

No. 1-10-2333

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 03 CR 10048
	)	
CARLOS AYALA,	)	Honorable
	)	Larry G. Axelrood,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE KARNEZIS delivered the judgment of the court.  
Justices Cunningham and Rochford concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Court erred in dismissing defendant's section 2-1401 petition on the basis that his appeal from the disposition of an earlier post-conviction petition deprived the circuit court of jurisdiction to consider the section 2-1401 petition; it did not. However, our review of the *sua sponte* dismissal of a section 2-1401 petition is *de novo*. Defendant's sentence for first degree murder including a 25-year firearm enhancement is neither unconstitutional nor void, as defendant alleged in his petition, so that the disposition of the petition was proper.
- ¶ 2 Following a 2004 bench trial, defendant Carlos Ayala was convicted of first degree murder and sentenced to 45 years' imprisonment. We affirmed on direct appeal. *People v. Ayala*, No. 1-04-3100 (2006)(unpublished order under Supreme Court Rule 23). We also

affirmed the dismissal, upon the State's motion, of his 2007 post-conviction petition. *People v. Ayala*, No. 1-09-0044 (2010)(unpublished orders under Supreme Court Rule 23). Defendant now appeals from the *sua sponte* disposition of his February 2010 *pro se* petition to vacate a void judgment. He contends that the court erred in denying him leave to file his petition for lack of jurisdiction due to his then-pending appeal of the post-conviction petition.

¶ 3 Defendant was charged with first degree murder in the March 2003 shooting death of Garland Gambrell, in an indictment alleging that defendant personally discharged a firearm that proximately caused death. After convicting defendant as charged, the court sentenced him to 45 years' imprisonment. The court explained that this comprised the minimum 20-year sentence for first degree murder and the minimum mandatory 25-year firearm enhancement, though the court also explained that "[i]f it were not for the existence of that mandatory enhancement in the sentence, I would add years to \*\*\* the minimum term of 20 years. But given this required enhancement, I think that that is sufficient."

¶ 4 Except for vacating a redundant murder count and correcting the mittimus accordingly, this court affirmed defendant's conviction and sentence on direct appeal.

¶ 5 In his 2007 post-conviction petition, defendant challenged various aspects of the pre-trial and trial proceedings but not his sentence. The court granted the State's motion to dismiss on November 14, 2008, and defendant timely appealed the dismissal, which we affirmed.

¶ 6 Defendant filed the instant *pro se* petition on February 8, 2010, while the aforementioned appeal was pending before us. The petition was entitled "Motion to Void Judgment and Correct Mittimus" and cited section 2-1401(f) of the Code of Civil Procedure. 735 ILCS 5/2-1401(f) (West 2010). Defendant argued that "the previous version" of the firearm enhancement to the first degree murder statute had been found unconstitutional, while its replacement statute did not

take effect until 2009, so that his sentence is void. He requested vacatur of the enhancement so that his sentence would be 20 years' imprisonment.

¶ 7 On March 31, 2010, the court denied defendant leave to file his petition, finding that it lacked jurisdiction while the appeal of the post-conviction proceeding was pending. Defendant filed a motion to reconsider, which the court denied on May 14, 2010. This appeal followed.

¶ 8 Defendant contends on appeal that the court erred in dismissing his section 2-1401 petition for lack of jurisdiction due to a pending appeal and that the appropriate remedy is to remand for further proceedings on the petition. The State admits that the court did not lack jurisdiction to hear the petition but argues that the dismissal was proper because a constitutional claim such as defendant's cannot be raised in a section 2-1401 petition.

¶ 9 Section 2-1401 provides a mechanism by which final judgments may be challenged more than 30 days after their entry, and paragraph (f) thereof provides that "[n]othing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief." 735 ILCS 5/2-1401(f) (West 2010). A motion to vacate an order or judgment as void, regardless of whether it is titled a section 2-1401 petition, is considered a section 2-1401 petition. *People v. Rodriguez*, 355 Ill. App. 3d 290, 293 (2005) and *In re Custody of Ayala*, 344 Ill. App. 3d 574, 581-82 (2003), citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 101-04 (2002).

¶ 10 The *sua sponte* dismissal or denial of a petition for relief from judgment is reviewed *de novo*, so that only dispositions of a section 2-1401 proceeding following an evidentiary hearing may be reviewed under a deferential standard. *People v. Vincent*, 226 Ill. 2d 1, 16-18 (2007). Under the *de novo* standard, we review the disposition rather than the reasoning of the circuit court; that is, our "review is completely independent of the trial court's decision." *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 34.

¶ 11 Here, it is undisputed that the circuit court did not lack jurisdiction over the instant section 2-1401 petition due to a pending appeal. *People v. Walker*, 395 Ill. App. 3d 860, 867 (2009). The parties instead dispute the appropriate response or disposition, with both parties agreeing (albeit not in such terms) that we should not reach the merits of the petition. Indeed, while the State at least briefly touches upon the merits of the petition and cites law in opposition to its merit, defendant makes no argument, much less citation of law, regarding the merits of the claim in his petition.

¶ 12 Regardless of the manner in which the court framed its decision – specifically, denial of leave to file – it disposed of a section 2-1401 petition *sua sponte* so that our review of the disposition is *de novo*. We find the cases cited by defendant to overcome or bypass *de novo* review to be inapposite. In *People v. Cleveland*, 342 Ill. App. 3d 912, 915-16 (2003), we expressly rejected the proposition from *People v. Day*, 152 Ill. App. 3d 416 (1987), that this court should not determine whether a post-conviction petition was frivolous and patently without merit when the circuit court did not reach that issue. As to *People v. Pearson*, 345 Ill. App. 3d 191, 195 (2003), *aff'd*, 216 Ill. 2d 58 (2005), where this court remanded from the *sua sponte* dismissal of a section 2-1401 petition because "the proceedings by which defendant's petition was dismissed were too far removed from those to which he was entitled for us to hold that he suffered no prejudice," defendant acknowledges that the supreme court held in *Vincent* that such *sua sponte* dismissal is proper. However, as noted above, the *Vincent* court also held that the review of a *sua sponte* dismissal is *de novo*. Thus, the *procedure* by which defendant's petition was disposed of was not removed from proper procedure, only the *reasoning* by which the court reached the disposition.

¶ 13 Conversely, we reject the State's argument that we should not reach the merits of defendant's constitutionally-based claim as section 2-1401 does not encompass such claims.

Under section 2-1401(f), a void judgment – as the instant petition claims regarding defendant's sentence – is an exception to the general provisions of section 2-1401. Thus, to resolve whether the court erroneously dismissed the instant petition, we must perforce address defendant's claim to the extent of determining whether the underlying judgment is indeed void.

¶ 14 To the offense of first degree murder, there is a mandatory sentence enhancement of 25 years to life imprisonment for personally discharging a firearm during the commission of the offense and thereby proximately causing death of another. 730 ILCS 5/5-8-1(a)(1)(d)(iii)(West 2010). This provision has been upheld against constitutional challenges including vagueness, due process, proportionate penalties, and double enhancement. *People v. Sharpe*, 216 Ill. 2d 481 (2005). The enhancement in question never having been stricken from the statute as unconstitutional, defendant's sentence including the firearm enhancement is not void or otherwise erroneous and the court did not err in disposing of the instant petition.

¶ 15 Accordingly, the judgment of the circuit court is affirmed.

¶ 16 Affirmed.