

NOTICE

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FILED

April 5, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160506-U
NO. 4-16-0506

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MING W. CHEN,)	No. 09CF1986
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding defendant’s section 2-1401 petition was untimely.

¶ 2 In April 2010, defendant, Ming W. Chen, pleaded guilty to the offense of unlawful possession with intent to deliver cannabis, and the trial court sentenced him to 24 months’ probation. In May 2016, defendant filed a petition to vacate the judgment, and the State filed a motion to dismiss. In June 2016, the court granted the State’s motion.

¶ 3 On appeal, defendant argues the trial court erred in granting the State’s motion to dismiss his petition to vacate the judgment. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In November 2009, the State charged defendant by information in Champaign County case No. 09-CF-1986 with one count of unlawful possession with intent to deliver

cannabis (720 ILCS 550/5(c) (West 2008)), alleging he knowingly and unlawfully possessed with the intent to deliver more than 10 grams but not more than 30 grams of a substance containing cannabis. In December 2009, attorney Donald Parkinson entered his appearance on behalf of defendant.

¶ 6 In April 2010, the trial court conducted a plea hearing. At the outset, the court admonished several defendants, including Chen, on the rights they would be giving up by pleading guilty. The court informed all of them that “if you are not a citizen of the United States, you are hereby advised that conviction of the offense with which you are charged may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States.”

¶ 7 After the trial court finished reading the guilty plea admonishments, the court called defendant’s case. Defendant indicated he understood the charge, the possible penalties, the right to a trial, and the “other rights” explained by the court. Defendant stated he had no questions and wanted to plead guilty. The court found defendant’s plea to be knowing and voluntary. At sentencing, the court deferred judgment for 24 months and placed defendant on 24 months’ probation as a first offender. The court also ordered defendant to pay various fines and fees, as well as perform 30 hours of community service.

¶ 8 In April 2011, the State charged defendant by information with one count of unlawful possession with intent to deliver cannabis (720 ILCS 550/5(d) (West 2010)) in case No. 11-CF-649. In October 2011, defendant pleaded guilty, and the trial court sentenced him to 24 months’ probation. Defendant’s probation in case No. 09-CF-1986, the instant case, was terminated unsuccessfully. In October 2013, defendant successfully completed his probation in case No. 11-CF-649.

¶ 9 In May 2016, in case No. 09-CF-1986, defendant filed a petition to vacate the judgment pursuant to section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2014)). Therein, defendant alleged his trial counsel and the trial court failed to advise him as to the immigration consequences following a guilty plea for certain offenses related to controlled substances. Defendant claimed counsel was deficient in his performance and he was suffering those immigration consequences in that he was denied readmission to the United States. Defendant stated he had a similar petition pending in case No. 11-CF-649. He asked that his guilty plea be vacated.

¶ 10 Defendant was born in China in 1990. In his memorandum in support of his petition, defendant stated he and his parents received visas to come to the United States when he was 10 years old. He graduated from high school and attended Parkland Community College. In February 2016, defendant returned to the United States after traveling abroad. While proceeding through customs, agents with the United States Immigration and Customs Enforcement were unable to conclusively determine whether defendant was admissible to the United States. He appeared before the United States Department of Homeland Security and was eventually detained. In his memorandum, defendant stated aliens are ineligible for admission to the United States if they violate certain laws involving controlled substances, including cannabis. See 8 U.S.C. § 1182(a)(2) (2014). At the time of filing the memorandum, defendant was still being detained and subject to deportation.

¶ 11 As grounds for relief, defendant argued his attorney provided ineffective assistance of counsel by failing to inform him of the collateral immigration consequences stemming from his guilty plea, citing the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010). Defendant also argued the two-year limitations period for filing

a section 2-1401 petition was inapplicable due to fraudulent concealment, *i.e.*, counsel's failure to advise defendant of the consequences of his conviction.

¶ 12 In his affidavit, defendant claimed he did not hear the mass admonishment regarding immigration consequences provided by the trial court. He was also unsure of whether he was even in the courtroom when the admonishment was made. Defendant claimed his English "was not very good and no interpreter was used." Defendant alleged he would not have pleaded guilty had he heard and understood the admonishment.

¶ 13 Also in May 2016, the State filed a motion to dismiss pursuant to section 2-615 of the Procedure Code (735 ILCS 5/2-615 (West 2014)). The State argued (1) section 2-1401 was an improper statutory mechanism for the relief sought; (2) the petition was beyond the two-year limitations period for section 2-1401 petitions; (3) defendant failed to make a clear showing of fraudulent concealment; (4) defendant failed to establish due diligence in presenting his claim; (5) constitutional claims of ineffective assistance of counsel were inappropriate in section 2-1401 petitions; and (6) defendant's claim of ineffective assistance of counsel was insufficient.

¶ 14 In June 2016, the trial court held a hearing on the State's motion to dismiss. Following argument, the court found defendant's section 2-1401 petition was not timely filed and defendant had not established due diligence. The court also found no evidence of fraudulent concealment to excuse the untimely filing of the petition. The court continued, in part, as follows:

"This court's own recollection, so it's clear, is that the full record of proceedings shows that the defendant was clearly present in court when the admonitions were given to the group, so there is a suggestion that he may not have been present in court. In fact, the

full record of proceedings demonstrates that he was present with his counsel, and this court has never given group admonitions without first confirming of course that the people the court says are present are present. So I know from my own recollection and the proceedings that I engage in that it would not have been taken a plea from someone, giving them admonitions, if I had not first confirmed they were present in court and acknowledged it. So that's a spurious argument.”

After reciting a portion of the transcript from the plea hearing, the court stated it was “very clear” that it admonished defendant as to the possibility of immigration consequences if he pleaded guilty. The court also noted defendant never indicated he had difficulty with the English language, but instead “answered everything appropriately, responsively and indicative of the fact that he fully understood what was transpiring.” The court granted the motion to dismiss. This appeal followed.

¶ 15

II. ANALYSIS

¶ 16

A. Standard of Review

¶ 17

In the case *sub judice*, the trial court granted the State’s motion to dismiss pursuant to section 2-615. A motion to dismiss under section 2-615 of the Procedure Code challenges only the legal sufficiency of the complaint. *Schloss v. Jumper*, 2014 IL App (4th) 121086, ¶ 20, 11 N.E.3d 57. In ruling on a section 2-615 motion to dismiss, “the question is ‘whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted.’ ” *Green v. Rogers*, 234 Ill. 2d 478, 491, 917 N.E.2d 450, 458-59 (2009) (quoting *Vitro v. Mihelcic*, 209

Ill. 2d 76, 81, 806 N.E.2d 632, 634 (2004)). The trial court should not grant the motion to dismiss “unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief.” *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161, 920 N.E.2d 220, 223 (2009). We review a dismissal pursuant to section 2-615 *de novo*. *Beacham v. Walker*, 231 Ill. 2d 51, 57, 896 N.E.2d 327, 331 (2008); see also *In re M.P.*, 401 Ill. App. 3d 742, 745, 928 N.E.2d 1287, 1291 (2010) (noting the dismissal of a section 2-1401 petition is also subject to *de novo* review).

¶ 18 B. Petition To Vacate the Judgment

¶ 19 Section 2-1401 of the Procedure Code sets forth a statutory procedure by which final orders and judgments may be challenged more than 30 days after entry. 735 ILCS 5/2-1401 (West 2014).

“Section 2-1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but it is not a continuation of the original action. [Citation.] The statute further requires that the petition be supported by affidavit or other appropriate showing as to matters not of record. [Citation.] The statute provides that petitions must be filed not later than two years after the entry of the order or judgment. [Citation.] The statute further provides for an exception to the time limitation for legal disability and duress or if the ground for relief is fraudulently concealed. [Citation.]” *People v. Vincent*, 226 Ill. 2d 1, 7, 871 N.E.2d 17, 22 (2007).

See also *People v. Caballero*, 179 Ill. 2d 205, 211, 688 N.E.2d 658, 660-61 (1997) (stating the

two-year time limitation for filing a section 2-1401 petition “must be adhered to in the absence of a clear showing that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed”). “Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition.” *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22.

¶ 20 Here, the trial court entered its deferred sentencing judgment against defendant in April 2010. In October 2011, defendant’s probation was terminated unsuccessfully and judgment was entered. Thus, defendant had two years to file a petition to vacate the judgment under section 2-1401. However, defendant did not file his petition until May 2016. Thus, defendant’s petition was untimely.

¶ 21 Defendant, however, argues the two-year time limitation does not apply because the grounds for relief were fraudulently concealed.

“To make a successful showing of fraudulent concealment, the defendant must ‘allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period.’ [Citation.] It is well established that fraudulent concealment sufficient to toll the two-year limitation period of the statute requires ‘affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief.’ [Citation.]” *People v. Coleman*, 206

Ill. 2d 261, 290-91, 794 N.E.2d 275, 293 (2002).

Moreover, “[f]raudulent concealment under section 2-1401(c) which will toll the two-year limitation period contemplates affirmative actions by one’s opponent or by the court, not one’s own attorney.” *People v. Baskin*, 213 Ill. App. 3d 477, 485, 572 N.E.2d 1067, 1072 (1991).

¶ 22 Here, defendant fails to point to any affirmative act or representation on the part of the State or the trial court that prevented him from discovering the immigration consequences of a felony drug conviction. Moreover, it has not been shown there was an attempt to conceal this matter from defendant which precluded its discovery by him. Instead, the transcript of the guilty plea hearing clearly shows the court admonished defendant that pleading guilty could have adverse immigration consequences.

¶ 23 Defendant relies on *People v. Dodds*, 2014 IL App (1st) 122268, 7 N.E.3d 83, in support of his argument that the section 2-1401 time limitation was tolled due to fraudulent concealment. However, *Dodds* is readily distinguishable. In that case, the defendant was incorrectly told by the trial court, the prosecutor, and defense counsel that he would only have to register as a sex offender for 10 years, when in actuality he had to register for life. *Dodds*, 2014 IL App (1st) 122268, ¶¶ 8-9, 21, 7 N.E.3d 83. Here, there was no affirmative misrepresentation by the prosecutor or the trial court.

¶ 24 Defendant also argues the time limitation was tolled based on his attorney’s breach of fiduciary duty. Citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 857 N.E.2d 229 (2006), he contends no affirmative misstatement was required because a fiduciary relationship existed between him and defense counsel. “ ‘It is well established that fraudulent concealment sufficient to toll a statute of limitations requires affirmative acts or representations designed to prevent the discovery of the cause of action’; however, there is ‘a widely recognized exception to this

general rule in those instances when the existence of a fiduciary relationship is clearly established.’ ” *DeLuna*, 223 Ill. 2d at 76, 857 N.E.2d at 245 (quoting *Crowell v. Bilandic*, 81 Ill. 2d 422, 428, 411 N.E.2d 16, 18 (1980)). “[A] *fiduciary* who is silent, and thus fails to fulfill his duty to disclose material facts concerning the existence of a cause of action, has fraudulently concealed that action, even without affirmative acts or representations.” (Emphasis in original.) *DeLuna*, 223 Ill. 2d at 77, 857 N.E.2d at 246. Based on these points of law, defendant contends his attorney’s silence as to the immigration consequences of pleading guilty to the charge in this case amounts to fraudulent concealment or acts as an exception to the general requirement that fraudulent concealment requires an affirmative act or statement.

¶ 25 We find *DeLuna* distinguishable. That case involved a legal-malpractice claim. It did not involve a section 2-1401 petition or the fraudulent concealment necessary to toll the two-year statute of limitations. Defendant has not cited any case law involving a section 2-1401 petition in a criminal case where a court held the silence of defense counsel constituted fraudulent concealment.

¶ 26 Defendant’s petition to vacate the judgment was untimely, and he has failed to show the two-year time limitation for filing a section 2-1401 petition should be tolled due to fraudulent concealment. Accordingly, we find the trial court did not err in granting the State’s motion to dismiss.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court’s judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed.

