

NOTICE
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2014 IL App (5th) 120391-U

NO. 5-12-0391

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).

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Christian County. |
| |) | |
| v. |) | No. 04-CF-154 |
| |) | |
| CHRISTOPHER J. COX, |) | Honorable |
| |) | James L. Roberts, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE SPOMER delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* Where the section 2-1401 petition was filed more than two years after the entry of judgment, its dismissal was proper.

¶ 2 The petitioner, Christopher J. Cox, appeals from an order granting the State's motion to dismiss his petition for postjudgment relief pursuant to section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2012)). The Office of the State Appellate Defender (OSAD) was appointed to represent Cox in this appeal. However, OSAD has filed a motion to withdraw as counsel, on the ground that this appeal does not present any issue of arguable merit. Cox has filed a response to OSAD's motion. After carefully considering OSAD's motion, Cox's response, and the entire record on

appeal, this court concludes that this appeal is bereft of merit. Accordingly, OSAD's motion to withdraw as counsel on appeal is granted, and the judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4 In July 2005, a jury found Cox guilty of disorderly conduct, domestic battery, unlawful restraint, aggravated fleeing or attempting to elude a police officer, armed violence, and aggravated unlawful restraint. The verdict on aggravated unlawful restraint was vacated because that offense was a lesser-included offense of armed violence. The circuit court sentenced Cox on each of the remaining counts. In regard to armed violence, the court sentenced Cox to imprisonment for a term of 22 years, and ordered that he serve 85% of the sentence.

¶ 5 On direct appeal, Cox argued that: (1) the statutory penalty for armed violence with the predicate felony of unlawful restraint was unconstitutionally disproportionate to the statutory penalty for aggravated unlawful restraint, requiring vacatur of the armed-violence conviction and reinstatement of the conviction for aggravated unlawful restraint, and (2) the sentencing court lacked authority to order that Cox serve 85% of his sentence for armed violence because the court did not make an express finding that the offense resulted in great bodily harm, requiring amendment of the sentencing order so as to grant Cox day-for-day credit. This court disagreed with both of Cox's arguments, and affirmed his convictions and sentences. *People v. Cox*, No. 5-06-0033 (May 11, 2007) (unpublished order pursuant to Supreme Court Rule 23). The decision in the direct appeal included a discussion of the proceedings that resulted in the convictions and sentences, including the trial evidence. That discussion need not be repeated here.

¶ 6 In December 2007, Cox filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2006)). He raised nine

claims concerning his convictions, ranging from his fitness to stand trial to the requirement that some of his sentences be served consecutively. Appointed counsel filed an amended petition that incorporated Cox's nine *pro se* claims and added two more. In August 2008, the circuit court, on the State's motion, dismissed the amended postconviction petition. On appeal from the dismissal order, Cox's appointed attorney filed a motion to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), arguing that the appeal lacked merit. This court agreed with appointed counsel, granted the *Finley* motion, and affirmed the judgment of the circuit court. *People v. Cox*, No. 5-08-0498 (July 16, 2010) (unpublished order pursuant to Supreme Court Rule 23). In that decision, this court addressed each postconviction claim. That discussion need not be repeated here.

¶ 7 On March 6, 2012, Cox filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure. He raised seven claims, summarized as follows: (1) The State (a) "conspired" with Cox's wife and with various police officers to "manufacture evidence" against him, including a 9-1-1 call and photographs of the crime scene and of Cox's wife's injuries, and (b) failed to disclose to the defense photographs of the crime scene, of Cox's injuries, and of Cox's wife, all of which would have exposed the conspiracy, (2) at Cox's trial, and with the knowledge of the trial judge, the State relied on "manufactured false evidence and testimony," including "bogus photographs" of Cox's wife, (3) (a) the State did not present any "physical evidence of guilt" such as Cox's fingerprints or Cox's wife's DNA, and (b) some of the photographs admitted into evidence, and a doctor's report, showed that Cox's wife had not suffered any injuries at the hands of Cox, (4) (a) the State knowingly used "false testimony" by "police and private citizens" including Christian County sheriff's chief deputy Dave Mahan and Cox's wife, and (b) court reporter Linda Myers deleted or altered testimony in the trial transcript, (5) the trial court and standby counsel would not allow Dr. Albright or Dr. Adams to testify on behalf

of Cox, and would not allow Cox to introduce into evidence Dr. Albright's "medical reports and test results", (6) due process was violated when the court ordered Cox to serve 85% of his prison sentence for armed violence on the basis of the sentencing judge's finding of great bodily harm; a finding by the jury was necessary to increase the penalty in this fashion, and (7) Cox was actually innocent, where he was "denied the right to access potentially exculpatory biological evidence" and the State withheld photographs, including photographs of Cox's wife. As to each of the seven claims in the petition, Cox asserted that the allegations rendered the judgment of conviction "void." For relief, Cox asked that the court "vacate" the 22-year sentence for armed violence and the 3-year sentence for domestic battery, or, in the alternative, grant him a new trial.

¶ 8 Apparently, Cox did not notify the State that he had filed the section 2-1401 petition, even though the State was the respondent. Cox's "notice of filing" indicates only that the Christian County circuit clerk and Circuit Judge Ronald Spears were notified. The docket entry for July 5, 2012, states that the court reviewed the petition, scheduled a hearing for August 20, 2012, and directed the clerk to notify the State and to issue a writ to bring Cox to court.

¶ 9 At the hearing held on August 20, 2012, the State moved to dismiss Cox's section 2-1401 petition on the grounds that it was untimely and its claims were barred by *res judicata*. The circuit court asked Cox, who was present for the hearing, to explain why he filed the petition outside the ordinary two-year limitation applicable to section 2-1401 petitions, but Cox merely discussed the substance of the claims presented in his petition. The court expressed agreement with the State's position, and granted the motion to dismiss the petition. From that judgment, Cox now appeals.

¶ 10

ANALYSIS

¶ 11 As previously noted, Cox failed to provide the State, the opposing party, with notice

of his section 2-1401 petition. This failure was contrary to the clear command of section 2-1401(b) of the Procedure Code that all parties to the petition shall be notified as provided by rule. 735 ILCS 5/2-1401(b) (West 2012). Despite the lack of notice, the State appeared at the hearing of August 20, 2012, and argued the merits of the petition. Through these actions, the State effectively waived the jurisdictional defect. See 735 ILCS 5/2-301(a-5) (West 2012) (a party waives all objections to the court's jurisdiction over his person if he files a responsive pleading or a motion, other than a motion for an extension of time to answer or otherwise appear, before filing a motion asserting the jurisdictional objection). See also *Mrugala v. Fairfield Ford, Inc.*, 325 Ill. App. 3d 484, 488 (2001) (when opposing party appears and argues merits of section 2-1401 petition despite failure of receipt of proper notice, a court will deem the party to have forfeited the jurisdictional defect). Therefore, the circuit court had personal jurisdiction over the State in this proceeding. Furthermore, the State's motion to dismiss the section 2-1401 petition was timely. Because the State appeared without having been served with summons, it had 30 days from the date of its appearance in which to file a responsive pleading. See Ill. S. Ct. R. 13(b) (eff. Feb. 16, 2011) (party that appears without having been served with summons is "required to plead within the same time as if served with summons on the day he appears"); Ill. S. Ct. R. 101(d) (eff. May 30, 2008) (in general, defendant must file answer within 30 days after service of summons). As previously noted, the State moved to dismiss the section 2-1401 petition on the day of its appearance. Because the circuit court followed the proper procedures and had jurisdiction, its dismissal of the section 2-1401 petition was valid. This court may properly review the dismissal order.

¶ 12 On appeal, the dismissal of a section 2-1401 petition is subject to *de novo* review. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 13 The purpose of a section 2-1401 petition is to bring to the attention of the circuit

court facts that, if known at the time of judgment, would have precluded entry of the judgment. *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). A section 2-1401 petition must be filed "not later than 2 years after the entry of the order or judgment" from which relief is sought. 735 ILCS 5/2-1401(c) (West 2012).

¶ 14 In this case, the judgment of conviction was entered on November 1, 2005, and Cox filed his section 2-1401 petition on March 6, 2012. In other words, six years, four months, and nearly a week separated the entry of the judgment and Cox's filing of the section 2-1401 petition. As the circuit court recognized, the petition was untimely. Due to the untimely filing, the petition was properly dismissed.

¶ 15 The two-year limitation period excludes any time during which the petitioner was under legal disability or duress or the ground for relief was fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2012). However, Cox did not allege any of these factors in his petition.

¶ 16 Also, if a section 2-1401 petition alleges that an order or judgment is void (see 735 ILCS 5/2-1401(f) (West 2012)), the two-year limitation does not apply. "Petitions brought on voidness grounds need not be brought within the two-year time limitation." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). No doubt aware that he would be filing his petition far beyond the two-year limitation, Cox sought to take advantage of this exception. In each of the seven claims in his petition, he included an allegation that the judgment of conviction was "void." However, the judgment in this case is not void. Indeed, no part of the judgment is void.

¶ 17 A judgment is void only where the court lacked subject matter or personal jurisdiction, or where it lacked the power to render the judgment or sentence in question. *People v. Wade*, 116 Ill. 2d 1, 5 (1987). In Illinois, circuit courts have subject matter jurisdiction over all justiciable matters. Ill. Const. 1970, art. VI, § 9. The circuit courts

acquire personal jurisdiction over a defendant when he appears before it. *People v. Raczkowski*, 359 Ill. App. 3d 494, 497 (2005). Without doubt, the circuit court of Christian County had jurisdiction over Cox's criminal case and over Cox, and Cox does not suggest otherwise. None of the allegations in claims 1 through 5, or in claim 7, even if true, could possibly have vitiated the court's jurisdiction. (As an aside, this court notes that many of the allegations in claims 1 through 5 and in claim 7 are nothing more than a rehash of claims that Cox made earlier, including at his trial.)

¶ 18 The only possible issue implicating jurisdiction is found in claim 6, wherein Cox claimed that the circuit court lacked the authority to order that Cox serve 85% of his prison sentence for armed robbery. Cox referred to the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and suggested that the court could not lawfully order that he serve 85% of his prison sentence for armed violence without a finding by the jury that he had caused great bodily harm.

¶ 19 A sentence or portion thereof that is not authorized by statute is void. *People v. Thompson*, 209 Ill. 2d 19, 23 (2004). Here, the court ordered Cox to serve 85% of his armed-violence sentence on the basis of the court's own finding that Cox's conduct leading to the armed-violence conviction resulted in great bodily harm to the victim. This order was entered pursuant to, and in accordance with, section 3-6-3(a)(2)(iii) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2)(iii) (West 2004)). This statute is constitutional and does not implicate *Apprendi* concerns. *People v. Newbolds*, 325 Ill. App. 3d 192, 196 (2001). No jury finding of great bodily harm was necessary. The court's own finding of great bodily harm was all that was necessary to support the order that Cox serve 85% of his sentence for armed violence. The order is clearly not void.

¶ 20 In claim 7 of his petition, Cox ostensibly presented a claim that he is actually innocent. Claims of actual innocence may appropriately be raised in section 2-1401

petitions. *People v. Bocclair*, 202 Ill. 2d 89, 102 (2002). Actual innocence involves total vindication or exoneration. *People v. Collier*, 387 Ill. App. 3d 630, 636 (2008). "The elements of a claim of actual innocence are that the evidence in support of the claim must be newly discovered; material and not merely cumulative; and of such conclusive character that it would probably change the result on retrial. [Citations.]" (Internal quotation marks omitted.) *People v. Edwards*, 2012 IL 111711, ¶ 32. Cox did not provide evidence of this sort. Nothing in Cox's petition or in its supporting documents completely exonerates Cox. Instead, Cox essentially alleged that he was denied access to evidence that may have been beneficial to his cause. Such allegations fall far short of establishing a claim of actual innocence.

¶ 21 Cox's section 2-1401 petition was untimely, and was properly dismissed on that basis. Any argument to the contrary would have no merit. Accordingly, OSAD's *Finley* motion to withdraw as counsel is granted, and the judgment of the circuit court is affirmed.

¶ 22 Motion granted; judgment affirmed.