

FOURTH DIVISION
Rule 23 Order filed March 30, 2017
Modified upon denial of rehearing June 8, 2017

No. 1-14-3943

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. 97 CR 366
)	
BURRELL GERALDS, JR.,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the trial court dismissing defendant’s petition for relief under section 2-1401 is affirmed; the petition for relief from judgment was not filed within two years after entry of judgment as required by law; defendant failed to exercise due diligence in filing his petition, and the two-year limitation period for filing defendant’s petition was not extended on grounds of fraudulent concealment because the existence of allegedly concealed evidence relied upon by defendant to support his petition for relief from judgment was revealed at the time of trial in 2001; defendant failed to present this

court with newly discovered evidence that could change the outcome of his trial. Finally, we correct defendant's mittimus so that his robbery conviction is vacated and his sentence for possession of a stolen motor vehicle is reduced.

¶ 2 Defendant, Burrell Gerald, Jr., appeals from a trial court ruling dismissing his petition for relief under section 2-1401. In 2001, following a jury trial, defendant was found guilty of murder, robbery, residential burglary, and possession of a stolen motor vehicle. Defendant filed the instant 2-1401 petition in March 2014, alleging evidence implicating an alternate defendant was fraudulently withheld. The State made an oral motion to dismiss, and after arguments the trial court granted the State's motion. For the following reasons we affirm the judgment of the trial court. We note that defendant's mittimus should reflect a sentence of seven years for possession of a stolen motor vehicle, to run concurrently with his other sentences, instead of fourteen years running consecutively. Additionally, his mittimus should be corrected so that it does not reflect a conviction of robbery.

¶ 3 **BACKGROUND**

¶ 4 The testimony at defendant's, Burrell Gerald, Jr., trial revealed the following. The victim, Father Paul Smith, was a Catholic priest who had been partially paralyzed prior to his death as a result of injuries he sustained in an earlier automobile accident. Defendant was present in the victim's home, working as a caretaker on the evening of November 22, 1996. Father Smith's corpse was found on the morning of November 23, 1996 by one of his nursing assistants, Joann Dillon, when she came into work that morning. Dillon found Father Smith's dead body under a pile of covers on the floor of his bedroom - he was lying in the fetal position with his face and arms tied in duct tape. Duct tape was wrapped around his head covering his forehead, eyes, nose, and mouth. According to the postmortem examination, the tape was

wrapped so tightly that Father Smith's "nose [was] compressed and flattened due to the tape." The medical examiner testified that the duct tape was cut rather than torn and that Father Smith likely struggled as his wrists were bound (the victim's hands were also bound with a telephone cord). He further testified that someone probably had to help hold the victim's wrists, implying more than one person was necessary to bind the victim. Dillon also informed police that Father Smith's car was missing. According to the log book Father Smith kept for caretakers to sign in and out of, defendant signed in on November 22, but never signed out. After learning police were searching for him, defendant called police and agreed to come in for questioning.

¶ 5 Defendant initially gave a statement to police that on the night of November 22, 1996, he dropped off Roosevelt Horton, a high school student who helped take care of Father Smith, at Horton's home at around 9 or 10 p.m. He explained that when he returned with the car he never entered Father Smith's home on the evening of November 22 because a person prevented him from doing so. After detectives confronted defendant with the inconsistencies of his statement, defendant gave another statement to police. In this statement defendant explained that he went to White Castle with Horton before dropping Horton off and returning to Father Smith's home. The record reveals police found a White Castle cup in the victim's home. Defendant admitted that he was present when Frederick Carter rang Father Smith's doorbell sometime after 10:30 p.m. and that defendant let Carter in despite Carter apparently telling defendant "I ought to rob" Father Smith. Defendant then claimed he waited in the living room while he left Carter alone in the bedroom with Father Smith. Carter returned and asked for duct tape, which defendant admitted to giving to Carter. Defendant claimed he later went to the bedroom and saw Father Smith tied up. He stated that Carter asked him where the key to the safe was and defendant told

him that it was on a string around Father Smith's neck. Defendant claimed that after Carter took the money from the safe, defendant, Carter, and Carter's twin brother left in Father Smith's car.

¶ 6 Defendant then gave a statement recorded by a court reporter to the State's Attorney, largely consistent with the second statement he gave police. In the court reported statement defendant was advised of his rights, and that the assistant State's Attorney present was a prosecutor and not defendant's lawyer. Defendant admitted he allowed his codefendant, Frederick Carter, to enter Father Smith's home. Defendant knew Carter planned on robbing the victim. After gaining entrance into the home, Carter went into the bedroom where the victim was preparing for bed. 30 minutes later, Carter came out of the bedroom and asked defendant for duct tape. Defendant found duct tape and gave it to Carter. Defendant then waited 45 minutes before going into the bedroom, where he "saw Father Smith laying on the floor, legs tied, arms – legs taped and tied, arms, wrists tied and taped and tape on his face." Carter asked defendant where the key to the safe was. Defendant showed Carter the key to the victim's safe was located on a string on Father Smith's neck. Carter took the keys, removed items from the safe and then defendant showed Carter where the keys to the victim's car were. They walked outside, met Carter's brother, who was acting as a lookout, and left the location driving Father Smith's car. Defendant discussed selling the car while they drove to purchase drugs with the stolen money. After stating he smoked cocaine at Carter's residence the entire day of November 23, 1996, defendant thought the Carters were going to sell the car and cut him out, and he insisted that he receive his share for the sale of the car. Defendant left after he claimed he saw a news report of Father Smith's death. He turned himself in to police after speaking with his family.

¶ 7 Rubin Buckley, a drug dealer, testified at trial that he went to Carter's home at roughly 5 a.m. on the morning of November 23, 1996. He exchanged two bags of cocaine with defendant for the keys to the victim's car. Rubin returned after four hours, gave defendant more cocaine, and then left with the car for another four hour period. Through this system of rental, Rubin had unsupervised use of the car for three four-hour periods. Defendant was subsequently charged with the murder and robbery of Father Smith. Defendant was tried together with his codefendants Frederick Carter and Freeman Carter.

¶ 8 On September 25, 2001, Cari Sandberg, the state forensic scientist who analyzed latent fingerprints from the crime scenes testified at defendant's trial. Defendant's attorneys were present for all of Sandberg's testimony and cross-examined her. Sandberg testified that she found one suitable latent print for comparison from the duct tape, her crime scene exhibit 2. She testified that she compared the print on the duct tape to the three codefendants and the victim, and that she needed better printcards from the codefendants and victim. After she received new prints from defendant and codefendants, Sandberg concluded that they did not match the print on the duct tape. However, she was unable to acquire a new print from Father Smith because he was already dead and buried. Therefore, she could not exclude Father Smith's print as the source of the print on the duct tape. Though defendant's prints did not match the print on the duct tape, defendant's printcard matched prints lifted from decedent's bedroom dresser and the lid to a White Castle cup and straw found in Father Smith's home. Sandberg further testified as to her crime scene exhibit 15, latent prints from the decedent's car. Regarding latent fingerprints found in decedent's car, defendant's counsel asked Sandberg "[w]hat did you compare them with," and she replied by naming the three codefendants: "Frederick E. Carter, Freeman Carter, Burrell

Geralds.” However, one of the codefendants at trial, Frederick Carter, also had counsel cross-examine Sandberg. For this following line of questioning, the court excused defendant’s jury and brought in codefendant’s jury, though defendant’s attorneys were still present.

Codefendant’s counsel’s first question for Sandberg was: “Miss Sandberg, you are familiar with a system called AFIS?” Sandberg then explained how “AFIS stands for automated fingerprint identification system. What this does is it holds a database full of fingerprint records which the latent print examiner can enter in an unknown latent and compare it to a known standard in the database.” Codefendant’s counsel proceeded to question Sandberg regarding the AFIS results:

“Q. Did you submit certain prints for an AFIS check in the course of your examination of prints found in this case?

A. Yes, I did.

Q. Which prints and from where were they recovered that were submitted?

A. They were from my exhibit number 15. They were 4 suitable prints.

However only 2 were suitable for AFIS processing.

Q. Were these 2 prints submitted for AFIS processing?

A. Yes, they were.

Q. Did the result come back?

A. Yes, it did.

Q. What was that result?

A. I identified those 2 latent impressions to the copy of the fingerprint marked Ron Owens.

Mr. Figura: Q. I wanted to ask you about the print which was found on the tape which was recovered. You recall that there was a print recovered from the tape, is that correct?

The Witness: A. Yes, there was.

Q. Was that recovered from the sticky side of the tape or shiny?

A. Shiny or nonsticky side of the tape.

Q. Do you know where that tape was located on the body of Father Smith?

A. No, I do not.

Q. And after examining all of the exhibits which were submitted to you by the Chicago Police Department, did you link any fingerprint on any of these exhibits to Fred Carter?

A. No, I did not.”

On redirect, the prosecutor questioned Sandberg concerning the fingerprints taken from the interior glass sunroof from decedent’s car that matched Owens’ printcard. Sandberg testified that she could not tell how old the latent fingerprint from the car was. No party had any further questions for Sandberg, and this concluded her testimony.

¶ 9 On December 20, 2001, a jury found defendant guilty of murder, robbery, residential burglary, and possession of a stolen motor vehicle. He was sentenced to 100 years for murder, 15 years each for robbery and residential burglary to be served concurrently, and a 14 year consecutive sentence for possession of a stolen motor vehicle. On appeal, we vacated the conviction and sentence for robbery because the robbery charge should have merged with the felony murder charge. *People v. Gerald*s, No. 1-02-0279 (2004) (unpublished order under

Supreme Court Rule 23). We also reduced defendant's sentence for possession of a stolen motor vehicle from 15 years running consecutively to 7 years to be served concurrently. *Id.* Defendant subsequently filed multiple unsuccessful motions for postconviction relief and relief under 735 ILCS 5/2-1401 (West 2014).

¶ 10 Defendant eventually received a box of crime lab reports and similar documents from the office of the Attorney General. The crime lab report contained Illinois state police's automated fingerprint identification system report matching Ron Owens' fingerprints to latent prints found on the interior roof of the victim's car. The defendant's initial pleading claimed he received the documents in April 2010, and in his brief defendant argues he received the evidence in April 2012. The report indicated that comparison of Owens' fingerprint card to the remaining latent impressions "did not reveal any identifications", but that "inked major case prints are needed for a conclusive comparison." The latent print worksheet signed by Sandberg indicated that major case prints from Owens were needed to compare to unidentified prints from three different crime scene exhibits (exhibits 2, 13, 15). The latent print matrix sheet detailing the results of comparisons of Owens' fingerprint card to crime scene exhibits indicated that Owens' prints were only compared against latent impressions from crime scene exhibit 15, decedent's car. Owens' prints matched an impartial print on the interior glass of the sunroof of decedent's car; Owens matched a print found on the roof over the driver's seat; Owens' prints were compared to latent prints on the left rear door window and no identification could be made, although the sheet noted how additional inked prints were needed for that comparison. The matrix sheet further indicated Owens' prints were not compared to the latent prints found on the duct tape and that Owens' prints were not compared to an impartial print on the interior glass of the sunroof over

the driver's seat.

¶ 11 Defendant filed the instant 2-1401 petition *pro se* on March 21, 2014. Defendant made four claims for relief: conflicting witness testimony given to the grand jury; perjury by one of the State's witnesses; that he gave his admissions only under duress; and that the State fraudulently concealed evidence of statements made by investigators and crime scene reports linking Owens' fingerprints to latent prints from the victim's car. The trial court heard arguments on the petition on August 28, 2014. The State argued defendant's petition was without merit and refuted his claims, specifically arguing how fingerprint records were available prior to trial. The State also argued the petition was untimely filed and there was no fraudulent concealment of evidence to toll the running of the limitations period. The trial judge agreed and dismissed the petition. This appeal followed.

¶ 12

ANALYSIS

¶ 13 Defendant seeks relief from his conviction of murder, robbery, residential burglary, and possession of a stolen motor vehicle more than a decade after being convicted. Under section 2-1401, "[r]elief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in this Section." 735 ILCS 5/2-1401 (West 2014). "The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2014). Additionally, "the petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years." 735 ILCS 5/2-1401(c) (West

2014). Section 2-1401 may provide relief in criminal as well as civil cases. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). To obtain relief under section 2-1401, the petitioner must prove, by a preponderance of evidence, some ground for “preclud[ing] entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition.” *Id.* at 7-8. For a defendant to obtain a new trial under section 2-1401, he must show (1) evidence has been discovered since the trial; (2) the evidence is of such character that it could not have been discovered prior to trial by the exercise of due diligence; (3) the evidence is material and not merely cumulative; and (4), the evidence is of such character that it will likely change the result on retrial. *People v. Burrows*, 172 Ill. 2d 169, 180 (1996). The defendant must both demonstrate due diligence in bringing the claim, and the new evidence must be capable of altering the result on retrial:

“in all the cases we have found in which newly discovered evidence was held not to be a sufficient ground for relief *** it was for one of two reasons: either the losing litigant, through the exercise of ordinary diligence, could have discovered and produced the evidence at trial; or the evidence was not of so material and controlling a nature that it probably would have changed the outcome of the trial.” *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 283-84 (1982).

Defendant filed his amended 2-1401 petition raising his fingerprint claims on March 21, 2014, well past the two year limitation period after judgment permitted by section 2-1401. 735 ILCS 5/2-1401 (West 2014). Defendant argues, however, that the time prior to his receipt of the fingerprint evidence should not be counted against that two year period because the evidence was fraudulently concealed during that time. He argues that because his petition was filed less than

two years after April 2012, when he received the fingerprint evidence, his petition should be considered timely filed.

¶ 14 In order to toll the two-year limitations period to file his petition on a claim of fraudulent concealment defendant must prove two things: (1) that the State affirmatively attempted to prevent defendant from discovering the grounds for relief, and; (2) that defendant demonstrated good faith and reasonable diligence in attempting to discover the grounds for relief prior to expiration of the statute of limitations period. *People v. Coleman*, 206 Ill. 2d 261, 290-91 (2002). We review *de novo* “section 2–1401 proceedings in which either judgment on the pleadings or dismissal for failure to state a cause of action has been entered.” *Vincent*, 226 Ill. 2d at 15.

¶ 15 Whether Defendant’s Petition was Timely Filed

¶ 16 In the oral motion to dismiss, the State argued that the petition was untimely filed. We will initially determine whether defendant’s petition was timely filed. A section 2-1401 “petition must be filed not later than two years after the entry of the order or judgment.” 735 ILCS 5/2-1401 (West 2014). In the present case, defendant was convicted in 2001 and filed his petition in 2014 – well past two years after entry of judgment. As stated above, for his petition to be considered timely filed defendant must prove that he exercised due diligence in attempting to discover the grounds for relief prior to the expiration of the statute of limitations period, or that he was either under legal disability or duress, or that the grounds for relief were fraudulently concealed. *Id.* Defendant claims he received the AFIS report and fingerprint worksheet and matrix in 2012. Defendant argues that his petition was timely filed in 2014 because: (1) he filed his petition within two years of receiving a fingerprint matrix from the State, and; (2) the State

fraudulently concealed fingerprint evidence prior to defendant's receipt of the documents. We are not persuaded by defendant's argument.

¶ 17 Initially, we note that defendant's argument is misleading. No trial testimony or any evidence on appeal indicated Owens' prints could not be excluded as the source of the latent prints on the duct tape. Rather, the evidence indicated Owens' prints were *never compared* against the prints on the duct tape.

¶ 18 A. Defendant Cannot Show He Exercised Due Diligence Under Section 2-1401

¶ 19 To be entitled to relief under section 2–1401, a defendant must show due diligence in filing his petition. Defendant “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.” *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220–21 (1986). Defendant has not shown due diligence in filing his petition. Sandberg testified at trial concerning the AFIS processing of her crime scene exhibit 15, and how only two of those prints were suitable for AFIS processing. This information was available at the 2001 trial. Defendant knew about the existence of this evidence at the time of his conviction in 2001 because counsel was present for Sandberg's entire testimony. The record therefore reveals defendant knew of the existence of an Illinois State police automated fingerprint identification system report detailing the relationship between Owens' prints and crime scene prints in 2001, and defendant failed to show how he demonstrated good faith or due diligence in obtaining the fingerprint records. Codefendant's counsel began his cross-examination of Sandberg by asking her whether she was “familiar with a system called AFIS?” This implied one of the trial

attorneys knew of the comparison of Owens' prints to prints from the victim's car (crime scene exhibit 15). Moreover it was revealed at trial that the fingerprint on the tape did not match defendant. Defendant's petition reveals nothing about the duct tape that was not testified to at trial. Because this evidence was revealed at trial in 2001 and defendant did not file his petition until 2014, we find the defendant failed to exercise due diligence in filing his section 2-1401 petition for relief. *Airoom, Inc.*, 114 Ill. 2d at 220–21.

¶ 20 B. Defendant Failed to Prove the State Fraudulently Concealed Evidence

¶ 21 Defendant alleges the time to file his petition should be tolled because the State fraudulently concealed evidence. Defendant claims the State failed to disclose evidence that Sandberg could not rule out Owens' prints on the duct tape, and that this excuses his late filing. Defendant cannot excuse his untimely filing of the petition by claiming the State fraudulently concealed his claimed grounds for relief because defendant failed to show the State took affirmative measures to conceal any fingerprint records. *Coleman*, 206 Ill. 2d at 290-91. Sandberg testified at trial concerning numerous comparisons of fingerprint evidence – prosecution and defendant's counsel questioned her about prints found on the duct tape, victim's car, the White Castle cup, other crime scene exhibits, and codefendant's counsel cross-examined Sandberg about Illinois state police's automated fingerprint identification system matching a fingerprint card from Ron Owens to latent fingerprints found in the victim's car while defendant's counsel was present. Thus, the information defendant claims as his grounds for relief was testified to at trial by the State forensic analyst. Therefore, defendant presents no newly discovered evidence. His claim that the State affirmatively prevented discovery of fingerprint evidence from the car and duct tape prior to trial is refuted by the record because the

State's witness answered questions concerning a number of fingerprint exhibits, including a latent lift from the duct tape and prints from the victim's car, on direct and cross-examination. Moreover, defendant fails to allege any facts that the State affirmatively concealed evidence after defendant's trial. Therefore, he has presented no reason to excuse his failure to comply with the two-year requirement for filing a petition under section 2-1401. 735 ILCS 5/2-1401 (West 2014).

¶ 22 Defendant argues his claim of fraudulent concealment by the State is supported by *Ostendorf*, 89 Ill. 2d at 284-85. In *Ostendorf*, the plaintiffs filed their petition four years after entry of judgment arguing the two-year limitation on bringing the petition was tolled through the defendant's fraudulent concealment of evidence and that the plaintiffs could not have uncovered the information earlier using reasonable diligence. *Id.* at 281. The defendant in *Ostendorf* deliberately withheld discovery material by denying the existence of internal safety reports, even though such reports were within the scope of interrogatories posed by the plaintiffs. *Id.* at 286. The plaintiffs found out about the reports when their attorney later discovered the documents during his representation of a different party in a different matter. *Id.* at 281. In the instant case, there is no allegation the State deliberately withheld information, or that defendant ever requested the information following his trial, or that defendant only learned of the evidence after exercising extraordinary effort. Defendant fails to prove his due diligence in pursuing the grounds for relief, a necessary element of fraudulent concealment. *Coleman*, 206 Ill. 2d at 290 (finding that a defendant did not make a "clear showing *** that grounds for relief were concealed" when the defendant did not show the prosecutor took affirmative acts to conceal involvement in other cases, and that the defendant failed to exercise due diligence because the

information was easily discoverable through a search of a published judicial opinion (emphasis in original)). The evidence was not fraudulently concealed. Had defendant exercised due diligence, he would have found the evidence prior to trial, and he has not provided any reason why he was prevented from acquiring the information after trial. *Ostendorf*, 89 Ill. 2d at 285. To succeed on his claim of fraudulent concealment, defendant must show not only that the fingerprint record could not be discovered through an exercise of due diligence prior to trial (*Burrows*, 172 Ill. 2d at 180), but also that he was prevented from acquiring the information during the interim between the trial and his filing of a petition under section 2-1401, else that time would be calculated toward his two year filing period. 735 ILCS 5/2-1401 (West 2014). In this case, defendant failed to show the State affirmatively acted to conceal the fingerprint records at any point in time. Therefore, we find the petition was untimely filed. See *Coleman*, 206 Ill. 2d at 291.

¶ 23 The Petition Fails to Present New Evidence Which Would Alter the Outcome of the Trial

¶ 24 Even if we assumed defendant timely filed his petition, we would still find the petition was properly dismissed. This court may sustain the judgment of the trial court based on any grounds found in the record. “As a reviewing court, we can sustain the decision of a lower court on any grounds which are called for by the record, regardless of whether the lower court relied on those grounds.” *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995). In this case, defendant’s petition was properly dismissed because it failed to present new evidence that would change the outcome of his trial. The purpose of a section 2-1401 petition is for a petitioner to bring to light newly discovered material evidence that would change the result on retrial. *Burrows*, 172 Ill. 2d at 180. However, the evidence defendant claims as grounds for

relief, that the print on the duct tape could not be identified and that Owens' prints were not compared to the duct tape, would not change the outcome of his trial.

¶ 25 Defendant's petition fails to bring to light newly discovered evidence because Owens' prints were never compared against the duct tape, so all evidence concerning the fingerprint on the duct tape was already testified to at trial. Sandberg's matrix sheet listed five different latent crime scene prints from two exhibits, noted that Owens' printcard was compared only to prints from the victim's car and matched two found on the interior roof of the victim's car. The latent print matrix sheet clearly listed that Owens' prints were not compared against any latent prints on the duct tape. Owens' prints were only compared against crime scene exhibit 15. The duct tape was crime scene exhibit 2. Defendant has no basis for claiming Owens' prints were compared against the prints on the duct tape nor does defendant have any basis for claiming he brought up new evidence concerning the duct tape. At best, defendant argued the possibility of a connection to Owens based on Sandberg's print matrix worksheet where she indicated the need for major case prints from Owens to compare against unidentified prints from crime scene exhibits 2, 13, 15. This simply indicated that there remained unidentified prints, which was also known at trial because Sandberg testified that she found one suitable latent print for comparison on the duct tape, that she compared the print against the three codefendants and the victim, and that she needed better printcards. After receiving better printcards from defendant and codefendants, she was able to exclude them as the source of the latent print on the duct tape. However, Sandberg was unable to obtain a better printcard from Father Smith because his corpse had already been buried. She could therefore not exclude Father Smith as the source of the unidentified print on the duct tape. Defendant's petition simply points out how there existed an

unidentified print on the duct tape and that it was never compared against Owens' prints.

Defendant's petition therefore reveals nothing newly discovered.

¶ 26 Defendant maintains that he presented evidence of an alternate suspect, exculpating himself. We disagree. At best, defendant brought to this court's attention material already in the record that the print on the duct tape is unidentified and does not match any of the codefendants. This merely points to a possible additional suspect rather than an alternate suspect. Defendant failed to show he has newly discovered evidence which would change the outcome of his trial.

¶ 27 Because we find defendant's petition is time-barred and that the trial court properly dismissed the petition, we note parenthetically that there is no limitation period on postconviction petitions demonstrating actual innocence. See *People v. Washington*, 171 Ill. 2d 475, 489 (1996) ("We therefore hold as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process."). Under the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2016)) any imprisoned person may initiate postconviction proceedings by presenting newly discovered evidence of actual innocence. If defendant has new evidence which he believes can prove his actual innocence, he may file a postconviction petition on grounds of actual innocence. A postconviction petition based on actual innocence is not subject to the limitations period found in section 2-1401. 725 ILCS 5/122-1 (West 2016). However, the claims defendant raises here under section 2-1401 are time barred. 735 ILCS 5/2-1401 (West 2014); *Coleman*, 206 Ill. 2d at 291.

¶ 28 Mittimus Corrected

¶ 29 Though defendant was convicted of murder, robbery, residential burglary, and

possession of a stolen motor vehicle, on appeal we granted defendant partial relief. We found his conviction and sentence of robbery should have merged with his felony murder conviction, and therefore vacated the robbery conviction. *People v. Geraldts*, No. 1-02-0279 (2004) (unpublished order under Supreme Court Rule 23). We also ordered his sentence for possession of a stolen motor vehicle be changed from 14 years to be served consecutively with his other sentences, to a 7 year sentence to run concurrently with his other sentences. Defendant argues that he is still listed as serving a 14 year sentence for possession of a stolen motor vehicle, and that he is still serving a 15 year robbery sentence. This court has the authority to order the clerk of the circuit court to correct a defendant's mittimus. See Ill. S. Ct. R. 615(b); *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). The State agrees with defendant that his mittimus should be corrected to reflect that we vacated the robbery conviction and reduced the sentence for possession of a stolen motor vehicle. Accordingly, we order the correction of defendant's mittimus to show that his conviction and sentence for robbery was vacated, and that he is serving a 7 year concurrent sentence for possession of a stolen motor vehicle instead of a 14 year consecutive sentence.

¶ 30 We affirm the judgment of the trial court dismissing defendant's petition for relief under section 2-1401. 735 ILCS 5/2-1401 (West 2014). The petition was not timely filed and defendant failed to prove the fingerprint report was fraudulently concealed. Defendant did not use due diligence in attempting to find his claimed ground for relief and he failed to prove the State affirmatively prevented him from acquiring the information.

¶ 31 **CONCLUSION**

¶ 32 For the foregoing reasons the judgment of the circuit court of Cook County is affirmed. We direct the clerk of the circuit court to correct defendant's mittimus.

1-14-3943

¶ 33 Affirmed; mittimus corrected.