

affirm the trial court's order denying the section 2-1401 petition as untimely. He also requests that his mittimus be corrected to reflect 323 days of presentence credit instead of 193 days. We agree.

Background

¶ 3 Following a 1996 bench trial, the trial court found Clark guilty of three counts of aggravated criminal sexual assault and sentenced him to three consecutive terms of 24 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Clark*, No. 1-96-3331 (1997) (unpublished order under Supreme Court Rule 23). We subsequently dismissed Clark's appeal from the dismissal of his initial *pro se* post-conviction petition, after granting the State Appellate Defender's motion for leave to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the dismissal of his second *pro se* post-conviction petition. *People v. Clark*, Nos. 1-98-4658 (1999); 1-00-0332 (2001) (unpublished orders under Supreme Court Rule 23). We also affirmed the dismissal of his initial *pro se* section 2-1401 petition. *People v. Clark*, No. 1-04-3355 (2006) (unpublished order under Supreme Court Rule 23).

¶ 4 On June 7, 2012, Clark filed another section 2-1401 petition, this one alleging that his consecutive sentences were void and that the State's evidence was insufficient to prove him guilty beyond a reasonable doubt. Clark contended that under section 5-8-4(c)(2) of the Unified Code of Corrections (730 ILCS 5/5-8-4(c)(2) (West 2010)), the trial court could not use the maximum sentence set forth in the extended-term statute to calculate the aggregate of the consecutive sentences he could receive because Clark was not eligible for an extended term

sentence. On July 20, 2012, the circuit court *sua sponte* denied the petition, finding "no basis in fact or law" for relief under section 2-1401.

Analysis

Defendant's Consecutive Sentences

¶ 5 Clark's sole contention is that the consecutive sentences imposed by the trial court were not authorized by statute and thus void. He maintains that the aggregate of his consecutive sentences could not exceed 60 years' imprisonment because he was not eligible for an extended-term sentence and the maximum Class X term authorized by statute was 30 years' imprisonment.

¶ 6 Section 2-1401 provides a comprehensive statutory procedure allowing for the vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401 (West 2010); *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). To obtain relief, a defendant must prove by a preponderance of the evidence the existence of a defense or claim that would have precluded entry of the judgment in the original action and diligence in discovering that defense or claim, and presenting the petition. *Vincent*, 226 Ill. 2d at 7-8. Section 2-1401 requires that the petition be filed within two years after the entry of the order or judgment, excluding time during which defendant is under a legal disability or duress, or the ground for relief is fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2010); *People v. Moran*, 2012 IL App (1st) 111165, ¶13. But, the statutory limitations period does not apply to petitions brought on voidness grounds. *People v. Gray*, 2013 IL App (1st) 112572, ¶ 7 (citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002)). We review *de novo* the circuit court's *sua sponte* denial of defendant's section 2-1401 petition. *People v. Thompson*, 377 Ill. App. 3d 945, 949 (2007).

¶ 7 Mindful that when beginning the review of a case we have an independent duty to ascertain our jurisdiction and determine which issue or issues, if any, have been forfeited, (*People v. Smith*, 228 Ill. 2d 95, 106 (2008)), we consider whether the challenged judgment was actually void to overcome the two-year limitations period for section 2-1401 petitions (*People v. Balle*, 379 Ill. App. 3d 146, 151 (2008)).

¶ 8 Our supreme court has consistently held that "a judgment is void if and only if the court that entered it lacked jurisdiction." *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 16 (citing *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993)). Jurisdictional failure can result from a court's lack of personal or subject matter jurisdiction, or the court's lack of power to render the particular judgment or sentence. *Davis*, 156 Ill. 2d at 156; accord *Gray*, 2013 IL App (1st) ¶ 10.

"[J]urisdiction or power to render a particular judgment does not mean that the judgment rendered must be the one that should have been rendered, for the power to decide carries with it the power to decide wrong as well as to decide right," and "a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law or both." *Davis*, 156 Ill. 2d at 156. Since *Davis*, the supreme court has continued to adhere to this formation of the voidness doctrine. *Moran*, 2012 IL App (1st) 111165, ¶ 18 (and cases cited therein).

¶ 9 Applying these principles to the facts, we conclude that the consecutive sentences imposed by the trial court were not void, and Clark could not proceed with his section 2-1401 petition outside the two-year statutory limitations period. *Moran*, 2012 IL App (1st) 111165,

¶ 10 Clark does not, nor could he, argue voidness on the basis of the trial court's lack of personal or subject matter jurisdiction. *Moran*, 2012 IL App (1st) 111165, ¶ 19. Rather, as stated, he maintains the trial court had no authority to impose consecutive sentences that

exceeded the maximum aggregate sentence allowed by statute. *Moran*, 2012 IL App (1st) 111165, ¶ 19. Clark reasons that because he was not eligible for an extended-term sentence under section 5-5-3.2 of the Unified Code of Corrections (730 ILCS 5/5-5-3.2 (West 2010)), the extended-term sentences authorized by section 5-8-2 of the Unified Code of Corrections (730 ILCS 5/5-8-2 (West 2010)) cannot be used to measure the aggregate of consecutive sentences allowed by section 5-8-4(c)(2) (730 ILCS 5/5-8-4(c)(2) (West 2010)).

¶ 11 The State responds, and we agree, that Clark's argument has been consistently rejected by courts of review. See, e.g., *People v. Woods*, 131 Ill. App. 3d 51 (1985); *People v. Beck*, 190 Ill. App. 3d 748 (1989); *People v. Myrieckes*, 315 Ill. App. 3d 478 (2000); *People v. Tucker*, 167 Ill. 2d 431 (1995), *superseded by statute as stated in People v. Pullen*, 192 Ill. 2d 36 (2000). In *Woods*, 131 Ill. App. 3d at 55, this court rejected the argument that the extended-term sentences authorized by section 5-8-2 could not be used in computing the maximum aggregate of consecutive sentences allowed section 5-8-4(c)(2), noting the absence of authority supporting this proposition and that "defendant has misread section 5-8-4(c)(2), which refers to section 5-8-2 only as a measuring statute. Defendant need not meet the separate qualifications for an extended-term sentence." In *Beck*, 190 Ill. App. 3d at 763, the Fifth District relied on *Woods* as persuasive authority in concluding that the extended-term statute functions as a measuring statute for the consecutive sentencing statute, adding, "[s]ince the consecutive sentence statute reveals no ambiguity regarding the qualifications for consecutive sentences, it is unnecessary to address the defendant's contention that we must construe section 5-8-4(c)(2) strictly in his favor." *Id.* Likewise, in *Myrieckes*, 315 Ill. App. 3d at 482, the Third District agreed with this court's interpretation of section 5-8-4(c)(2) in *Woods*, noting that the plain language of the section refers

to the "maximum terms *authorized*" by section 5-8-2 and not the maximum for which a particular defendant is eligible. (Emphasis in original.) The Third District further noted that in *Tucker*, the supreme court, in *dicta*, interpreted section 5-8-4(c)(2) consistently with the First District's interpretation stating, "We note that section 5-8-4(c)(2) refers to the aggregate of the maximum *extended* terms authorized for the two most serious felonies involved. [Citation.] For example, where a defendant is convicted of a Class X felony, the maximum extended-term is 60 years. [Citation.] Thus, a defendant convicted of a number of Class X felonies may be sentenced to consecutive terms of imprisonment not to exceed a total of 120 years. (Emphasis in original.)" *Myrieckes*, 315 Ill. App. 3d at 482 (quoting *Tucker*, 167 Ill. 2d at 437).

¶ 12 Clark was convicted of three counts of aggravated criminal sexual assault, a Class X felony (720 ILCS 5/12-14(d) (West 2002), the maximum extended-term is 60 years' imprisonment and the maximum aggregate of his consecutive sentences could not exceed 120 years. Because Clark's 72-year aggregate sentence did not exceed 120 years' imprisonment, his sentencing argument fails.

¶ 13 In reaching this conclusion, we reviewed the cases cited by Clark and find they do not require a different result. For example, in *People v. Tomasello*, 329 Ill. App. 3d 1053, 1056-57 (2002), this court noted that the sentencing court's alleged statement that defendant, who was convicted of three counts of aggravated criminal sexual assault, could receive a maximum aggregate sentence of 120 years' imprisonment was correct, "as defendant could be sentenced to consecutive 60 year prison terms for two of the convictions." Thus, *Tomasello* actually supports our conclusion here, rather than defendant's argument. As stated, we conclude that the trial court's sentencing order was not void, so as to permit Clark to proceed with his section 2-1401

petition outside the two-year statutory limitations period. *Moran*, 2012 IL App (1st) 111165, ¶ 19.

Mittimus

¶ 14 Clark next contends that he was taken into custody on October 17, 1995, and sentenced on September 4, 1996, which entitles him to 323 days of presentence credit rather than the 193 days he received. The State responds that because Clark has not demonstrated due diligence in bringing this claim, he should not be permitted to raise it for the first time on appeal. We observe, however, that a claim for credit is a statutory "application of the defendant" that may be raised at any stage of court proceedings and, thus, the appellate court, in the interests of an orderly administration of justice, may grant the relief requested. *People v. Purcell*, 2013 IL App (2d) 110810, ¶¶ 8-9 (citing *People v. Caballero*, 228 Ill. 2d 79, 87-88 (2008)).

¶ 15 In turn, our *de novo* review (*People v. Harris*, 2012 IL App (1st) 092251, ¶ 34) of the common law record—the presentence investigation report filed September 4, 1996, and the mittimus entered on the same date—confirms that Clark was arrested on October 17, 1995, and sentenced on September 4, 1996, and thus entitled to presentence credit for 323 days. Under Supreme Court Rule 615(b)(1), we order the mittimus corrected to reflect 323 days of presentence incarceration credit. *People v. Coleman*, 409 Ill. App. 3d 869, 881 (2011).

¶ 16 For the reasons stated, we affirm the *sua sponte* denial of Clark's section 2-1401 petition and order the mittimus corrected to 323 days of presentence incarceration credit.

¶ 17 Affirmed as modified.