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IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| |) | Cook County |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 10 CR 15347 |
| |) | |
| KAMERON MCGEE, |) | |
| |) | Honorable |
| Defendant-Appellant. |) | Kevin M. Sheehan, |
| |) | Judge Presiding. |

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Affirming the judgment of the circuit court denying certain relief requested in a section 2-1401 petition.

¶ 2 Following a bench trial, Kameron McGee (defendant) was convicted of attempting to board an aircraft with a weapon and aggravated unlawful use of a weapon (AUUW).

We affirmed his convictions. *People v. Kameron McGee*, 2013 IL App (1st) 120387-U (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735

ILCS 5/2-1401 (West Supp. 2015)), contending that his AUUW conviction was void *ab initio* under the Illinois Supreme Court decision in *People v. Aguilar*, 2013 IL 112116. He further argued that his conviction for attempting to board an aircraft with a firearm “must also be vacated in light of *Aguilar* and its progeny.” The circuit court of Cook County entered an order granting the section 2-1401 petition with respect to his AUUW conviction and denying the petition with respect to his conviction for attempting to board an aircraft with a weapon.

Defendant contends on appeal that section 29D-35.1 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/29D-35.1 (West 2010)) regarding boarding or attempting to board an aircraft with a weapon is ambiguous and must be strictly construed in his favor under the rule of lenity. For the reasons stated below, we affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 Transportation Security Administration (TSA) employees testified during defendant’s trial that at approximately 8:30 a.m. on August 13, 2010, they observed an image of a handgun inside a bag that was going through an x-ray machine at a security checkpoint at Chicago O’Hare International Airport (O’Hare). A TSA supervisor contacted the Chicago police department. When the police arrived, TSA released the bag from the x-ray machine and inquired of defendant whether the bag belonged to him; defendant answered affirmatively. The supervisor testified that defendant did not attempt to run or to avoid answering her questions, was not belligerent, and did not act nervous or hostile. When she requested defendant’s driver’s license and boarding pass, he provided them without resistance.

¶ 5 A Chicago police officer testified that, in examining the contents of the bag, he discovered clothes, toiletries, and a semi-automatic handgun. The weapon had a full clip, but there was no bullet in the chamber. Defendant was arrested and taken to the airport police

station where he was interrogated. After waiving his *Miranda* rights, defendant informed the police that he forgot the weapon was in his bag. On cross-examination, the officer testified that he had to unzip and fish through the bag to retrieve the weapon. The officer explained that defendant appeared surprised and upset when the handgun was pulled out of the bag.

¶ 6 After the State rested, the defense moved for a directed finding, arguing the State did not prove defendant knew the weapon was in the bag because the testimony demonstrated he forgot the handgun was in the bag. The trial court denied the motion.

¶ 7 Defendant testified at trial that on August 13, 2010, he went to O'Hare to fly to a family reunion. His friend was scheduled to pick him up at 7 a.m. to drive him to the airport for his 9:30 a.m. flight, but defendant overslept. He was awakened by his friend calling him and honking on the horn. He frantically packed, rushed to his friend's vehicle, and placed his bags in the trunk. Defendant checked his luggage with the Skycap and went to the security line with his carry-on bag. When he arrived at the security line, he removed his belt and shoes, emptied his pockets, placed his carry-on bag on the conveyor belt, and walked through the x-ray machine. After he walked through the x-ray, the belt stopped and TSA employees inquired whether the bag belonged to him, and he responded affirmatively. An employee asked him whether he knew that there was a weapon in the bag, and defendant answered "[a]bsolutely not." TSA again asked whether he knew there was a weapon in the bag and defendant responded "no." After the police arrived, he observed an officer remove a handgun from his bag. Defendant then became emotional and tears began to form in his eyes. He apologized and told the officers that he did not know his handgun was in the bag. Defendant was placed under arrest.

¶ 8 Defendant testified that he had gone to the shooting range three days before his scheduled flight and did not realize that the weapon remained in his bag until it was discovered at the

airport. On August 13, 2010, defendant thought the weapon was in his nightstand, where he typically placed it after cleaning and reassembling it. The handgun was not heavy, and he did not feel or notice it in the bottom of the bag as he packed.

¶ 9 The trial court did not find defendant's testimony to be credible. In the trial court's opinion, the testimony was uncontroverted that defendant exclusively owned the weapon and had exclusive control over the handgun and the carry-on bag. The trial court also found knowledge despite there being a three-day span between when defendant last touched the handgun after taking it to the shooting range and when it was discovered in the bag at the airport. Defendant was found guilty of boarding or attempting to board an aircraft with a firearm and AUUW, and was sentenced to one year of felony probation. The trial court denied his motion for a new trial.

¶ 10 On appeal, defendant argued that the State failed to prove his guilt beyond a reasonable doubt because he did not *knowingly* carry the weapon into the airport and attempt to board an aircraft. In an order entered on February 8, 2013, we affirmed the judgment of the trial court. *McGee*, 2013 IL App (1st) 120387-U. The Illinois Supreme Court denied defendant's petition for leave to appeal in May 2013. *People v. McGee*, No. 1-15-772 (May 29, 2013).

¶ 11 Defendant, through counsel, filed a petition for relief from judgment pursuant to section 2-1401 of the Code on January 7, 2016. Citing *Aguilar*, defendant argued that his AUUW conviction was void *ab initio*. He further contended that his conviction for attempting to board an aircraft with a firearm must be vacated, asserting that "*Aguilar* makes clear that on August 13, 2010, [defendant] had a constitutional right to possess his firearm because he had been issued a Firearm Owner's Identification ('FOID') Card by the Illinois State Police."

¶ 12 In an order entered on February 17, 2016, the circuit court concluded that defendant's challenge to his AUUW conviction based on *Aguilar* was meritorious and that his AUUW

conviction was void *ab initio*. Conversely, the circuit court rejected his argument regarding his conviction for boarding or attempting to board an aircraft with a weapon under section 29D-35.1 of the Criminal Code stating that “the holding in *Aguilar* was limited to the AUUW statute and has no bearing on this conviction.” In his section 2-1401 petition, defendant quoted a portion of section 29D-35.1(b): “This Section does not apply to any person authorized by either the federal government or any state government to carry firearms.” The circuit court stated that defendant’s “characterization of section 5/29D-35.1(b) is extremely disingenuous because he deliberately cites only the portion of the statute that supports his argument.” Observing that defendant did not satisfy *all* of the requirements set forth in the statute – *e.g.*, notifying the commander of the aircraft that he possessed a firearm – the court concluded that his challenge to his conviction was “frivolous and entirely without merit.” Defendant filed this timely appeal.

¶ 13

ANALYSIS

¶ 14 Defendant argues on appeal that section 29D-35.1 of the Criminal Code (720 ILCS 5/29D-35.1 (West 2010)) is ambiguous and should be strictly construed in his favor under the rule of lenity. Subsections (a) and (b) of the statute provide as follows:

“§ 29D-35.1 Boarding or attempting to board an aircraft with weapon.

(a) It is unlawful for any person to board or attempt to board any commercial or charter aircraft, knowingly having in his or her possession any firearm, explosive of any type, or other lethal or dangerous weapon.

(b) This Section does not apply to any person authorized by either the federal government or any state government to carry firearms, but the person so exempted from the provisions of this Section shall notify the commander of any aircraft he or she is about to board that he or she does possess a firearm and show

identification satisfactory to the aircraft commander that he or she is authorized to carry that firearm.” 720 ILCS 5/29D-35.1 (West 2010).

¶ 15 Defendant initially contends on appeal that *Aguilar* “makes clear” that he had a constitutional right to possess his firearm on August 13, 2010, because he had been issued a FOID Card by the Illinois State Police. He then asserts that “article 29D” of the Criminal Code, which addresses terrorism, does not define or limit the “authorization” required for the exemption provided in section 5/29D-35.1(b). 720 ILCS 5/29D-10, D-35.1(b) (West 2010). Invoking the rule of lenity – which provides that “ambiguous criminal statutes will generally be construed in the defendant’s favor” (*People v. Gutman*, 2011 IL 110338, ¶ 12) – defendant argues that “the Illinois State Police would fall under the category of ‘any state government’ ” for purposes of section 29D-35.1(b).

¶ 16 Defendant next “anticipate[s]” an argument from the State that was raised by the circuit court, *i.e.*, that under the statute, “the person so exempted from the provisions of this Section shall notify the commander of any aircraft he or she is about to board that he or she does possess a firearm and show identification satisfactory to the aircraft commander that he or she is authorized to carry that firearm.” 720 ILCS 5/29D-35.1(b) (West 2010). His appellate brief then poses a series of questions apparently intended to highlight the alleged ambiguity of the statute, *e.g.*, whether the co-pilot would qualify as the “commander” and whether notification must be in writing. According to defendant, “this Court should find that the statute, 720 ILCS 5/29D-35.1, is ambiguous and that, under the rule of lenity, the statute must be construed in favor of the accused.” Defendant thus asserts that his conviction “cannot stand.”

¶ 17 The State raises a number of arguments in response to defendant’s contentions. For purposes of the efficient disposition of this appeal, we need address only one, *i.e.*, the petition

was untimely vis-à-vis defendant's challenge to his conviction under section 29D-35.1. Section 2-1401 provides, in pertinent part, that "[r]elief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition[.]" 735 ILCS 5/2-1401(a) (West Supp. 2015). A claim that was not raised in the direct appeal, but could have been, is barred. *People v. Coleman*, 358 Ill. App. 3d 1063, 1067 (2005). In this case, the Illinois Supreme Court decision in *Aguilar* was issued subsequent to our ruling in the original appeal and thus was not, and could not have been, addressed therein.

¶ 18 Generally, "the petition must be filed not later than 2 years after the entry of the order or judgment." 735 ILCS 5/2-1401(c) (West Supp. 2015). The two-year period herein had long expired when defendant filed his section 2-1401 petition in early 2016. The Illinois Supreme Court, however, has recognized that "a challenge to a final judgment based on a facially unconstitutional statute that is void *ab initio*" is "exempt from forfeiture and may be raised at any time." *People v. Thompson*, 2015 IL 118151, ¶ 32. See also 735 ILCS 5/2-1401(f) (West Supp. 2015) (providing that "[n]othing contained in this Section affects any existing right to relief from a void order or judgment"). Our supreme court also stated that a voidness challenge "because the court that entered the final judgment lacked personal or subject matter jurisdiction" is also "not subject to forfeiture or other procedural restraints." *Id.* ¶ 31. As defendant does not challenge his conviction under section 29D-35.1 on any voidness grounds, the arguments in his section 2-1401 petition regarding such conviction were untimely.

¶ 19 We note that the circuit court's order provided in part: "Generally, the petitioner must file a petition pursuant to section 2-1401 within two years after the entry of the judgment unless they allege the judgment itself is void. In the instant case [defendant] alleges his convictions are void." Based on our careful review of the section 2-1401 petition, however, we respectfully and

narrowly disagree with the circuit court's characterization of defendant's arguments, but regardless our review of this issue is *de novo*. *People v. Dodds*, 2014 IL App (1st) 122268, ¶ 19. In his section 2-1401 petition, defendant argued that his AUUW conviction "is void *ab initio*." Defendant, however, did not raise any "voidness" argument with respect to his conviction for attempting to board an aircraft with a firearm. He instead argued that such conviction "must also be vacated in light of *Aguilar* and its progeny," because, according to defendant, *Aguilar* "makes clear that on August 13, 2010, [he] had a constitutional right to possess his firearm because he had been issued a [FOID Card] by the Illinois State Police." Regardless of the merits of this contention, defendant's position in his petition was *not* that section 29D-35.1 was void *ab initio* or that the trial court lacked jurisdiction. Defendant instead contended that he was exempt from prosecution under the statute based on his FOID card, pursuant to *Aguilar*. The portion of his petition addressing his conviction under section 29D-35.1 was thus time-barred. Compare *People v. McDaniel*, 2016 IL App (2d) 141061, ¶ 7 (noting that "so long as a section 2-1401 petition challenges a judgment on voidness grounds, and McDaniel's petition did, the petition, regardless of its substantive merit, is not subject to section 2-1401's two-year limitations period").

¶ 20 We also observe that, to be entitled to relief under section 2-1401, defendant was required to " '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.' " *People v. Glowacki*, 404 Ill. App. 3d 169, 171 (2010), citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). In his section 2-1401 petition, defendant did not set forth any specific factual allegations supporting his purported due diligence in filing

the petition. He instead cited *People v. Reymar Clinic Pharmacy, Inc.*, 246 Ill. App. 3d 835, 841 (1993), for the proposition that “[an] attack on [a] void judgment is not subject to [the] time constraints of [a] petition to vacate from judgment, nor is it subject to any due diligence requirements.” As noted above, defendant’s challenge to his conviction under section 29D-35.1 did not constitute a “voidness” challenge. Defendant was therefore required to comply with the due diligence and other requirements, but failed to do so. Although not necessary for our analysis, we further note that defendant would be hard-pressed to demonstrate due diligence in filing his section 2-1401 petition given that *Aguilar* was decided more than two years before defendant filed the petition.

¶ 21 In sum, defendant argues on appeal that section 29D-35.1 is ambiguous and seeks application of the rule of lenity, which is a “canon of statutory construction.” *People v. Jackson*, 2011 IL 110615, ¶ 21. Defendant, however, has not advanced any voidness challenges that would potentially exempt his challenge “from the typical rules of forfeiture and procedural bars in section 2-1401 of the Code.” *Thompson*, 2015 IL 118151, ¶ 39. We affirm the circuit court’s judgment denying his petition for relief from judgment for his conviction for boarding or attempting to board an aircraft with a weapon based on, among other things, the expiration of the two-year period provided by section 2-1401 and defendant’s failure to set forth specific factual allegations supporting his due diligence in filing the petition. See, e.g., *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008) (noting that the appellate court “may affirm the trial court’s judgment on any basis supported by the record, regardless of the actual reasoning or grounds relied upon by the circuit court”).

1-16-0985

¶ 22

CONCLUSION

¶ 23 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 24 Affirmed.