

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of De Kalb County.
)	
Plaintiff-Appellee,)	
)	No. 10-CF-306
v.)	
)	Honorable
ERIC E. BERNARD,)	William P. Brady and
)	Robbin J. Stuckert,
Defendant-Appellant.)	Judges, Presiding.

JUSTICE McLAREN delivered the judgment of the court, with opinion.
Justices Zenoff and Hudson concurred in the judgment and opinion.

OPINION

¶ 1 Defendant, Eric E. Bernard, appeals from the judgment of the circuit court of De Kalb County, denying his *pro se* petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). He contends that the court abused its discretion in failing to recognize that it had the discretionary authority to appoint counsel to represent him in a section 2-1401 proceeding. Because the court's failure to recognize its discretionary authority was not harmless, we reverse and remand so that the court can properly exercise its discretion whether to appoint counsel.

¶ 2

I. BACKGROUND

¶ 3 After a jury trial, defendant was convicted of armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)). Because the jury also found that he was armed with a firearm during the commission of the offense, his 55-year, extended-term prison sentence included a mandatory 15-year enhancement (see 720 ILCS 5/18-2(b) (West 2010)). Defendant filed a direct appeal, and we affirmed. See *People v. Bernard*, 2018 IL App (2d) 140411-U.

¶ 4 On July 20, 2015, defendant filed a *pro se* petition pursuant to section 2-1401 of the Code. In that petition, defendant asserted a claim of actual innocence. In support of the petition, defendant attached the affidavit of Jose Paredes, who averred that someone other than defendant committed the armed robbery.

¶ 5 The State filed a response to the petition, claiming that Paredes had recanted his affidavit. The State sought dismissal of the petition or an evidentiary hearing.

¶ 6 On August 12, 2016, defendant filed a *pro se* supplemental petition. He alleged that he had had a falling out with Paredes, after which Paredes said that he would not come forward with the truth. Defendant claimed that he had other newly discovered evidence that proved his innocence.

¶ 7 On April 12, 2017, defendant filed a motion for the appointment of counsel for his section 2-1401 petition. He also filed a motion for substitution of the case's current presiding judge, Judge Robbin J. Stuckert. At a status hearing on May 3, 2017, Judge Stuckert commented that, because the petition was a civil matter, defendant was not entitled to appointed counsel. Judge Stuckert noted that, while she could not appoint the public defender, she could see if someone from the private bar was interested in representing defendant. Judge Stuckert assigned to another judge the motion for substitution.

¶ 8 Later that day, Judge William P. Brady heard the motion for substitution. He also addressed whether to appoint counsel on defendant's petition. He noted that, because it was a civil

proceeding, defendant was not entitled to appointed counsel. Judge Brady continued the motion for substitution.

¶ 9 On the next court date, June 7, 2017, defendant was not present. Without ruling on the motion for substitution, Judge Brady revisited the issue of whether counsel could be appointed. Judge Brady decided that he would consider defendant's petition as one brought under the Post-Conviction Hearing Act (see 725 ILCS 5/122-1 *et seq.* (West 2016)), advance the petition to the second stage of review, and appoint counsel, attorney Robert Nolan.

¶ 10 On August 10, 2017, Judge Stuckert entered an order noting that the case would be reassigned to Judge Brady because he made his June 7, 2017, ruling before deciding the motion for substitution.

¶ 11 On September 19, 2017, the court (Judge Brady presiding) explained to defendant that it had recharacterized his 2-1401 petition as a postconviction petition so that the court could appoint counsel, which it could not do on a section 2-1401 petition.

¶ 12 On December 5, 2017, defendant filed an amended section 2-1401 petition and a motion to proceed *pro se*. He alleged that he did not wish to seek postconviction relief at that time. That same day, the court granted both motions. The court reverted to the original classification of the petition as a section 2-1401 petition, discharged Nolan, and permitted defendant to proceed *pro se* on the amended section 2-1401 petition he had filed that day. The court remarked that defendant was not entitled to counsel on a section 2-1401 petition anyway.

¶ 13 In the amended petition, defendant again alleged actual innocence. He attached the affidavit of Anthony Fields, who averred that defendant was uninvolved in the armed robbery and that Fields and others had committed the crime.

¶ 14 On October 30, 2018, the court conducted an evidentiary hearing at which defendant represented himself. On direct examination by defendant, Fields testified that he and two other people committed the bank robbery of which defendant was convicted. According to Fields, in 2014, his ex-girlfriend learned that defendant and someone named “King” had been convicted of the robbery. Although he did not come forward at that time, in 2016, after giving his life to God, Fields decided that he did not want defendant and King to be in prison for something they had not done. Fields testified that he was currently in prison and did not know defendant beyond seeing him a few times in the prison.

¶ 15 According to Fields, on November 10, 2009, he and a friend named “G-Ball” went to De Kalb to commit a robbery. Someone named “Jasmine,” whom G-Ball had met at a strip club, provided them clothes that she said belonged to her boyfriend.¹ On the morning of November 11, 2009, Fields, G-Ball, and a friend of G-Ball disguised themselves to rob someone. However, G-Ball was unable to contact the intended victim. They then drove across the street and robbed the bank. Afterward, G-Ball threw from the car window a bag containing the clothes and one of the guns used in the robbery. At a Northern Illinois University dorm room, Fields took \$3000 of the proceeds, and the group split up.

¶ 16 Defendant indicated that he wanted to ask Fields more questions about the items thrown from the car but that he needed the trial exhibits to do so. The court stated that it would locate the exhibits and allow defendant to ask Fields more questions. The court then stated that, meanwhile, it would allow the prosecutor to cross-examine Fields regarding his testimony up to that point.

¹ Jasmen Cunningham, who was charged in relation to the bank robbery, had dated defendant in November 2009. See *Bernard*, 2018 IL App (2d) 140411-U, ¶ 11.

Defendant stated that he was not yet done with his examination of Fields. He then asked Fields if he was testifying that Fields and G-Ball committed the bank robbery. Fields confirmed that defendant and King were not involved in the robbery and had been convicted of a crime they did not commit. Defendant then stated that he had no more questions.

¶ 17 When the court asked the prosecutor if she had any questions at that point, defendant interrupted and said, “This is bulls***, man.” When the State indicated that it wanted to cross-examine Fields, defendant responded, “Looking like gonna do something. You lucky the police is here.”

¶ 18 When the State asked Fields how he had traveled to court, defendant interrupted, stating “F*** (unintelligible). Tripping, we just heard evidence that—.” When the court addressed defendant, defendant said that he needed his “shot,” was trying to remain cool, and was losing control. When the court responded that one of the ways he could be cool was to allow the prosecutor to question Fields, defendant told the court to just leave him alone. Defendant added, “I’m just saying I didn’t do this and they still got me up in this place, man.” When the prosecutor asked Fields if he was transported to court by the Department of Corrections, defendant again interrupted and asked for his documents. Defendant then told the court that it was “trying to play Pontiac with [him]” and that he could “go all day for days.” Defendant then added that he wanted his exhibits to further question Fields and that the court was acting as a lawyer as opposed to a judge. He then stated that he needed his “shot” and that he was seriously mentally ill. When the court asked if defendant was taking medication, defendant responded that he wanted his medicine and that he was “schizo” and “bipolar” and had “PTSD.” Defendant then told the court, “This man just told you I ain’t do nothing and that they committed the crime and you sitting up there acting like you ain’t hear nothin,’ you want to hear what [the prosecutor] got to say.” Defendant added

that he did not want to “be dealing with this bull***, man,” that the court had heard the evidence, and that he wanted to go home right now. When defendant stated that he and King were in prison for something they did not do, the court commented that that was inaccurate. Defendant then asked the court if it was there during the incident and, if so, to tell him what had happened. When defendant repeatedly demanded that the court tell him what had happened, the court responded that it would not conduct the hearing with defendant yelling. The court then had defendant removed from the courtroom.

¶ 19 Fields then told the court that he had just testified that he committed the crime. When Fields rose from the witness chair, the court told him to get back in the chair. Fields responded that he was not “getting back s***.” He reiterated that he had just testified that defendant had not committed the robbery and that the court was “playin’ with that man life.” When a correctional officer told Fields that the court might want to ask Fields a few more questions, Fields stated that he would not answer any more questions without defendant present. The court then stated that it was striking Fields’ entire testimony and dismissing defendant’s petition because the State did not have an opportunity to cross-examine Fields. The court remarked that defendant was free to file a motion to reinstate the petition.

¶ 20 On December 28, 2018, defendant filed a *pro se* motion to reconsider the dismissal of his petition. On January 2, 2019, he filed a postconviction petition and a motion for the appointment of counsel to assist him with his motion to reconsider. On January 2, 2020, attorney Nolan, who appeared in court to represent defendant on his postconviction petition, volunteered to assist defendant with his amended motion to reconsider the denial of his section 2-1401 petition. The court appointed Nolan to represent defendant on the motion to reconsider. Although the court granted Nolan 60 days to amend the motion to reconsider, Nolan never did so.

¶ 21 On March 16, 2020, defendant filed a motion to terminate Nolan's representation and proceed *pro se*. At a hearing on August 25, 2020, the court asked defendant if he still wanted Nolan to represent him. Defendant answered that the only reason he had filed the motion to proceed *pro se* was because he had not spoken to Nolan and did not know what was going on with his case. The court then noted that no further amendments to the motion to reconsider had been filed. Finding that defendant failed to establish the existence of any newly discovered evidence or that the court had erred in its application of the law, the court denied the motion to reconsider. Defendant, in turn, filed this timely appeal.

¶ 22

II. ANALYSIS

¶ 23 Before we analyze the claimed issues on appeal, we must relate that the actions of *pro se* defendant during his contentious outburst were reprehensible and deserving of a finding of criminal contempt punishable by jail time. The trial judge showed exemplary patience in dealing with this intolerable situation. We admonish defendant that his actions deserved punishment other than removal from the court room.

¶ 24 Turning to the issues on appeal, defendant contends that the court, because it did not know that it had the discretion to appoint counsel to represent him on his section 2-1401 petition, abused its discretion in denying his request to appoint counsel. In response, the State concedes that the court abused its discretion by not recognizing that it had such discretion but argues that the error does not require reversal, because the defendant was not prejudiced.

¶ 25 Where a court erroneously believes that it has no discretion in a matter, its failure to exercise discretion can itself constitute an abuse of discretion. See *People v. Chapman*, 194 Ill. 2d 186, 223-24 (2000). However, the effect of such a failure to exercise discretion must be assessed

in the context of the entire proceeding. *Chapman*, 194 Ill. 2d at 224. Indeed, not every error is of such magnitude that relief is warranted. *Chapman*, 194 Ill. 2d at 224-25.

¶ 26 A petitioner seeking to collaterally attack a judgment has no constitutional right to the assistance of counsel. *People v. Stoecker*, 2020 IL 124807, ¶ 35. Additionally, a petitioner filing a section 2-1401 petition has no express statutory right to the assistance of counsel. *Stoecker*, 2020 IL 124807, ¶ 36. Accordingly, a trial court is not obligated to appoint counsel in connection with a section 2-1401 petition. *Stoecker*, 2020 IL 124807, ¶ 36. However, courts have the discretion to appoint counsel in such proceedings. *Stoecker*, 2020 IL 124807, ¶ 36.

¶ 27 Here, as the State properly concedes, the court failed to recognize that it had the discretion to appoint counsel. Indeed, two different judges opined that, because it was a civil proceeding, the court had no authority to appoint counsel. However, the court had the discretion to appoint counsel. Thus, the court abused its discretion in failing to exercise that discretion.

¶ 28 That leaves the issue of whether defendant suffered prejudice sufficient to justify reversing and remanding so that the court can, as a matter of discretion, decide whether to appoint counsel. The State asserts that defendant has not shown that he was prejudiced, because he was twice appointed counsel and has not shown what difference it would have made if appointed counsel had amended his section 2-1401 petition. We disagree.

¶ 29 Recently, the Third District faced a very similar issue. See *People v. Dalton*, 2021 IL App (3d) 180093-U. There, the defendant's *pro se* section 2-1401 petition was dismissed. *Dalton*, 2021 IL App (3d) 180093-U, ¶ 6. On appeal, the court reversed and remanded. *Dalton*, 2021 IL App (3d) 180093-U, ¶ 7 (citing *People v. Dalton*, 2017 IL App (3d) 150213, ¶ 37).

¶ 30 On remand, after asking if the defendant wanted counsel to be appointed, the court stated that it had no authority to appoint counsel, because the section 2-1401 proceeding was civil.

Dalton, 2021 IL App (3d) 180093-U, ¶¶ 8-9. After the court dismissed the section 2-1401 petition, the defendant again appealed. *Dalton*, 2021 IL App (3d) 180093-U, ¶¶ 11, 13.

¶ 31 On appeal, the appellate court noted that the record showed that the trial court was unaware that it had the discretion to appoint counsel. *Dalton*, 2021 IL App (3d) 180093-U, ¶ 15. Accordingly, the court held that the trial court had abused its discretion. *Dalton*, 2021 IL App (3d) 180093-U, ¶ 15. After rejecting the defendant's contention that such an abuse of discretion warranted an automatic reversal (*Dalton*, 2021 IL App (3d) 180093-U, ¶ 16 (citing *Chapman*, 194 Ill. 2d at 224-25)), the court held that reversal was appropriate under the facts of that case (*Dalton*, 2021 IL App (3d) 180093-U, ¶ 17). The court explained that it was impossible to determine whether, had counsel been appointed, he or she would have amended the petition and whether such amendments would have affected the outcome of the proceeding. *Dalton*, 2021 IL App (3d) 180093-U, ¶ 17. Because the court could not conclude that the trial court's failure to exercise its discretion was necessarily harmless, it remanded to provide the trial court the opportunity to properly exercise its discretion whether to appoint counsel. *Dalton*, 2021 IL App (3d) 180093-U, ¶ 17.

¶ 32 Here, we agree with and adopt the reasoning of the *Dalton* court. We cannot 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. Further, defendant would likely have benefitted from counsel at the evidentiary hearing. Counsel would have been more effective in the direct examination of Fields and provided oversight during any cross-examination. Additionally, if defendant were removed from the courtroom, counsel would remain to protect defendant's interests. It is also likely that, with counsel present, Fields would not have balked at

cross-examination as he did, resulting in the striking of his testimony and the summary dismissal of defendant's petition.

¶ 33 Although the trial court appointed counsel after recharacterizing the section 2-1401 petition as a postconviction petition, this did not ultimately benefit defendant. Shortly after appointing counsel, the court reversed itself and treated the petition as a section 2-1401 petition, reiterating its previous ruling that it lacked the authority to appoint counsel on such a petition. Thus, counsel had only a brief time to amend the petition and did not do so.

¶ 34 Nor was appointing counsel for the limited purpose of amending the motion to reconsider the denial of the section 2-1401 petition sufficient to eliminate any prejudice stemming from the court's earlier failure to exercise its discretion. The motion to reconsider was not a substitute for the section 2-1401 proceeding itself. Indeed, in reviewing the motion to reconsider, the court noted that it was not conducting a *de novo* reassessment of its denial of the petition but was applying narrow criteria. Thus, the appointment of counsel to represent defendant on his motion to reconsider was too late to benefit defendant regarding the denial of his petition.

¶ 35 We find that the court abused its discretion by not recognizing its discretion to appoint counsel in a section 2-1401 proceeding, and the record does not conclusively establish that defendant was not harmed by the error. Therefore, we reverse and remand to allow the court to properly exercise its discretion whether to appoint counsel.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we reverse the judgment of the circuit court of De Kalb County and remand for further proceedings.

¶ 38 Reversed and remanded.

No. 2-18-1055

Cite as: *People v. Bernard*, 2021 IL App (2d) 181055

Decision Under Review: Appeal from the Circuit Court of De Kalb County, No. 10-CF-306; the Hon. William P. Brady and the Hon. Robbin J. Stuckert, Judges, presiding.

Attorneys for Appellant: James E. Chadd, Thomas A. Lilien, and Lucas Walker, of State Appellate Defender's Office, of Elgin, for appellant.

Attorneys for Appellee: Richard D. Amato, State's Attorney, of Sycamore (Patrick Delfino, Edward R. Psenicka, and Leslie Martin, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
