

No. 1-11-1479

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. 98 CR 5630
)	
DONTAY MURRAY,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 **Held:** The trial court properly dismissed defendant's petition for relief from judgment because it was filed more than two years after the complained-of judgment.

¶ 2 Defendant Dontay Murray¹ appeals from the dismissal of his *pro se* petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)) (the Code). The section 2-1401 petition challenged, as void, the circuit court's previous summary dismissal of defendant's *pro se* postconviction petition. On appeal,

¹ Defendant's first name is also spelled Dantay in the record.

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defendant contends that he is entitled to relief under section 2-1401 because the circuit court's summary dismissal of his *pro se* postconviction petition was void when it was entered 93 days after the petition was filed. In the alternative, defendant contends that the circuit court's order summarily dismissing his *pro se* postconviction petition was void because it was issued pursuant to an unconstitutional "statutory scheme" that fails to appoint counsel to *pro se* defendants at the first stage of postconviction proceedings.

¶ 3 On appeal, this court concluded that because the circuit court lacked the power, under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)), to summarily dismiss defendant's postconviction petition after 90 days had passed, the order summarily dismissing the petition on the 93rd day was void. See *People v. Murray*, 2014 IL App (1st) 111479-U, ¶ 14. We therefore reversed the dismissal of defendant's petition for relief from judgment, and directed the trial court to both grant the petition and advance defendant's *pro se* postconviction petition for further proceedings pursuant to the Act.

¶ 4 On January 20, 2016, our supreme court denied a petition for leave to appeal filed by the State, but directed this court to vacate our judgment and reconsider the matter in light of *People v. Castleberry*, 2015 IL 116916, to determine whether a different result was warranted. We vacated the judgment and allowed the parties to file supplemental briefs. Upon reconsideration, we conclude that the circuit court's order summarily dismissing defendant's *pro se* postconviction petition was not void, and, therefore, the dismissal of his petition for relief from judgment was correct on the merits. Accordingly, we affirm the trial court's judgment.

¶ 5 After a jury trial, defendant was convicted of first degree murder and armed robbery, and sentenced to 28 years in prison. In affirming that judgment on direct appeal, this court noted, *inter alia*, that defendant's claim that he was denied effective assistance of counsel by trial

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counsel's failure to request that the jury be instructed on the lesser-included offense of involuntary manslaughter was not properly before the court, because the record did not indicate whether trial counsel or defendant made the decision not to request such an instruction. Our review on direct appeal was limited to matters contained in the trial record. See *People v. Murray*, No. 1-01-0769, Order at 12 (2002) (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant then filed a *pro se* postconviction petition alleging that he was denied the effective assistance of counsel when defense counsel failed to request that the jury be instructed on the lesser-included offense of involuntary manslaughter and to consult defendant regarding this decision. The petition was stamped "received" on February 19, 2003, and "filed" on February 20, 2003. On May 23, 2003, the circuit court summarily dismissed the petition as frivolous and patently without merit. Although the common law memorandum of orders ("half sheet") indicates that defendant filed a notice of appeal from this decision on July 2, 2003, no record of that appeal appears in the records of this court.

¶ 7 In June 2006, defendant filed the pending *pro se* section 2-1401 petition for relief from judgment, alleging that the circuit court's 2003 order summarily dismissing his postconviction petition was void because it was entered 93 days after the petition was filed. The trial court granted the State's motion to dismiss the petition. Defendant appeals from that judgment.

¶ 8 Section 2-1401 of the Code provides a mechanism authorizing a trial court to vacate or modify a final order or judgment in civil and criminal proceedings. *People v. Thompson*, 2015 IL 118151, ¶ 28. A section 2-1401 petition must be filed no earlier than 30 days from entry of the final order but not more than 2 years after entry. 735 ILCS 5/2-1401(a), (c) (West 2006). The only exception to the two-year deadline occurs when a petition challenges a void judgment. *Thompson*, 2015 IL 118151, ¶ 29. Unless there has been an evidentiary hearing, this court

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reviews the dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 9 On appeal, defendant first contends that the trial court erred by dismissing his petition for relief from judgment because the summary dismissal of his *pro se* postconviction petition was void as it was entered 93 days after the petition was filed. Although defendant concedes that more than two years elapsed between the complained-of order and the filing of his section 2-1401 petition, he contends that he is not barred from seeking relief because he is attacking a void judgment which is not subject to the two-year time limitation of section 2-1401(c). See 735 ILCS 5/2-1401(c) (West 2006).

¶ 10 The State concedes that postconviction petitions cannot be summarily dismissed more than 90 days after they were filed, and that the postconviction petition at issue was dismissed 93 days after it was filed. The State, however, argues that the order summarily dismissing the postconviction petition was voidable, rather than void, because the circuit court had personal jurisdiction over defendant and subject matter jurisdiction over the proceeding. The State further argues that because the complained-of order was voidable, rather than void, it is not subject to attack in a section 2-1401 proceeding filed outside the two-year bar. We agree with the State.

¶ 11 Our supreme court has previously recognized three elements that comprise a trial court's jurisdiction: (1) personal jurisdiction, (2) subject matter jurisdiction, and (3) the statutory authority to render a particular judgment. *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 21. In *People v. Castleberry*, 2015 IL 116916, ¶ 19, our supreme court abolished the void sentence rule which had held that any judgment failing to conform to a statutory requirement was void. In their supplemental briefs, the parties disagree as to whether *Castleberry* can be applied to the present case. Defendant asserts, relying on *People v. Smith*, 2016 IL App (1st) 140887, ¶ 30, that

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Castleberry cannot be retroactively applied. Defendant's argument is foreclosed, however, by our supreme court's recent holding that “*Castleberry* applies to [a] defendant's section 2-1401 petition that was pending at the time *Castleberry* was decided.” See *People v. Price*, 2016 IL 118613, ¶ 35.²

¶ 12 In *People v. Castleberry*, 2015 IL 116916, ¶ 19, our supreme court abolished the void sentence rule. In so doing, the court noted that the void sentence rule developed from prior cases which held that in addition to subject matter and personal jurisdiction, circuit courts also possessed “inherent authority” or “inherent power.” *Id.* ¶ 13. The court noted that:

“our cases have at times also held ‘that the power to render the particular judgment or sentence is as important an element of jurisdiction as is personal jurisdiction and subject matter jurisdiction.’ [Citation.] Based on this idea, the rule has developed which holds that a circuit court which violates a particular statutory requirement when imposing a sentence acts without ‘inherent authority’ or ‘inherent power.’ And, because the court has acted without power, it has acted without jurisdiction, thereby rendering the sentence void. Thus, the void sentence rule is stated: ‘A sentence which does not conform to a statutory requirement is void.’ [Citation.]” *Id.*

The court then stated the Illinois Constitution granted circuit courts original jurisdiction over all justiciable matters. *Id.* ¶ 18. In other words, “ ‘while the legislature can create new justiciable

² Because of the similarity in issues, we waited for our supreme court to decide *Price* before issuing this Rule 23 order.

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matters by enacting legislation that creates rights and duties, the failure to comply with a statutory requirement or prerequisite does not negate the circuit court's subject matter jurisdiction or constitute a nonwaivable condition precedent to the circuit court's jurisdiction.' ” *Id.* ¶ 15 (quoting *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 37).

¶ 13 The court concluded that the “inherent power” idea of jurisdiction was at odds with the grant of jurisdiction given to the circuit courts under the Illinois Constitution, and could not be reconciled with its decisions in *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514 (2001), *Bellevue Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325 (2002), and *LVNV Funding, LLC v. Trice*, 2015 IL 116129. *Castleberry*, 2015 IL 116916, ¶ 18. Therefore, only the most fundamental defects, such as the lack of personal jurisdiction or the lack of subject matter jurisdiction, warrant declaring a judgment void. *Id.* ¶ 15 (citing *LVNV Funding, LLC*, 2015 IL 116129, ¶ 38).

¶ 14 Applying *Castleberry* here, we find that the order dismissing defendant's postconviction petition 93 days after its filing was voidable, not void. As our supreme court explained in *Castleberry*, a judgment is void only if it was entered by a court lacking either personal jurisdiction or subject matter jurisdiction. *Id.* ¶¶ 11, 15. Here, defendant does not challenge the circuit court's personal jurisdiction. See *People v. Woodall*, 333 Ill. App. 3d 1146, 1156 (2002) (“A criminal defendant confers personal jurisdiction upon the trial court when he appears and joins the issues with a plea.”). Rather, he challenges the circuit court's authority or ability to dismiss his postconviction petition after 93 days when the Act requires such an order to be entered within 90 days. However, the circuit court obtains its subject matter jurisdiction from article VI, section 9, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 9). See also *Castleberry*, 2015 IL 116916, ¶ 18. Because a circuit court's subject matter jurisdiction over

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criminal cases comes from the constitution, a circuit court cannot lose jurisdiction over a criminal case through “ ‘ the failure to satisfy a certain statutory requirement or prerequisite.’ ” *Id.* ¶ 15 (quoting *LVNV Funding, LLC*, 2015 IL 116129, ¶ 30).

¶ 15 The circuit court, therefore, had the jurisdiction to summarily dismiss defendant’s *pro se* postconviction petition, and its order doing so 93 days after the petition was filed was merely voidable, rather than void. In other words, the circuit court’s failure to comply with a provision of the Act did not divest the court of jurisdiction such that the resulting judgment would be rendered void. See *id.* (quoting *LVNV Funding, LLC*, 2015 IL 116129, ¶ 37) (“ ‘the failure to comply with a statutory requirement or prerequisite does not negate the circuit court’s subject matter jurisdiction or constitute a nonwaivable condition precedent to the circuit court’s jurisdiction’ ”). Therefore, because the order defendant is challenging is not a void order, the trial court properly denied defendant relief. See *People v. McDaniel*, 2016 IL App (2d) 141061, ¶ 4 (post-*Castleberry* there was no true “voidness” as alleged in the defendant’s petition; rather there was only a voidable fine, which was no longer subject to collateral attack through a section 2-1401 petition).

¶ 16 In the alternative, defendant contends that the circuit court’s order summarily dismissing his *pro se* postconviction petition is void because it was issued pursuant to an unconstitutional statutory scheme that does not appoint counsel to indigent defendants who file collateral proceedings alleging ineffective assistance of counsel when those claims cannot be resolved on direct appeal. See *Thompson*, 2015 IL 118151, ¶ 32 (“A second type of voidness challenge that is exempt from forfeiture and may be raised at any time involves a challenge to a final judgment based on a facially unconstitutional statute that is void *ab initio*.”).

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¶ 17 This court did not address defendant's alternative argument in its prior disposition of defendant's appeal because we resolved the case on nonconstitutional grounds. See *People v. Lee*, 214 Ill. 2d 476, 482 (2005)); see also *In re E.H.*, 224 Ill. 2d 172, 178 (2006) (constitutional issues should be reached only as a last resort).

¶ 18 We are unpersuaded by defendant's reliance on *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911 (2013). This court has previously held that *Martinez* does not apply to postconviction proceedings in Illinois because: (1) *Martinez* was not a constitutionally-based decision, but rather addressed federal *habeas* law and specifically addressed Arizona criminal procedure; and (2) *Martinez* was limited to collateral proceedings which provide the first opportunity to raise a claim of ineffective assistance, but under Illinois law, unlike the Arizona law considered in *Martinez*, a defendant generally may raise an ineffective assistance claim on direct appeal, prior to collateral proceedings. See *People v. Sutherland*, 2013 IL App (1st) 113072, ¶ 18-19; *People v. Miller*, 2013 IL App (1st) 111147, ¶ 41; *People v. Jones*, 2013 IL App (1st) 113263, ¶¶ 29-30. The present case is not a federal *habeas* proceeding and, therefore, *Martinez* does not apply.

¶ 19 The *Sutherland* court also distinguished *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), a later Supreme Court case that extended the *Martinez* holding to Texas, where local rules required ineffective assistance claims to be raised in postconviction proceedings. The *Sutherland* court noted that in Illinois, defendants do not have a constitutional right to be represented by counsel in postconviction proceedings and that ineffective assistance claims may be raised on direct appeal. *Sutherland*, 2013 IL App (1st) 113072, ¶¶ 18-19.

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¶ 20 We therefore follow *Sutherland*, *Miller* and *Jones*, and likewise find that the holdings of *Martinez* and *Trevino* do not apply to postconviction proceedings in Illinois. Therefore, defendant's argument that the circuit court's order is void must fail.

¶ 21 For the reasons listed above, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.