

Nos. 1-15-3191 and 1-16-0263 (Consolidated)

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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KENDALL BOWMAN,	)	Appeal from the
	)	Circuit Court of
Petitioner-Appellant,	)	Cook County.
	)	
v.	)	No. 05 CR 24234
	)	
KIM BUTLER,	)	Honorable
	)	Joan Margaret O'Brien,
Respondent-Appellee.	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Ellis and Justice Howse concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court properly dismissed petitioner's petition for *habeas corpus* relief where the delay of two years between the issuance of this court's mandate and resentencing was not unreasonable when petitioner suffered no prejudice.
- ¶ 2 Petitioner Kendall Bowman appeals the trial court's denial of his petition for *habeas corpus*, in which petitioner argued that the trial court lacked jurisdiction to resentence him following this court's mandate in his direct appeal (*People v. Bowman*, 2012 IL App (1st)

102010) when approximately three years elapsed after the issuance of the mandate and imposition of a new sentence.<sup>1</sup>

¶ 3 Following a jury trial, petitioner was found guilty of aggravated battery of a child and aggravated battery with a firearm, and subsequently sentenced to a term of 25 years for the aggravated battery of a child, with an additional 25-year enhancement, for a total of 50 years. Since the facts leading to petitioner's conviction are not relevant to the issue raised on appeal, we limit our discussion to the facts as necessary to our analysis. A detailed discussion of the facts and all issues raised on appeal can be found at *People v. Bowman*, 2012 IL App (1st) 102010. In that appeal, we affirmed petitioner's conviction, but remanded for resentencing based on the trial court's misstatement of the basis for the sentence enhancement. *Id.* ¶¶ 78-80. This court's mandate issued on November 8, 2012. The record indicates that on December 6, 2012, the trial court reviewed this court's decision.

¶ 4 In September 2013, petitioner filed his *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). In July 2014, the State<sup>2</sup> moved to dismiss petitioner's 2-1401 petition. The trial court also appointed the public defender to represent petitioner on his 2-1401 proceedings. At a December 2014 status hearing, the case appeared before a different trial judge than had presided over petitioner's trial. In its brief on appeal, the State pointed out that the trial judge who presided over petitioner's trial had since retired and was part of the reason the case was heard by a new judge on remand.

Petitioner's counsel stated that it was his belief that petitioner was entitled to a new sentencing

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<sup>1</sup> Petitioner filed a Notice of Appeal from the October 2015 denial of his *habeas corpus* petition (No. 1-15-3191) as well as a Notice of Appeal from the November 2015 resentencing order (No. 1-16-0263), the only issue raised on appeal relates to his *habeas corpus* petition. No issue has been raised related to the resentencing order. The cases were consolidated on appeal on appellant's motion.

<sup>2</sup> In this decision, the general reference to "the State" collectively refers to both agencies, the Attorney General and State's Attorney of Cook County, for clarity.

hearing on remand based on our decision in 2012. Counsel asked “to investigate to determine whether or not Mr. Bowman is entitled to a sentencing remand.” Counsel also suggested that “the proper procedure might be to allow his sentencing remand to be handled by the court before we address his post-conviction issues.” The court continued the case by agreement until February 2015.

¶ 5 At the February 2015 status hearing, petitioner’s counsel requested an extension of time to review the direct appeal record. Neither party referenced resentencing. In May 2015, the parties appeared for the next status hearing. The assistant State’s Attorney (ASA) stated that petitioner had a postconviction petition that had been docketed and petitioner’s counsel had been investigating the matter, including looking into the appellate remand. Petitioner’s counsel informed the court that “[t]here was an appellate remand that indicated that my client was entitled to a resentencing in his case,” and he passed that information in his office and attorneys were “looking into that.” Counsel stated that there was a possibility that his supervisors “may handle the resentencing in their office rather than to have [him] handle that in a PC.” The ASA stated that the resentencing was “never done,” and was from “ages ago before any of us were here.” He said that he was in agreement that the public defender’s office “needs to figure out which way that they need to handle this.” The trial court asked how long the case had been pending when the remand had not been addressed, and petitioner’s counsel stated that there had been no activity on the case until petitioner’s 2-1401 petition had been filed. The court stated, “Since this has been sitting around for a long time, your office has got to make the decision which way. When there is a remand from the Appellate Court to me, it would make sense to address that.” Petitioner’s attorney asked for a continuance until August 2015, but the court requested an earlier status date and the case was continued until June 2015.

¶ 6 At the June 2015 status hearing, a different assistant public defender appeared for petitioner and indicated that, “while we are not ready to proceed on the sentencing hearing today we will be ready by the next court date.” Petitioner’s counsel stated that more time was needed to research the issue. The parties also discussed how best to proceed on defendant’s *pro se* 2-1401 petition. The parties agreed to order a new presentence investigation.

¶ 7 In August 2015, the parties appeared for resentencing. The State indicated that it was ready to proceed, but petitioner’s initial counsel assigned on the 2-1401 petition stated that he had “come to the conclusion after doing research that [he] believe[d] that this Court no longer has jurisdiction to move forward to re-sentencing my client.” He informed the court that he had prepared a petition for *habeas corpus*, but needed to properly serve Attorney General’s office. The matter was continued to allow service of the petition.

¶ 8 In October 2015, petitioner filed a motion for leave to file a petition for state *habeas corpus* relief. Petitioner stated in his petition that he was currently “under no sentence, but is held in custody pursuant to a conviction for aggravated battery of a child and aggravated battery with a firearm and sentence of 50 years imprisonment.” He also stated that the mandate from this court’s prior decision was issued in November 2012, but he has not been resentenced in accordance with the mandate. Petitioner argued that the amount of time between the issuance of this court’s mandate and the State’s attempt to “revive the case for a sentencing hearing is unreasonable and unexplained.” Petitioner contended that the “State’s failure to re-sentence Petitioner within a reasonable amount of time divested this Court of jurisdiction.” Petitioner asserted that it was a violation of his due process rights under the constitutions of both the United States and Illinois. According to petitioner, he was eligible to be released from custody under section 10-124 of the Code of Civil Procedure (735 ILCS 5/10-124 (West 2012)).

¶ 9 Also in October 2015, the State filed a motion to dismiss petitioner’s *habeas corpus* petition under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)), asserting that petitioner’s petition failed to “state a ground upon which an order of *habeas corpus* may issue and should be dismissed with prejudice.” Petitioner subsequently filed a response to the motion to dismiss. On October 30, 2015, the trial court granted the State’s motion to dismiss petitioner’s petition for *habeas corpus*. Petitioner filed a notice of appeal of the dismissal (No. 1-15-3191).

¶ 10 In November 2015, the trial court conducted a new sentencing hearing and imposed a sentence of 45 years. Petitioner subsequently filed a notice of appeal of his sentence (No. 1-16-0263). As previously noted, no issues were raised on appeal related to petitioner’s sentence.

¶ 11 On appeal, petitioner argues that the trial court erred in dismissing his petition for *habeas corpus* because the trial court lost jurisdiction due to the delay in resentencing following the issuance of this court’s mandate, and the subsequent delays were not attributable to petitioner. The State maintains that it had jurisdiction over petitioner and petitioner offers no relevant authority for the proposition that a delay in resentencing entitles him to habeas relief.

¶ 12 “A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face.” *Beacham v. Walker*, 231 Ill. 2d 51, 57 (2008). We review an order granting a 2-615 motion *de novo*. *Id.* We accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts, and we construe the allegations in the complaint in the light most favorable to the petitioner. *Id.* at 58. “Given these standards, a cause of action should not be dismissed, pursuant to a section 2-615 motion, unless it is clearly apparent that no set of facts can be proved that would entitle the petitioner to relief.” *Id.*

“However, the petitioner must allege facts sufficient to bring a claim within a legally recognized cause of action.” *Id.*

¶ 13 “*Habeas corpus* provides relief only on the grounds specified in section 10-124 of the Code of Civil Procedure (735 ILCS 5/10-124 (West 1996)).” *Id.* “It is well established that an order of *habeas corpus* is available only to obtain the release of a prisoner who has been incarcerated under a judgment of a court that lacked jurisdiction of the subject matter or the person of the petitioner, or where there has been some occurrence subsequent to the prisoner's conviction that entitles him to release.” *Id.* “A complaint for order of *habeas corpus* may not be used to review proceedings that do not exhibit one of these defects, even though the alleged error involves a denial of constitutional rights.” *Id.*

¶ 14 In this case, petitioner bases his claim for *habeas corpus* on the delay between this court's November 2012 mandate on his direct appeal and his resentencing hearing. It is undisputed that after the trial court reviewed the mandate in December 2012, no further action occurred regarding resentencing until after counsel was appointed to assist petitioner with his 2-1401 petition. The trial court resentenced petitioner to a term of 45 years in November 2015.

¶ 15 Petitioner relies primarily on one case to support his claim that the trial court lost jurisdiction. In that case, the supreme court held that:

“The rule is clear that such post-trial activity, including the imposition of sentence, may not be indefinitely postponed, for public policy and the effective enforcement of the criminal law require reasonable promptness in those areas of its administration where specific time limitations are not imposed. Whether a given period of delay is so unreasonable as to deprive a court of its

authority to proceed is dependent in substantial measure upon the circumstances.” *People ex rel. Houston v. Frye*, 35 Ill. 2d 591, 593 (1966).

¶ 16 Despite the language cited above, petitioner fails to cite any authority holding that a trial court lost jurisdiction in a criminal matter following a reviewing court mandate due to an unreasonable delay. All of the cases cited by petitioner involved a delay between the initial finding of guilt and the subsequent sentencing hearing. See *People v. Sanders*, 131 Ill. 2d 58, 63-64 (1989) (finding that the 4 1/2 year delay between the defendant’s conviction for gambling-related offenses and sentencing did not deprive the trial court of jurisdiction where the delay was attributable to the defendant); *People v. Williams*, 309 Ill. App. 3d 1022, 1024-25 (2000) (finding that a four-year delay between conviction for driving under the influence and sentencing was unreasonable and violated the defendant’s due process rights). No court has held that a delay in resentencing following a remand from a reviewing court is subject to the same jurisdictional defect as a delay between the initial conviction and sentencing.

¶ 17 As a result, we reject petitioner’s claim that the trial court lost jurisdiction of petitioner’s case because of a delay of approximately two years between the issuance of this court’s mandate and the proceedings which commenced in the trial court on remand.

¶ 18 Next, assuming *arguendo* that a delay between the issuance of a reviewing court’s mandate and resentencing is subject to the same due process concerns cited in the cases petitioner relies upon, we find that a delay of two years and one month was not so unreasonable as to prejudice petitioner.

¶ 19 When considering a defendant’s claim of a due process violation, courts generally focus on four factors: “(1) the length of the delay; (2) the reason for the delay; (3) the defendant’s

responsibility to assert his right; and (4) the resulting prejudice to the defendant.” *People v. Sistrunk*, 259 Ill. App. 3d 40, 54 (1994). Petitioner has not argued that he can satisfy these factors, and we find that he was not prejudiced by the delay.

¶ 20 While petitioner asserts that the delay attributable to the State was two years and nine months (November 2012 to August 2015), we find that the operative dates are from November 2012 to December 2014, when petitioner’s counsel first informed the trial court and the State that he believed petitioner was subject to resentencing. Subsequent status hearings were by agreement as petitioner’s counsel requested time to determine the best way to proceed with resentencing and the 2-1401 petition. Thus, the operative time period of the delay was two years and one month, from November 2012 to December 2014.

¶ 21 Unlike the defendants in *Sanders* and *Williams*, who were convicted of minor offenses punishable by minimal jail time, petitioner here was convicted of the aggravated battery of a child, when he shot a 10-year-old child in the leg. *People v. Bowman*, 2012 IL App (1st) 102010, ¶¶ 2-3. In his direct appeal, this court affirmed petitioner’s conviction, but remanded for resentencing. Petitioner was properly convicted of aggravated battery of a child and aggravated battery with a firearm, and subject to a minimum sentencing range of 31 to 55 years in prison. See *id.* ¶ 73. We conclude that the two-year delay did not prejudice petitioner when his prison term far exceeded the period of delay, and the time continued to count toward the completion of his sentence. Further, we cannot find that the sentence actually imposed would have been any different had it been imposed earlier. Accordingly, we find that the trial court did not err in dismissing petitioner’s petition for *habeas corpus*.

¶ 22 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.



Nos. 1-15-3191  
1-16-0263 (Cons.)

¶ 23 Affirmed.