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2019 IL App (3d) 170046-U

Order filed August 8, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois
Plaintiff-Appellee,)	
v.)	Appeal No. 3-17-0046
JESSIE L. BREWER,)	Circuit No. 06-CF-1107
Defendant-Appellant.)	Honorable Frank R. Fuhr Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Schmidt and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* Although trial court erred when it *sua sponte* dismissed the defendant's petition for relief from judgment, the error was harmless because the issues raised by the defendant were *res judicata*.

¶ 2 Defendant Jessie Brewer filed a petition for relief from a 2008 conviction, alleging the trial court violated his right to a speedy trial. The trial court *sua sponte* dismissed the petition, finding it was untimely. Brewer appealed the dismissal. We affirm.

¶ 3 **FACTS**

¶ 4 Defendant Jessie Brewer was arrested and charged with deceptive practices in June 2006 for an unrelated case in Rock Island County. He made a speedy trial demand and was released on bond the following day. He did not request a speedy trial after his release on bond. In November 2006, Brewer was again arrested in Rock Island County, this time charged with three counts of aggravated battery of a child. 720 ILCS 5/12-4.3(a) (West 2006). He did not post bond on the battery charges and remained in custody during the pendency of the proceedings. There is no indication that Brewer withdrew or revoked his bond in the deceptive practices case after he was placed in custody on the aggravated battery charges.

¶ 5 On December 12, 2006, the case was for set for a trial on January 29, 2007. On January 25, the case was continued to April 9, 2007, with the delay attributed to Brewer. A pretrial hearing took place on April 5, 2007, and the State requested a continuance to May 21, 2007. The request was granted over Brewer's objection and speedy trial concerns, with the delay attributed to the State. Another pretrial hearing took place on May 18, 2007, at which time the State announced it was electing to proceed on the deceptive practices case first. Brewer objected to delaying the trial on the aggravated battery charges, stating he was ready for trial on them. The trial court allowed the State to proceed on the deceptive practices case over Brewer's objection. The court determined that the State would satisfy the speedy trial term by prosecuting either the deceptive practices case or the aggravated battery case within the 120-day speedy trial term. Brewer pleaded guilty to deceptive practices on May 22, 2007.

¶ 6 In June 2007, Brewer filed a motion to dismiss the aggravated battery charges, alleging a speedy trial violation. According to Brewer's calculations, he remained in presentence custody for more than 120 days. He submitted speedy trial calculations showing 138, or alternatively, 134 days, between when he was arrested and brought to trial on the aggravated battery charges.

A hearing took place on Brewer's motion to dismiss. The trial court again determined that section 103-5(e) of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/103-5(e) (West 2006)) applied, providing the State an additional 160 days from when Brewer pleaded guilty in the deceptive practices case to try him on the aggravated battery charges.

¶ 7 A jury trial took place. The jury found Brewer guilty of one count of aggravated battery of a child and not guilty on the remaining two counts. Brewer filed a posttrial motion alleging the trial court erred when it denied his motion to dismiss based on a speedy trial violation. The trial court denied Brewer's motion and sentenced him to a 20-year term of imprisonment. Brewer appealed his sentence and this court affirmed. *People v. Brewer*, No. 3-08-0352 (2009) (unpublished order under Supreme Court Rule 23).

¶ 8 In November 2010, Brewer filed a *pro se* postconviction petition alleging his right to a speedy trial was violated because the State did not try him on the aggravated battery charges within 120 days of his arrest. The trial court summarily dismissed the petition as frivolous and patently without merit. Brewer appealed, arguing that he presented the gist of a constitutional claim of ineffective assistance of appellate counsel. *People v. Brewer*, 2012 IL App (3d) 110137-U, ¶ 12. This court found Brewer forfeited the issue of ineffective assistance of appellate counsel by first raising it on appeal and affirmed the summary dismissal. *Id.* ¶ 16. We noted Brewer did not present for this court's consideration the alleged speedy trial violation that he argued in his postconviction petition. *Id.* ¶ 11 n.1.

¶ 9 In August 2016, Brewer filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2016)). He argued that his speedy trial right was violated and that the two-year statute of limitations applicable to section 2-1401 petitions did not apply. In December 2016, the trial court dismissed Brewer's section 2-

1401 petition *sua sponte* as untimely. The court declined to convert the petition into a successive postconviction petition because it was not a claim of actual innocence or newly discovered evidence. Brewer timely appealed.

¶ 10

ANALYSIS

¶ 11

The issue on appeal is whether the trial court erred when it *sua sponte* dismissed Brewer's section 2-1401 petition because it was untimely. Brewer argues that the trial court should not have dismissed his petition because the judgment against him was void and the two-year statute of limitations for a section 2-1401 petition does not apply. According to Brewer, he suffered a violation of his right to a speedy trial when the trial court allowed the State to elect to proceed on the deceptive practices case first, extending his speedy trial term on the aggravated battery charges past 120 days, and resulting in a void conviction. He further submits that as a *Collins*-type petition, the limitations and diligence requirements of section 2-1401 do not apply.

¶ 12

A section 2-1401 petition must be brought more than 30 days but less than two years after the challenged judgment. 735 ILCS 5/2-1401(a), (c) (West 2016). The trial court may not *sua sponte* dismiss a section 2-1401 petition on limitations grounds. *People v. Malloy*, 374 Ill. App. 3d 820, 823 (2007). However, where a section 2-1401 petition lacks merit and the lack cannot be cured by amendment, an erroneous dismissal results in harmless error. *Id.* at 824. The prohibition is because the limitations period is not a jurisdictional prerequisite but an affirmative defense. *People v. Berrios*, 387 Ill. App. 3d 1061, 1063 (2009). Expiration of the two-year limitations period is an affirmative defense that must be raised or is considered waived. *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003).

¶ 13

The speedy trial statute provides that a defendant in custody must be tried within 120 days after arrest unless the delay is caused by the defendant. 725 ILCS 5/103-5(a) (West 2016).

A defendant out on bail must be tried within 160 days from the date he demands trial, excepting periods of delay attributable to the defendant. 725 ILCS 5/103-5(b) (West 2016). Any delay occasioned by the defendant temporarily suspends the speedy trial clock. 725 ILCS 5/103-5(f) (West 2016). When a defendant is in simultaneous custody on more than one charge in the same county, or simultaneously demands trial on more than one charge pending in the same county, the State must try him on at least one charge within the applicable speedy trial term under (a) or (b) and the remaining charges within 160 days of judgment on the first charge. 725 ILCS 5/103-5(e) (West 2016).

¶ 14 Brewer challenges the trial court’s untimeliness finding, arguing that he suffered a speedy trial violation which he submits voided his conviction and allowed him to challenge the void judgment at any time, including outside the two-year limitations period for a section 2-1401 petition. This argument fails. Brewer did not raise a voidness challenge on direct appeal or in his postconviction petition, so the issue is forfeited. *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002) (issues that could have been raised in earlier proceedings but were not are forfeited).

¶ 15 Both Brewer and the State contend that the trial court erred when it *sua sponte* dismissed Brewer’s section 2-1401 petition on untimeliness grounds. We agree. The State maintains that this court should still affirm the dismissal in the interests of judicial economy. The State also submits that affirmance is appropriate because the speedy trial issue is *res judicata*, making the petition without merit and the trial court’s error harmless. In response, Brewer asserts that his section 2-1401 petition is akin to a *Collins* petition and is not subject to the two-year limitations period, thus negating the court’s basis for dismissal.

¶ 16 A section 2-1401 petition brings to the attention of the court facts that do not appear on the record but if the court had known them, it would not have entered judgment. *People v.*

Bramlett, 347 Ill. App. 3d 468, 473 (2004). Generally, a section 2-1401 petitioner must set forth specific factual allegations supporting: (1) a meritorious claim or defense exists, (2) due diligence in presenting the claim or defense in the original action, and (3) due diligence in filing the section 2-1401 petition. *Id.* (citing *In re Estate of Barth*, 339 Ill. App. 3d 651, 662 (2003)). A *Collins* petition is one of three types of section 2-1401 petitions recognized in this state. *Aurora Loan Services, LLC v. Pajor*, 2012 IL App (2d) 110899, ¶ 15. It allows the petitioner relief from errors of law apparent on the record's face. *Id.* The test is whether the "trial court's ruling was legally inconsistent with the undisputed facts." *Id.* ¶ 21. We review *de novo* a trial court's dismissal of a section 2-1401 petition. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 17 The issue of a speedy trial violation is one that can be determined on the face of the record as it involves the factual calculation of the amount of time a defendant spent in custody prior to his trial or other events. The issue of whether Brewer suffered a speedy trial violation could have been raised and argued on direct appeal or on appeal of the dismissal of his postconviction petition. He based his postconviction petition on a speedy trial violation argument but did not raise it on appeal of the dismissal of the petition, arguing ineffective assistance of appellate counsel for failing to raise the issue instead. See *People v. Brewer*, 2012 IL App (3d) 110137-U. We affirmed the summary dismissal of Brewer's postconviction petition. *Id.* ¶ 13. The issue of a speedy trial violation is thus *res judicata*. *People v. Davis*, 2014 IL 115595, ¶ 13 (*res judicata* bars issues that were raised or could have been raised in earlier proceedings). Accordingly, Brewer's claim regarding his speedy trial term cannot provide for the basis for a viable section 2-1401 petition and any error resulting from the trial court's determination regarding the violation was harmless.

¶ 18

CONCLUSION

¶ 19 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 20 Affirmed.