

No. 1-13-0720

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 22172
)	
LAVONDELL NOBLE,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's petition for relief from judgment was properly dismissed as untimely when the imposition of a term of mandatory supervised release was required by operation of law and did not render his sentence void.
- ¶ 2 Defendant LaVondell Noble appeals from the circuit court of Cook County's dismissal of his petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, the defendant contends that the circuit court erred when it dismissed his petition because the failure of the trial court to state that he must serve a term of mandatory supervised release (MSR) upon his release from prison

rendered his sentence, as interpreted by the Department of Corrections (DOC), void. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 The record reveals that the defendant was found guilty of aggravated kidnapping and unlawful use of a weapon by a felon following a bench trial. On February 17, 2005, he was sentenced to concurrent prison terms of 12 and 4 years. This judgment was affirmed on direct appeal. See *People v. Noble*, No. 1-05-0840 (2007) (unpublished order under Supreme Court Rule 23). He then filed an unsuccessful collateral attack upon his convictions. See *People v. Noble*, No. 1-08-2840 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 In 2011, the defendant filed a "Motion for Post-Conviction Testing" alleging that he was entitled to have certain fingerprint evidence compared to fingerprint data in the Federal Bureau of Investigation's Integrated Automated Fingerprint Identification System in order to advance his claim of actual innocence. The State filed a motion to dismiss, which the trial court granted. That judgment was ultimately reversed on appeal. See *People v. Noble*, 2012 IL App (1st) 113548-U.

¶ 5 In 2012, the defendant filed the instant section 2-1401 petition alleging that because there was no mention of MSR at sentencing, the defendant's sentence, as interpreted by the DOC, was void. In other words, the petition alleged that the DOC could not impose a period of MSR upon defendant when the trial court did not explicitly sentence him to a period of MSR. The circuit court subsequently dismissed the petition. It is from this judgment that the defendant now appeals.

¶ 6 Section 2-1401 of the Code provides a statutory mechanism by which a final order or judgment may be vacated or modified more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2012). Section 2-1401 requires that the petition be filed within two years after the entry of

the order or judgment, excluding the time during which a defendant is under a legal disability or duress, or the ground for relief is fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2012); *People v. Moran*, 2012 IL App (1st) 111165, ¶ 13. The final judgment in a criminal case is the sentence. *People v. Jake*, 2011 IL App (4th) 090779, ¶ 24. However, the statutory limitations period does not apply to a petition challenging a judgment as void. *People v. Gray*, 2013 IL App (1st) 112572, ¶ 7; see also *People v. Raczkowski*, 359 Ill. App. 3d 494, 496-97 (2005) (if the circuit court lacked jurisdiction over the parties or the subject matter or exceeded its statutory power to act, the judgment is void and may be attacked at any time).

¶ 7 Initially, this court notes that the defendant has not shown that he acted with due diligence. See *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003) (to obtain relief under section 2-1401, defendant must affirmatively set forth specific factual allegations supporting the existence of a meritorious defense or claim; due diligence in presenting this defense or claim in the original action; and due diligence in filing the section 2-1401 petition for relief). In the instant case, the defendant's section 2-1401 petition was filed in 2012, approximately seven years after he was sentenced in 2005. The defendant offers no explanation for his delay in filing; rather, he contends that he is not barred from seeking relief because he is attacking a void judgment. While it is certainly true that a defendant may attack a void judgment at any time (*Raczkowski*, 359 Ill. App. 3d at 496-97), the judgment must actually be void in order to overcome the two-year time limit (*People v. Harvey*, 196 Ill. 2d 444, 447 (2001)). The defendant contends that his three-year term of MSR is void because the DOC, rather than the court, imposed it. He argues that absent the trial court stating, orally or in writing at the time of sentencing, that a defendant must serve a term of MSR, such a term cannot be added to "the end of [the] time" stated by the court.

¶ 8 During the pendency of this appeal, our supreme court rejected similar claims in *People v. McChriston*, 2014 IL 115310. In that case, the defendant argued, in a section 2-1401 petition, that the DOC impermissibly added a three-year term of MSR to his sentence when the sentencing order did not indicate that he would be required to serve a term of MSR and the trial court did not mention MSR at the sentencing hearing.

¶ 9 In rejecting this argument, our supreme court reasoned that the General Assembly may enact legislation that includes a MSR term in a sentence by operation of law. *Id.* ¶ 13.

Construing the plain language of section 5-8-1(d) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d) (West 2004)), which is applicable to the case at bar, the *McChriston* court held that a sentence includes a period of MSR "as if it were written within the sentence," even if the trial court did not mention the MSR term at the sentencing hearing or include it in the sentencing order. *Id.* ¶¶ 16-17. Therefore, the *McChriston* court concluded the DOC did not in fact add a term of MSR to the defendant's sentence but, instead, it was added by an operation of law. *Id.* ¶ 23. The *McChriston* court also held that the imposition of MSR did not violate federal due process, rejecting the defendant's argument that the imposition of the three-year term of MSR impermissibly increased his sentence. *Id.* ¶¶ 25-31. The *McChriston* court further noted that "the enforcement of the mandatory MSR term in this case was not an increase in sentencing, as the MSR term attached automatically as though written into defendant's sentence." *Id.* ¶ 31.

¶ 10 Accordingly, applying the principles in *McChriston*, the defendant's arguments in the instant appeal must fail as the term of MSR that he must serve upon his release from prison was not added to his sentence by the DOC, but was included in the judicially imposed sentence even though the trial court failed to mention the MSR term at sentencing or include it in the sentencing order. See *McChriston*, 2014 IL 115310, ¶¶ 17, 23.

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¶ 11 Therefore, because the defendant has failed to establish that the challenged judgment was void, he cannot overcome the two-year time period in which he could have filed his section 2-1401 petition (*Harvey*, 196 Ill. 2d at 447), and the petition was properly dismissed (*Moran*, 2012 IL App (1st) 111165, ¶ 13).

¶ 12 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 13 Affirmed.