

No. 1-14-1374

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. 04 CR 17327
)	
DAMEN TOY,)	Honorable
)	James M. Obbish,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* Circuit court's *sua sponte* dismissal of defendant's *pro se* section 2-1401 petition affirmed where defendant's allegation was barred by the doctrine of *res judicata*.

¶ 2 Defendant Damen Toy appeals from an order of the circuit court of Cook County dismissing *sua sponte* his *pro se* 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, defendant solely contends that the court erred when it dismissed his petition because he raised a meritorious claim that, prior to his decision to appear *pro se* at trial, the court improperly

admonished him about the sentencing range he faced, thereby rendering his waiver of counsel invalid. We affirm.

¶ 3 Following a May 2007 jury trial, at which defendant appeared *pro se*, defendant was convicted of two counts of aggravated criminal sexual assault with a firearm and two counts of attempted armed robbery. The trial court sentenced defendant to consecutive prison terms of 45 years and 30 years for the two counts of aggravated criminal sexual assault. Each of these sentences included a 15-year sentencing enhancement because the jury found that defendant was armed with a firearm. The court also imposed concurrent terms of 10 years' imprisonment for each count of attempted armed robbery, and a consecutive term of 6 months' imprisonment for contempt of court, for an aggregate sentence of 75 years and 6 months' imprisonment.

¶ 4 On direct appeal, defendant argued, *inter alia*, that "his waiver of counsel was not valid because the trial court did not give him oral admonishments about the potential range of sentences." *People v. Toy*, 407 Ill. App. 3d 272, 273 (2011). In our prior opinion, this court discussed in great detail defendant's requests to represent himself, the trial court's admonishments pursuant to Supreme Court Rule 401(a) (eff. July 1, 1984), and its cautions and warnings to defendant about the disadvantages of self-representation. *Id.* at 273-76. We found that the record showed that on two occasions the trial court gave defendant written documents listing the charges pending against him and the possible sentences he faced, including consecutive sentences. *Id.* at 283. In October 2005, the court gave defendant a written list of all of the charges and possible sentences for his four pending cases, and in February 2006, the court confirmed that defendant had received that written explanation. *Id.* We noted that "the prosecutor stated on the record that defendant faced '58 years minimum, 202 years maximum' on all pending

cases." *Id.* In October 2006, the trial court gave defendant the second document specifying the charges and penalties for this particular case. *Id.* at 276, 283-84.

¶ 5 This court then stated:

"We point out that defendant is not contending that he did not understand the document or that he was unaware of the possible sentences he faced in the case. Rather, defendant claims that the trial court failed to comply with Rule 401(a) by not orally admonishing him about his potential sentences. However, defendant fails to cite any authority for his proposition that compliance with Rule 401(a) must be done orally." *Id.* at 283.

We then found that the record showed that "the trial court went beyond the requirements of Rule 401(a) to make it clear that defendant knowingly and intelligently made the decision to waive counsel." *Id.* at 284. Accordingly, we concluded that "the trial court substantially complied with Rule 401(a)" and "properly admonished defendant pursuant to Rule 401(a)." *Id.* at 283-84.

¶ 6 In November 2011, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) which was summarily dismissed by the circuit court. On appeal, defendant asserted for the first time that his sentences for aggravated criminal sexual assault, which included the 15-year firearm sentencing enhancements, violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) because armed violence based on a sexual assault consisted of identical elements, but the offenses had different penalties. This court found that, in light of our supreme court's holding in *People v. Hauschild*, 226 Ill. 2d 63 (2007), which was followed by this court in *People v. Hampton*, 406 Ill. App. 3d 925 (2010), defendant's 15-year sentencing enhancements violated the

proportionate penalties clause and were unconstitutional. *People v. Toy*, 2013 IL App (1st) 120580, ¶ 29. Rather than remand the case to the circuit court for second-stage postconviction proceedings, this court invoked its authority under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999) and reversed the dismissal of defendant's postconviction petition, granted the petition on the issue raised on appeal, vacated his sentences for aggravated criminal sexual assault, and remanded the case for resentencing on those two counts. *Id.* at ¶ 30. This opinion was filed on December 20, 2013.

¶ 7 On March 27, 2013, while the above appeal was pending, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code, duplicating the proportionate penalties argument that his counsel had raised on appeal. According to the clerk's memorandum of orders contained in the common law record, in October 2013, the State agreed that pursuant to *Hauschild* defendant should be resentenced, and in November 2013, the trial court appointed counsel to represent defendant for resentencing.

¶ 8 On September 16, 2013, while the above appeal was still pending, defendant filed the instant *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code alleging that, in light of the proportionate penalties argument, his waiver of counsel prior to trial was invalid because the trial court failed to properly admonish him about the minimum and maximum sentences he faced if convicted. Defendant pointed out that the trial court's admonishment regarding the minimum and maximum penalties included the 15-year sentencing enhancements. He argued that, if the sentencing enhancements were unconstitutional, then the court's admonishment was inaccurate and improper under Rule 401(a), which thereby rendered his waiver of counsel invalid.

¶ 9 On February 7, 2014, the clerk of the circuit court received another *pro se* petition for relief from judgment filed by defendant pursuant to section 2-1401 of the Code, solely alleging that the grand jury lacked jurisdiction to act in his case. Defendant claimed that because the common law record did not expressly show that the grand jury had been impaneled and sworn, the grand jury was never properly impaneled, and thus, his indictment was void for want of jurisdiction. The circuit court subsequently found that this petition was "entirely frivolous" and dismissed it *sua sponte*. Defendant's appeal of that judgment was decided against him on June 2, 2016. *People v. Toy*, 2016 IL App (1st) 141375-U.

¶ 10 At a March 14, 2014, status hearing on this court's mandate for resentencing, defense counsel stated that in addition to representing defendant for resentencing, the court had also appointed her to address the issue of the adequacy of its Rule 401(a) admonishments raised in the instant petition. The court then recalled that defendant had raised the issue of the adequacy of the admonishments on direct appeal, and that the appellate court had found that he was properly admonished. The circuit court explained that if the issue had already been ruled upon by the appellate court, then it was *res judicata* and defendant could not raise it again. The court then asked the State to file a motion to address the issue.

¶ 11 On April 16, 2014, after the circuit court dismissed defendant's February 2014 petition, as noted above, defendant, speaking for himself, asserted that the allegation in the instant petition challenging the Rule 401(a) admonishments was not the same issue he raised on direct appeal. Defendant explained that the issue on direct appeal was whether the court erred when it failed to admonish him orally, whereas the issue in the instant petition was whether the admonishments were proper regarding the minimum and maximum sentence he could receive. The court then

reviewed the instant petition again, and found that the issue challenging the waiver of counsel was previously raised on direct appeal and rejected by the appellate court. The court noted:

"[s]pecifically, the appellate court found that the trial courts admonishments were in substantial compliance with Supreme Court Rule 401A. ***

The appellate court further found that pursuant to Supreme Court Rule 401, you knowingly and voluntarily waived your right to counsel, and the trial court was not required under the rule to orally admonish you further. So that claim is barred by res judicata. It's been ruled on."

Defendant maintained that the issue in his petition was not the same issue raised on direct appeal, and the circuit court disagreed and dismissed the 2-1401 petition *sua sponte*. The record shows that the State filed a motion to dismiss defendant's petition that same day, but there is no indication that the court considered that motion when it dismissed defendant's petition.

¶ 12 On appeal, defendant solely contends that the court erred when it dismissed his petition because he raised a meritorious claim that, prior to his decision to appear *pro se* at trial, the court improperly admonished him about the sentencing range he faced, thereby rendering his waiver of counsel invalid. Defendant points out that the trial court's Rule 401(a) admonishments regarding the minimum and maximum sentences he faced included the 15-year firearm sentencing enhancements. He argues that since the enhancements were subsequently found unconstitutional, the admonishments were erroneous, and therefore, the trial court did not substantially comply with Rule 401(a). Defendant maintains that this issue differs from the issue he previously raised on direct appeal, which challenged the court's failure to give the admonishments orally, and claims that the appellate court did not find that the substance of the admonishments complied

with Rule 401(a), and thus, his claim is not barred by *res judicata*. Defendant asserts that his convictions should be reversed and his case remanded for a new trial.

¶ 13 The State responds that defendant's claim is barred by *res judicata* because he previously litigated the issue of whether he was properly admonished under Rule 401(a) on direct appeal, and the appellate court found that he knowingly and intelligently waived his right to counsel. Alternatively, the State argues that defendant's claim is without merit because, at the time that he was admonished, the sentencing enhancements were still considered proper, and therefore, the admonishments were not erroneous, and his waiver of counsel was valid.

¶ 14 We review the circuit court's dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). The circuit court may *sua sponte* dismiss a section 2-1401 petition when it finds that such petition is patently frivolous. *People v. Addison*, 371 Ill. App. 3d 941, 944 (2007).

¶ 15 Section 2-1401 is a civil remedy which extends to criminal cases and provides a comprehensive, statutory procedure for vacating a final judgment that is more than 30 days old. *Vincent*, 226 Ill. 2d at 7-8. "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *Id.*

¶ 16 When reviewing a section 2-1401 petition, the court must determine whether facts exist that were unknown to the court at the time of trial that would have prevented entry of the judgment. *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003). A petition filed under section 2-1401 "is 'not designed to provide a general review of all trial errors nor to substitute for direct appeal.'

" *People v. Haynes*, 192 Ill. 2d 437, 461 (2000), quoting *People v. Berland*, 74 Ill. 2d 286, 314 (1978). Moreover, issues previously raised at trial or in other collateral proceedings cannot form the basis of a petition for relief. *Addison*, 371 Ill. App. 3d at 945, citing *Haynes*, 192 Ill. 2d at 461. Claims that were raised and decided on direct appeal are barred as *res judicata*. *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 30.

¶ 17 In this case, we find that defendant's claim that the trial court improperly admonished him about the sentencing range he faced, thereby rendering his waiver of counsel invalid, was raised and decided on direct appeal, and thus, is barred by the doctrine of *res judicata*. The record shows that on direct appeal, defendant argued that "his waiver of counsel was not valid because the trial court did not give him oral admonishments about the potential range of sentences." *Toy*, 407 Ill. App. 3d at 273. In our analysis, we stated that defendant's argument was "that his waiver of counsel was not valid because he was not given the proper admonishments regarding the possible range of sentences." *Id.* at 281.

¶ 18 In our prior opinion, this court discussed in great detail defendant's requests to represent himself, the trial court's admonishments pursuant to Rule 401(a), and the court's cautions and warnings to defendant about the disadvantages of self-representation. *Id.* at 273-76. We then found that on two occasions the trial court gave defendant written documents listing the charges pending against him and the possible sentences he faced, with one of those documents specifying the charges and penalties for this particular case. *Id.* at 283-84. Based on this record, we found that "the trial court went beyond the requirements of Rule 401(a) to make it clear that defendant knowingly and intelligently made the decision to waive counsel." *Id.* at 284. Accordingly, we

concluded that "the trial court substantially complied with Rule 401(a)" and "properly admonished defendant pursuant to Rule 401(a)." *Id.* at 283-84.

¶ 19 We disagree with defendant's assertion that the issue raised in the instant petition differs from the issue he raised on direct appeal. We acknowledge that on direct appeal defendant argued that the trial court erred because it failed to give him the admonishments orally, and that he now contends that the admonishments were erroneous because the minimum and maximum sentences included the 15-year sentencing enhancements. However, the overarching issue for both contentions is whether the trial court's admonishments substantially complied with Rule 401(a). Defendant's claim that this court did not previously find that the substance of the admonishments complied with Rule 401(a) is belied by the record. As quoted above, we expressly found that the trial court went beyond the requirements of Rule 401(a) to ensure that defendant knowingly and intelligently waived counsel, and specifically concluded that the court substantially complied with the rule and properly admonished him pursuant to the rule. Therefore, we find that the issue raised by defendant in the instant section 2-1401 petition was already raised, thoroughly addressed and rejected by this court on direct appeal, and thus, it is barred by the doctrine of *res judicata*.

¶ 20 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.