

NOTICE
Decision filed 08/09/17. 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.

2017 IL App (5th) 140398-U

NO. 5-14-0398

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,)	Madison County.
)	
v.)	No. 96-CF-2295
)	
JEFFREY A. EWING,)	Honorable
)	James Hackett,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Moore and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed the defendant's petition for relief of judgment because the petition was untimely.

¶ 2 The defendant, Jeffrey A. Ewing, appeals the circuit court's denial of his motion for relief of judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other

document supporting his appeal. The defendant filed a response. We considered OSAD's motion to withdraw as counsel on appeal. We considered the defendant's response to OSAD's motion. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Madison County.

¶ 3

BACKGROUND

¶ 4 The defendant was convicted of first-degree murder for the killing of Dwight Riddlespringer on an accountability theory, along with other counts unnecessary to our disposition of this case. The evidence at trial overwhelmingly showed that the defendant gave Clifton Wheeler a gun and immediately thereafter, Wheeler shot and killed Riddlespringer with that gun. In opening statements, the defendant's attorney stated that Wheeler would testify that he shot Riddlespringer in self-defense thereby exonerating the defendant. Previously, Wheeler testified before the grand jury that he acted in self-defense, but he also testified to the grand jury that he pleaded guilty to killing Riddespringer.

¶ 5 Around this time, Wheeler was involved in other murders including the murder of Nekemar Pearson. Wheeler pleaded guilty to the murder of Riddlespringer and promised to testify in any other prosecutions regarding the Riddlespringer murder. In exchange he received a 23-year sentence in connection with the Pearson murder and promises not to be charged for testifying truthfully in other trials. The existence of this deal was not provided to the defendant in discovery.

¶ 6 At trial, the defendant called Wheeler to testify. At that time, a conference was held concerning Wheeler asserting his fifth amendment (U.S. Const., amend. V) right not to testify. Part of the discussion during that conference was the fact that by testifying Wheeler might open himself up to felony charges. Wheeler's attorney appeared at the conference and indicated Wheeler would not testify. The State indicated that if Wheeler testified, he might open himself up for charges of perjury and charges related to another unspecified murder where he may have helped move the body. Ultimately, Wheeler asserted his fifth amendment right and did not testify. On December 10, 1999, the jury found the defendant guilty of first-degree murder and the other counts.

¶ 7 The defendant filed a posttrial motion. Relevant to this appeal, he alleged that it was improper to allow Wheeler to assert a fifth amendment right to not testify because he was under no threat of prosecution as he already pleaded guilty in connection with the Pearson murder and was promised he would not be charged in other murders if he testified truthfully in those cases. The posttrial motion also sought relief based on the fact that the State had not informed the defendant of the deal of immunity granted to Wheeler in connection with another murder, thereby denying him the opportunity to argue that Wheeler should not have been allowed to assert his fifth amendment rights because he had pleaded or been granted immunity in the cases in which he could be subject to prosecution. In response, the State pointed out that the defendant's attorney witnessed Wheeler's testimony in another case indicating Wheeler had been granted immunity, showing the defendant had actual knowledge of Wheeler's plea. However the

defendant learned of the deals with Wheeler, he was aware of them by the time of filing his posttrial motion.

¶ 8 On direct appeal, this court affirmed in part and vacated a count of armed violence. *People v. Ewing*, No. 5-01-0154 (2003) (unpublished order under Supreme Court Rule 23). Since that time, the defendant has filed at least one postconviction petition pursuant to the Post-Conviction Hearing Act (735 ILCS 5/2-1401 (West 2016)) and a section 2-1401 petition prior the section 2-1401 that is the subject of this appeal. They are irrelevant to this decision.

¶ 9 On June 9, 2014, the defendant filed the section 2-1401 petition that is the subject of this appeal. In that section 2-1401 petition the defendant cast a wide net of arguments, some with no sounding in law at all, and some that came close to plausible issues in a section 2-1401 petition. The fundamental argument made in his section 2-1401 petition was that he was not made aware of Wheeler's plea deal involving the Pearson murder trial (a fact he argues was fraudulently concealed), and that if he had been aware of the plea, he would have been able to compel Wheeler to testify by showing that he was under no threat of prosecution. He also made arguments regarding perjury by Wheeler.

¶ 10 The State filed a motion to dismiss, arguing that the defendant's petition was untimely having been filed over a decade after his conviction. The trial court granted the State's motion and dismissed the defendant's petition. This appeal followed.

¶ 11 ANALYSIS

¶ 12 Section 2-1401 provides a mechanism to collaterally attack a "final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7 (2007) (citing 735 ILCS 5/2-1401(a)

(West 2002)). Section 2-1401 replaced the common law writ system. *Id.* A petition filed under section 2-1401 is to be filed in the "same proceeding in which the order or judgment was entered, but it is not a continuation of the original action." *Id.* (citing 735 ILCS 5/2-1401(b) (West 2002)). The petition is to be supported by "affidavit or other appropriate showing as to matters not of record." *Id.* (citing 735 ILCS 5/2-1401(c) (West 2002)). Relief is obtained "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." *Id.* at 7-8 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209 (1986)). "[T]he 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 2016). "Petitions filed beyond the two-year period will not generally be considered." *People v. Gosier*, 205 Ill. 2d 198, 206 (2001) (citing *People v. Caballero*, 179 Ill. 2d 205, 210 (1997)). Nevertheless, attacks on void judgments may be made at any time. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002).

¶ 13 We review the dismissal of defendant's section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007) (citing *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005)).

¶ 14 There is no question that the defendant's section 2-1401 petition was filed more than two years after his conviction—in fact more than 14 years after his conviction. Therefore, the trial court properly dismissed the petition unless the conviction was void

or the facts potentially altering the outcome of the defendant's trial were fraudulently concealed until less than two years prior to his filing this petition. The defendant did not assert that his conviction was void, so we only need address whether the facts in question, the existence of the plea agreement, were fraudulently concealed by the State until less than two years from the time the defendant filed the underlying section 2-1401 petition. They were not.

¶ 15 Even assuming, without deciding, that the State fraudulently concealed the existence of the plea deal in the murder of Pearson before trial, the defendant's posttrial motion included arguments concerning the pleas that the defendant argues were fraudulently concealed for over a decade. Therefore, the record belies any argument that the defendant's decade-long wait to seek relief of judgment was based on fraudulent concealment. He showed no diligence in bringing this petition based on evidence he was aware of 14 years ago.

¶ 16 With regard to the claims of perjury, we note that the statements involved in the defendant's claim involved Wheeler's testimony before the grand jury and his failure to testify in the defendant's trial. In essence, the defendant argues that by not testifying he committed perjury. The record indicates that the defendant was aware of the grand jury testimony; he was aware of the claim of fifth amendment right; he has presented no evidence of fraudulent concealment that was not known by the time he filed his posttrial motion. As such, the trial court properly dismissed the defendant's section 2-1401 petition for being untimely.

¶ 17

CONCLUSION

¶ 18 The circuit court properly dismissed the defendant's petition. OSAD's motion for leave to withdraw is granted, and the circuit court of Madison County's order is affirmed.

¶ 19 Motion granted; judgment affirmed.