NOTICE
Decision filed 05/06/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 110488-U

NO. 5-11-0488

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Marion County.
	)	
v.	)	No. 06-CF-346
	)	
EARL L. DYESS,	)	Honorable
	)	Sherri L. E. Tungate,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE SPOMER delivered the judgment of the court.
Justices Wexstten and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal of *pro se* postconviction petition affirmed where defendant had no standing under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2010)) to file the petition because he was not a prisoner at the time of filing. Circuit court's failure to recharacterize the petition as a petition for relief from judgment under section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) was harmless error because had the petition been recharacterized, there would have been no cause to grant it because the defendant did not exercise due diligence in filing it.

¶ 2 The defendant, Earl L. Dyess, appeals the October 21, 2011, order of the circuit court of Marion County that dismissed his *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2010)). The defendant contends that the circuit court erred by failing to *sua sponte* recharacterize the petition as a petition for relief from judgment, pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 On August 22, 2006, the defendant pled guilty to count II of an information charging him with unlawful delivery of a controlled substance, in violation of sections 401(d) and 407(b)(2) of the Illinois Controlled Substances Act (720 ILCS 570/401(d), 407(b)(2) (West 2006)). Count I of the information was dismissed. The same date, the circuit court sentenced the defendant to eight years in the Illinois Department of Corrections (IDOC), followed by two years of mandatory supervised release (MSR). On August 29, 2011, the defendant filed a *pro se* petition titled "Petition For Habeas Corpus Pursuant To Illinois Post Conviction Relief Act" (petition). The petition states that the defendant was paroled on March 11, 2009, and subsequently charged with another drug offense on June 19, 2009, in the United States District Court for the Southern District of Illinois, and sentenced to a term of 151 months without the possibility of parole. According to the petition, this was an enhanced penalty due to the above state conviction. However, the record reflects that the defendant had an additional state conviction in 2001 for unlawful delivery of a controlled substance. 720 ILCS 570/100 to 603 (West 2000).

¶ 5 The defendant's MSR expired on March 11, 2011, more than five months before the defendant filed the petition. The circuit court addressed the petition pursuant to the Act (725 ILCS 5/122-1 (West 2010)) and dismissed it on October 21, 2011, for a lack of standing because the defendant was no longer a prisoner at IDOC and his MSR had expired. The circuit court acknowledged the defendant's argument that his constitutional rights were violated due to ineffective assistance of counsel because his attorney reneged on having the defendant's record expunged, but rejected the same because the defendant failed to attach to his petition affidavits, records, or other evidence to support his claims, as required by the Act. 725 ILCS 5/122-1 (West 2010). The defendant filed a timely notice of appeal.

¶ 6 ANALYSIS

¶ 7 The defendant's sole issue on appeal is summarized as follows: whether the circuit court erred by not *sua sponte* recharacterizing and analyzing his petition as a petition for relief from judgment under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). When the circuit court enters a judgment on the pleadings, the standard of review is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). Section 122-1(a) of the Act provides that "[a]ny person *imprisoned in the penitentiary* may institute a proceeding under this Article." (Emphasis added.) 725 ILCS 5/122-1(a) (West 2010). Accordingly, only a state prisoner may bring a postconviction petition.

¶ 8 In this case, the defendant titled the petition as "Petition For Habeas Corpus Pursuant To Illinois Post Conviction Relief Act." Moreover, in the opening paragraph of the petition, the defendant stated that he filed the petition pursuant to the Act, and he reasserted at the end of the petition that he was seeking postconviction relief. He filed the petition on August 29, 2011, more than five months after his MSR expired. Accordingly, he was no longer a state prisoner when he filed the petition, the Act did not apply to him at the time of the filing (see 725 ILCS 5/122-1(a) (West 2010)), and the circuit court did not err by dismissing the petition for a lack of standing under the Act. The defendant does not dispute this point.

¶ 9 However, the defendant cites *People v. Cheeks*, 318 Ill. App. 3d 919, 921 (2001), where, like this case, the defendant filed a *pro se* petition under the Act and argued on appeal that the circuit court should have considered his petition under section 2-1401 of the Code. The appellate court observed that while the defendant in *Cheeks* " 'did not expressly invoke [section 2-1401] in the circuit court, he was proceeding *pro se* and was not afforded the assistance of counsel' " (318 Ill. App. 3d at 921-22 (quoting *People v. Brown*, 169 Ill. 2d 94, 109 (1995) (Harrison, J., dissenting)), and thus held it "inappropriate to deny [the defendant] an opportunity to pursue the applicable remedy merely because he did not understand the law

well enough to bring his claim under the Code rather than the Act." 318 Ill. App. 3d at 922. Accordingly, the cause was remanded for the circuit court to consider the defendant's claims under the Code. *Cheeks*, 318 Ill. App. 3d at 920, 922.

¶ 10 Applying these principles to the case at bar, we realize that the defendant, like the defendant in *Cheeks*, filed the petition *pro se* and likely did not understand that he should have sought relief under the Code rather than the Act. However, we refuse to remand the case as the *Cheeks* court did because in the instant case it was harmless error for the circuit court to summarily dismiss the petition without recharacterizing it as a petition for relief from judgment, pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). This is so because, as explained below, even if the petition had been recharacterized, it would not have affected the outcome of the circuit court proceedings. See *People v. McNeal*, 405 Ill. App. 3d 647, 675 (2010) (harmless error may be invoked by reviewing court to "dispose of claims of error that have a *de minimus* impact on the outcome of the case" (internal quotation marks omitted)).

¶ 11 "Section 2-1401 of the Code *** provides a comprehensive statutory procedure by which final orders and judgments may be challenged more than 30 days after their entry." *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003). "Although a section 2-1401 petition is usually characterized as a civil remedy, its remedial powers extend to criminal cases." *People v. Haynes*, 192 Ill. 2d 437, 460-61 (2000). "A section 2-1401 petition *** is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition." *Id*. at 461.

¶ 12 As provided in the Code, the petition must be filed within two years after the entry of the judgment being challenged, unless the defendant is under legal disability or duress or the ground for relief is fraudulently concealed. See 735 ILCS 5/2-1401(c) (West 2010). In this

case, the defendant does not argue that he was under legal disability or duress or that the ground for relief was fraudulently concealed. Rather, the defendant suggests that it was impossible for him to file the petition until he discovered that his conviction was not expunged, a discovery which could have been made only after the defendant finished serving his sentence with IDOC. The judgment here is the defendant's conviction and sentence which was entered on August 22, 2006. The defendant was paroled on March 11, 2009, and his MSR expired on March 11, 2011. Therefore, it was impossible for the defendant to discover that his conviction was not expunged in time to meet the two-year filing deadline. See 735 ILCS 5/2-1401(c) (West 2010). Even assuming, *arguendo*, that the defendant is excused from the two-year filing requirement because of the impossibility of filing, he is not excused from the following requirements provided by the Illinois Supreme Court in *People v. Pinkonsly*:

> "To obtain relief under section 2-1401, the defendant must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." (Internal quotation marks omitted.) 207 Ill. 2d at 565.

¶ 13 In the case at bar, the defendant was paroled on March 11, 2009, and his MSR expired on March 11, 2011. He waited nearly 2½ years after he was paroled, and over five months after his MSR expired, to file the petition. He had ample opportunity to exercise due diligence to check his record and file the petition earlier but failed to do so. In fact, he filed the petition only after he discovered that his federal prison sentence would be enhanced by the state conviction and was seemingly unconcerned with it prior to that time. Based on these facts, we find the defendant did not meet the due diligence requirement set forth in

People v. Pinkonsly (207 Ill. 2d at 565). Accordingly, even if we were to remand the case for the circuit court to recharacterize the petition and analyze it under the Code, the petition would be properly dismissed for the defendant's lack of due diligence. As such, we find that the circuit court's summary dismissal of the petition for a lack of standing under the Act was harmless error.

¶ 14 CONCLUSION

¶ 15 For the foregoing reasons, we affirm the October 21, 2011, order of the circuit court of Marion County that dismissed the petition.

¶ 16 Affirmed.