remanded for a new trial. *Id.* at 566.

¶ 13 In *Partee*, the petitioner, prior to the dismissal of his post-conviction petition, requested the appointment of counsel other than the public defender. The trial court denied his request, stating that it had authority only to appoint the public defender. 268 Ill. App. 3d at 862-63. The

appellate court noted that under the Post-Conviction Hearing Act, denying or allowing petitioner's motion to appoint counsel other than the public defender was within the trial court's discretion; the record, however, indicated that the court "failed to exercise that discretion, apparently believing that [it] lacked any option in the matter." *Id.* at 868-69. Consequently, the appellate court reversed the trial court's denial of petitioner's motion.

¶ 14 Here, the first two sentences of the trial court's four-page order pertain to petitioner's request for the appointment of counsel. The first acknowledges the applicability of section 2-1401 petitions to criminal cases. The second accurately states that section 2-1401 provides no statutory basis for the appointment of counsel. The request for appointed counsel is mentioned a final time in the concluding paragraph of the ruling, wherein it is denied, along with the section 2-1401 petition.

¶ 15 We cannot assume from this ruling that the trial court understood it had discretionary authority to appoint counsel despite there being no statutory basis for doing so. Rather, we conclude from the court's singular declaration regarding the lack of statutory authority that its inquiry ended there. In other words, the court apparently denied petitioner's request for appointed counsel because it erroneously believed it had no discretion in the matter.

¶ 16 The State asserts that any error in the court's failure to exercise its discretion was harmless because it was "not structural," citing *People v. Averett*, 237 Ill. 2d 1 (2010). In *Averett*, the supreme court addressed structural error in the context of a criminal trial, not a post-conviction petition for relief from judgment. Furthermore, the court listed the denial of counsel as one of the limited examples of structural error requiring automatic reversal. *Averett*, 237 Ill. 2d at 12. Thus, even if we were to determine that the *Averett* court's structural error analysis could be applied in this case, it would not support the State's argument.

¶ 17 The State argues that this case is analogous to *People v. Pierce*, 56 Ill. 2d 361 (1974). In *Pierce*, the supreme court adopted the view that “it is within the discretion of the trial court to allow or refuse the request for the review of testimony.” 56 Ill. 2d at 364. During deliberations, the jury asked to review the testimony of the prosecuting witness and the arresting officer. After discussing the matter with both counsel and obtaining their agreement, the trial court replied to the jury: “I cannot instruct further. You must continue with your deliberations.” *Id.* at 363. Under the circumstances, the supreme court could not say that discretion was abused by the court’s denial of the jury’s request. The court went on to note, however, that the testimony of both witnesses was “unequivocally incriminating and damaging to the defendant.” *Id.* at 364. Thus, “[i]f it could be said on any ground that the trial court should not have refused the jury’s request, any consequent error was a species of harmless error, error which favored the defendant and of which he cannot complain.” *Id.*

¶ 18 *Pierce*’s unique facts and twofold holding clearly distinguish it from the present case. Here, it cannot be argued that the trial court’s denial of petitioner’s request for counsel was not an abuse of discretion because the decision was reached with petitioner’s agreement. Nor can it be said that refusing petitioner’s request was harmless error in that it favored petitioner. Accordingly, we find the State’s reliance on *Pierce* to be misplaced.

¶ 19 Finally, the State appears to argue that the denial of petitioner’s request for appointed counsel could not be an abuse of discretion in light of the trial court’s findings on the merits of the petition. This argument is beyond our purview. The only issue before us is whether the trial court failed to recognize its discretionary authority to decide petitioner’s motion for the appointment of counsel. As did the court in *Partee*, “we specifically make no finding as to whether the circuit court would have abused its discretion if it had exercised it in denying

petitioner's motion." *Partee*, 268 Ill. App. 3d at 869. See also *Tedder v. Fairman*, 92 Ill. 2d 216, 227 (1982) ("We refrain from rendering a judgment on the merits of the unamended petitions for the writs of *mandamus*."). Accordingly, we vacate the court's denial of petitioner's request for appointed counsel and remand for further proceedings. See *Green v. Yellow Cab Co.*, 221 Ill. App. 3d 908, 915 (1991) ("Where a trial court erroneously believes it has no discretion or authority to perform some act, the appellate court should not preempt the exercise of such discretion, but should remand the cause back to the trial court.").

¶ 20

III. CONCLUSION

¶ 21 For the reasons stated, we vacate the circuit court's denial of petitioner's motion for the appointment of counsel and remand for further proceedings consistent with this disposition.

¶ 22 Vacated in part and remanded.