

NOTICE

Decision filed 06/13/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 150346-U

NO. 5-15-0346

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 11-CF-1784
)	
HERMAN ADDISON,)	Honorable
)	Robert P. LeChien,
Defendant-Appellant.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's order dismissing the defendant's petition, which was filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), is affirmed because the order attacked in the trial court and on appeal was not void, merely voidable, and defendant has failed to allege due diligence in raising this claim in the trial court in the original action, and in filing the petition.

¶ 2 The defendant, Herman Addison, appeals the order of the circuit court of St. Clair County that dismissed his petition filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). For the reasons that follow, we affirm.

¶ 3

FACTS

¶ 4 The facts necessary to our disposition of this appeal are as follows. Many were recounted in the defendant's earlier, related appeal, and are included here because they remain relevant. Following a trial by jury, the defendant was convicted of felony domestic battery as a result of severely beating his former paramour and housemate, Stacy Jones, with a cane and with his fists. He received the maximum extended-term sentence of six years in the Illinois Department of Corrections. On April 23, 2013, he filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), along with several other motions that are not relevant to this appeal. On the following day, April 24, 2013, the Honorable John Baricevic entered an order in which he *sua sponte* dismissed the petition and the other motions, ruling that the filings occurred "more than 30 days after [the defendant's] sentencing and [judgment] on his conviction" and that accordingly the trial court lacked jurisdiction to consider the filings. The defendant appealed, and in an unpublished order, we vacated, as improper, Judge Baricevic's *sua sponte* dismissal of the defendant's petition, and remanded for further proceedings. See *People v. Addison*, 2015 IL App (5th) 130245-U, ¶ 6.

¶ 5 On remand, the defendant filed the amended petition that is at issue in this appeal. Therein, he contended that his extended-term sentence was void, because, he alleged, the State had failed to prove, as required by statute, that the predicate aggravated battery conviction that led to the enhancement of the charge at issue was committed against a family or household member. The defendant's amended petition contained no factual allegations regarding his due diligence in bringing his claim to the trial court, and no

factual allegations regarding the defendant's due diligence in filing the amended petition. The defendant did, however, request a hearing on his petition. The State responded to the amended petition by filing a motion to dismiss it for lack of personal jurisdiction. The State contended that the defendant failed to properly serve the amended petition on the State, and failed to file return of service. While the amended petition and the State's response thereto were still pending, the defendant filed a petition for *habeas corpus* relief wherein he again raised the issue of his extended-term sentence being void.

¶ 6 On August 4, 2015, Judge Robert LeChien entered an order in which he dismissed, with prejudice, the amended petition, ruling that the defendant presented "no statement of a meritorious defense" and that the matter had not been raised in a direct appeal. He concluded that pursuant to section 2-1401, there was no valid basis for granting the amended petition. He also ruled that because he was dismissing the defendant's amended petition, the State's motion to dismiss was rendered moot, as was the defendant's response to that motion. On August 17, 2015, the defendant filed a notice of appeal, and this timely appeal followed.

¶ 7 ANALYSIS

¶ 8 A petition filed pursuant to section 2-1401 is an avenue by which one may seek relief from a final judgment more than 30 days after the entry of that judgment, "provided the petition proves by a preponderance of evidence certain elements." *People v. Laugharn*, 233 Ill. 2d 318, 322 (2009). "Although a section 2-1401 petition is usually characterized as a civil remedy, its remedial powers extend to criminal cases." *People v. Haynes*, 192 Ill. 2d 437, 460-61 (2000). As a general proposition, a criminal defendant

may use a section 2-1401 petition to both address factual errors that occurred during prosecution but were unknown at the time of the judgment, and to challenge a void judgment. *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008). On appeal, this court will review *de novo* the trial court's dismissal of a section 2-1401 petition, and this court also "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" trial court. *Id.*

¶ 9 Whether brought in a civil case or a criminal one, a party seeking relief via a section 2-1401 petition " 'must 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) (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). An exception to the due diligence requirements exists if the party is attacking a void order. *Id.* at 171-72. However, "[a]n order is void only if the court that entered it lacked jurisdiction." *Id.* at 172. If a party relies on a voidness argument to excuse its failure to allege due diligence, and that reliance is erroneous because the order was not in fact void, the erroneous reliance by the party is "fatal" to the petition and dismissal is proper. *Id.* at 173.

¶ 10 Whether a particular order "is void or voidable presents a question of jurisdiction." *People v. Davis*, 156 Ill. 2d 149, 155 (1993). An order is void if it is "entered by a court lacking personal or subject matter jurisdiction or the inherent power to make and enter that order." *In re Custody of Ayala*, 344 Ill. App. 3d 574, 583 (2003). In contrast, an

order is voidable if it is "entered erroneously, either through mistake of fact or law or both, by a court having jurisdiction." *Id.* at 584. If a court has jurisdiction, "an order will not be rendered void nor will the court lose jurisdiction merely because the court makes such a mistake." *Id.* Moreover, if an order is voidable, rather than void, it "is not subject to collateral attack." *People v. Davis*, 156 Ill. 2d 149, 155-56 (1993). Therefore, it "may only be challenged directly, and the challenger must proceed under section 2-1401 and comply with all the requirements of that section." *Ayala*, 344 Ill. App. 3d at 584. As noted above, this includes the due diligence requirements of section 2-1401.

¶ 11 In the case at bar, the defendant contended in the trial court, and contends on appeal, that his extended-term sentence was void because, he alleged, the State had failed to prove, as required by statute, that the predicate aggravated battery conviction that led to the enhancement of the charge at issue was committed against a family or household member. He does not otherwise take issue with the jurisdiction of the trial court, either personal or subject matter, claiming instead that his conviction and sentence "are illegal because the trial court had no statutory authority to enter judgment for the Class 4 felony domestic battery." In support of this proposition, he cites *People v. Brown*, 225 Ill. 2d 188, 203 (2007). However, *Brown* specifically expounds upon the principle, discussed above, that an order is not void if it is entered erroneously, either through mistake of fact or law or both, by a court having jurisdiction, stating explicitly that if the trial court "imposes an excessive sentence because of a mistake of law or fact, the sentence is merely voidable." *Id.* at 205.

¶ 12 Although the defendant attempts to couch his argument as one of voidness, the factual allegations underlying his argument relate to whether proof was adduced in the trial court that would support the extended-term sentence the defendant received. The defendant contends that no proof was offered that the aggravated battery in the predicate case, styled as case number 05-CF-36, was committed against a family or household member, and that the PSI likewise contains no information about the facts of that offense. He notes that at his sentencing hearing, the State referred to 05-CF-36 as the predicate aggravated battery conviction but did not describe the victim of that offense or maintain that the victim was a family or household member, and that when the trial judge later referenced 05-CF-36, he too did not state that the victim of the offense, Kathy Ross, was a family or household member.

¶ 13 However, to the extent the trial judge was mistaken, as a matter of fact, about the familial and/or household relationship between the defendant and Kathy Ross, and/or was mistaken, as a matter of law, about whether the relationship qualified as a family or household member relationship regardless of its factual nature, pursuant to *Brown*, if the trial court "imposes an excessive sentence because of a mistake of law or fact, the sentence is merely voidable." 225 Ill. 2d at 205. The defendant does not claim—and indeed there is no evidence in the record that would support such a claim if he made one—that the trial court lacked personal and subject matter jurisdiction in this case. Nor does he claim—nor could he claim—that an enhancement of a Class A misdemeanor domestic battery offense to a Class 4 felony offense is impermissible if a defendant has a prior conviction for, *inter alia*, aggravated battery against a family or household member, for

such an enhancement is clearly allowed pursuant to section 12-3.2(b) of the Criminal Code of 1961 (720 ILCS 5/12-3.2(b) (West 2010)), and the trial judge thus had express statutory authority to enter the sentence, assuming he believed, correctly or incorrectly, that the victim in case 05-CF-36 was a family or household member.

¶ 14 Accordingly, this is not a voidness case. Because it is instead a case involving a voidable order, the defendant was required to comply with all the requirements of section 2-1401, including the due diligence requirements. See, *e.g.*, *In re Custody of Ayala*, 344 Ill. App. 3d 574, 584 (2003). As explained above, the defendant's amended petition contained no factual allegations regarding his due diligence in bringing his claim to the trial court, and no factual allegations regarding the defendant's due diligence in filing the amended petition. The defendant's erroneous reliance on voidness as an excuse to explain his failure to allege due diligence is fatal to his petition, and dismissal of the petition was proper. See, *e.g.*, *People v. Glowacki*, 404 Ill. App. 3d 169, 173 (2010).

¶ 15 CONCLUSION

¶ 16 For the foregoing reasons, we affirm the dismissal of the defendant's amended petition.

¶ 17 Affirmed.