2021 IL App (2d) 190969-U
No. 2-19-0969
Order filed December 2, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-1440
JOHN R. ZEMATER, JR.,	)	Honorable William J. Parkhurst,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: There was no merit to defendant's argument that the trial court declined to appoint counsel on defendant's section 2-1401 petition because the court mistakenly believed that it had no discretionary authority to appoint counsel in such cases. The court's comment that it lacked *statutory* authority to appoint counsel was not an affirmative showing that it believed it also lacked *nonstatutory, discretionary* authority to appoint counsel. Even if the court so believed, the error was harmless, as appointed counsel would have been unable to amend the petition to state a viable claim.

¶ 2 Defendant, John R. Zemater, Jr., appeals the trial court's order dismissing his petition brought under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(a) (West 2018)). He contends that the trial court erred in denying his request for appointed counsel by failing

to recognize that it had discretion to appoint counsel despite the lack of statutory authority for such an appointment. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2012, defendant was charged with deceptive practices (720 ILCS 5/17-1(B)(1) (West 2010)) in that, with the intent to defraud, he delivered a check for $5000 payable to himself to Bank of America, knowing that the check would not be paid. On December 27, 2012, defendant was accepted into the Second Chance pretrial diversion program. Defendant's successful completion of the four-year program would result in the charge being dismissed without a felony conviction. Per the diversion order, the parties agreed that defendant owed $5052 in restitution to Bank of America. Defendant signed a diversion agreement that required, *inter alia*, the payment of restitution and the performance of 200 hours of community service.

¶ 5 On June 13, 2017, the case came up for status on defendant's completion of the diversion program. The prosecutor informed the court that the parties had agreed that the State would dismiss the charges and send the remaining restitution balance to collection. The court asked how restitution could be ordered with the case being dismissed. After a recess, the prosecutor presented a signed agreement for defendant to pay the remaining restitution. Defendant assured the court that he had signed the agreement freely and voluntarily. The court thus dismissed the charge and declared the case closed. A separate order stated that, by agreement of the parties, the remaining restitution balance of $2280 was being sent to collection and that defendant agreed to pay that balance as well as any fees associated with collection.

¶ 6 Two years later, defendant filed a petition pursuant to section 2-1401 of the Code. In it, he alleged that he had agreed to the June 13, 2017, restitution order on the advice of his public defender. Defendant had since discovered, however, that restitution cannot be imposed on a

dismissed charge and that, under contract law, the agreement was the result of a mutual mistake of fact. Defendant alleged that he would never have agreed to pay restitution had he known that the State could not require it.

¶ 7 Defendant requested the appointment of counsel other than the public defender. The trial court appointed Ron Haskell as counsel. However, one month later, the court vacated the appointment, noting that there is no statutory basis for appointing counsel on a petition for relief from judgment. The court gave the State 30 days to respond to the petition. Defendant filed motions to stay the collection of restitution and to reconsider Haskell's discharge.

¶ 8 One month later, the case came up for hearing on defendant's motions. The court noted that the State had not filed a response to the section 2-1401 petition and that the court was *sua sponte* dismissing the petition. Defendant protested that he had filed a motion to reconsider the discharge of counsel, but the court reiterated that it was dismissing the petition in a final order. When petitioner sought a ruling on his motion to reconsider, the court denied it. Defendant timely appealed.

¶ 9 II. ANALYSIS

¶ 10 Defendant contends that the trial court erred by denying his request to reappoint private counsel. While conceding that there is no statutory basis for appointing counsel on a section 2-1401 petition, defendant argues that the court failed to recognize that it nonetheless had the discretion to appoint counsel. We disagree with defendant's assessment of what the court knew.

¶ 11 A defendant collaterally attacking a judgment has no constitutional right to counsel. *People v. Stoecker*, 2020 IL 124807, ¶ 35. Additionally, a defendant has no express statutory right to counsel on a section 2-1401 petition. *Id.* ¶ 36. However, a court may exercise its discretion to appoint counsel in such a case. *Id.*

¶ 12 The trial court is presumed to know the law and apply it correctly unless the record affirmatively demonstrates otherwise. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 72. Thus, we must presume that the trial court knew the foregoing principles. In *People v. Sweet*, 2017 IL App (3d) 140434, the court considered a nearly identical situation. The defendant filed a section 2-1401 petition challenging his conviction of first-degree murder and asked that counsel be appointed. *Id.* ¶¶ 27-28. The trial court denied the request, noting that there was no statutory authority for the appointment of counsel on a section 2-1401 petition. *Id.* ¶ 28. On appeal, defendant made the same argument that defendant makes here: that the trial court failed to recognize that it had the discretion to appoint counsel anyway. The Third District rejected this argument. Citing *In re Jonathon C.B.*, the court held that the trial court's failure specifically to mention its discretionary authority was not an "affirmative indication" that it did not know that such authority existed. *Id.* ¶ 45. Rather, the trial court's reference to a lack of statutory authority meant no more than what it said: no statutory authority existed. *Id.*

¶ 13 Here, too, the trial court's reference to a lack of statutory authority does not mean that it was unaware of its discretionary authority. To hold otherwise would turn on its head the presumption that the trial court knows the law. Moreover, the court's *sua sponte* dismissal of the petition demonstrated the court's belief that the petition lacked even arguable merit. Thus, we can infer that the court saw no need to exercise its discretion in favor of appointing counsel.

¶ 14 Defendant cites *People v. Dalton*, 2021 IL App (3d) 180093-U, but it is inapplicable. In addition to being merely persuasive authority, *Dalton* is distinguishable. There, the trial court was twice on the verge of appointing counsel for the defendant, but each time the prosecutor interrupted to remind the court that it lacked statutory authority to do so. *Id.* ¶¶ 8-10. Thus, the trial court apparently was inclined to appoint counsel but was dissuaded by the prosecutor's insistence that

the court lacked the authority. Unlike here, it was possible to infer that the trial court in *Dalton* would have exercised its discretionary authority to appoint counsel for the defendant had the court been aware of it.

¶ 15 After the briefs were filed in this case, we decided *People v. Bernard*, 2021 IL App (2d) 181055, where we held that the trial court erred by not recognizing that it had discretion to appoint counsel to represent the defendant on his section 2-1401 petition. However, that case is also distinguishable.

¶ 16 In *Bernard*, the defendant filed a section 2-1401 petition claiming he was actually innocent and requested counsel. The trial court stated that the defendant was not entitled to appointed counsel, because it was a civil matter. However, later the court decided to recharacterize the petition as a postconviction petition, to allow appointing counsel. When the defendant moved to reconsider the recharacterization and proceed *pro se*, the court granted the motions, remarking that the defendant was not entitled to counsel on a section 2-1401 petition anyway. *Id.* ¶ 12. The defendant filed an amended petition, which included the affidavit of a witness who averred that he, and not the defendant, committed the crime for which the defendant was convicted. Id. ¶ 12-13.

¶ 17 The court held an evidentiary hearing. The witness testified that he committed the crime, but the defendant attempted to prevent the State from cross-examining him. The defendant began a profane tirade and ultimately was removed from the courtroom. The court struck the witness's testimony and dismissed the petition. *Id.* ¶ 19.

¶ 18 The defendant appealed. The State conceded that the trial court erred by failing to recognize that it had discretion to appoint counsel for the defendant on his section 2-1401 petition, but the State argued that the error was harmless. We accepted the concession, noting that the court had

twice stated that it had no authority to appoint counsel. *Id.* ¶ 27. However, we disagreed that the error was harmless. We "[could] not determine whether appointed counsel would have amended the section 2-1401 petition and whether any such amendments might have changed the outcome of the proceeding." *Id.* ¶ 32. We also noted that counsel could have more effectively examined the witness and, at the very least, could have protected the defendant's interests after he was removed from the courtroom. *Id.*

¶ 19 Here, in contrast, the trial court never specifically stated that it lacked the authority to appoint counsel, so we must presume that it knew the law and applied it correctly. Even if the court did err, any error was harmless. The court properly held that the petition lacked even arguable merit. Defendant does not argue otherwise, and we can conceive of no way appointed counsel could have amended the petition to state a viable claim.

¶ 20 III. CONCLUSION

¶ 21 We affirm the judgment of the circuit court of Kane County.

¶ 22 Affirmed.