

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).

2018 IL App (4th) 4160471-U
NO. 4-16-0471
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
November 5, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
JERROLD D. JOHNSON,)	No. 07CF86
Defendant-Appellant.)	
)	Honorable
)	Robert K. Adrian,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the office of the State Appellate Defender’s motion to withdraw as appellate counsel and affirm the trial court’s judgment where no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on the ground that no meritorious issues can be raised on appeal.

For the reasons that follow, we grant OSAD’s motion and affirm the trial court’s judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Trial and Conviction

¶ 5 On February 16, 2007, the State charged defendant by information with one count of armed robbery (720 ILCS 5/18-2(a)(1) (West 2006)). The trial court appointed Edward Downey of the public defender’s office to represent defendant. On June 18, 2007, defendant filed

a written motion to proceed *pro se*. The court granted defendant's motion and allowed appointed counsel to withdraw.

¶ 6 On February 21, 2008, Christian Baril entered his appearance as retained counsel for defendant. On April 1, 2008, defendant posted \$7500 bond and was released from jail. After several continuances, Judge Alesia McMillen, who presided over defendant's jury trial, set the matter for a July 21, 2008, jury trial. On the Friday prior to the scheduled trial date, defense counsel moved to continue the trial because defendant suffered an apparent stroke and seizures on July 11 and 13. The following Monday, July 21, 2008, defense counsel indicated he would withdraw the motion, but defendant objected. Defense counsel asked that defendant be allowed to testify about his medical condition. Near the end of his testimony, defendant stated his desire to fire defense counsel and proceed *pro se*. The trial court denied the motion to continue and indicated that because defendant failed to file a written motion seeking discharge of counsel, Baril remained counsel for the defendant. Defense counsel represented defendant through jury selection.

¶ 7 The following morning, defendant arrived late during the State's opening statements. After four of the State's witnesses testified, the court adjourned for a lunch recess. During the recess, defendant presented a written motion to discharge his counsel and proceed *pro se*. The court filed the motion but denied it as untimely.

¶ 8 The jury found defendant guilty of armed robbery. At sentencing, the State presented the trial court with a statement of defendant's prior convictions to qualify him as a habitual criminal. See 720 ILCS 5/33B-1 (West 2008) (imposing a mandatory life sentence for individuals convicted of three Class X felonies except in death penalty cases). The court found defendant to be a habitual criminal and sentenced him to natural-life imprisonment.

¶ 9

B. The Direct Appeal

¶ 10 Defendant appealed, arguing the trial court erred by (1) failing to properly admonish defendant before accepting his waiver of counsel, (2) allowing the State to impeach defendant with his prior felony convictions for armed violence and burglary, and (3) failing to conduct a preliminary inquiry into defendant's posttrial claims of ineffective assistance of counsel. This court affirmed defendant's conviction and sentence. *People v. Johnson*, No. 4-08-0807 (Apr. 29, 2010) (unpublished order under Supreme Court Rule 23).

¶ 11

C. The Postconviction Proceeding

¶ 12 In March 2011, defendant filed a *pro se* postconviction petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2010)). Defendant argued, in part, that the trial court erred when it denied his motion to discharge his retained counsel and proceed *pro se*.

¶ 13

In September 2012, the trial court dismissed the petition following second-stage proceedings. On appeal, this court affirmed the trial court's judgment. *People v. Johnson*, 2014 IL App (4th) 120919-U.

¶ 14

D. Petition for Relief From Judgment

¶ 15 In December 2015, defendant filed a *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 his petition, defendant alleged he was denied his right of self-representation at the jury trial and his conviction and sentence are therefore void. During a March 9, 2016, appearance, the trial court noted defendant failed to properly serve his petition on the State and the State declined to accept service. However, when the case was next called in court on June 8, 2016, the trial court

indicated the State accepted service on March 9, 2016, but failed to file an answer. On its own motion, the court dismissed the petition as frivolous and without merit.

¶ 16 E. Motion to Withdraw

¶ 17 Defendant filed a timely notice of appeal, and the trial court appointed OSAD to represent him. In June 2018, OSAD filed a motion for leave to withdraw, asserting a lack of meritorious claims to raise on appeal. In its proof of service, OSAD states a copy of the motion “is being mailed to the appellant in an envelope deposited in a U.S. mail box *** with proper postage prepaid.” On its own motion, this court granted defendant leave to file additional points and authorities by July 6, 2018. He filed none. After examining the record, we grant OSAD’s motion and affirm the trial court’s judgment.

¶ 18 II. ANALYSIS

¶ 19 OSAD contends any argument suggesting the trial court erred in dismissing defendant’s section 2-1401 petition would be without merit.

¶ 20 “A section 2-1401 petition for relief from a final judgment is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition.” *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000). Generally, when seeking relief under section 2-1401, petitioner must meet the statutory time limit by filing his petition no more than two years following entry of judgment. 735 ILCS 5/2-1401(c) (West 2012). In order to obtain relief where a petition is filed beyond the two-year time limit, a petitioner must demonstrate being under a legal disability or duress or that the grounds for relief were fraudulently concealed. *People v. Caballero*, 179 Ill. 2d 205, 210-211, 688 N.E.2d 658, 660-61 (1997).

¶ 21 In this case, the trial court entered final judgment on October 27, 2008. Defendant's petition was not filed until December 21, 2015, well past the two-year statutory requirement. Defendant does not allege disability, duress, or fraudulent concealment. Defendant nevertheless asserts the judgment is void and thus can be attacked at any time. See *People v. Hillier*, 237 Ill. 2d 539, 546, 931 N.E.2d 1184, 1188 (2010). Specifically, defendant argues the judgment is void because he was denied his constitutional right to self-representation at trial. We review *de novo* the court's dismissal of defendant's section 2-1401 petition requesting relief from a void judgment. *Pekin Insurance Co. v. Campbell*, 2015 IL App (4th) 140955, ¶ 29, 44 N.E.3d 1103.

¶ 22 An argument that an order or judgment is void is not subject to waiver. *People v. Macias*, 371 Ill. App. 3d 632, 643, 863 N.E.2d 776, 785 (2007) (citing *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1205 (2004)). Relief from judgment for voidness under section 2-1401 is available where: (1) the rendering court lacked personal or subject matter jurisdiction or (2) the challenge is based on a facially unconstitutional statute. *People v. Thompson*, 2015 IL 118151, ¶¶ 31-32, 43 N.E.3d 984.

¶ 23 Because defendant does not argue the trial court lacked personal or subject matter jurisdiction or that the armed robbery statute is facially unconstitutional, he cannot show the judgment is void. Accordingly, he failed to meet the two-year filing requirement, and thus, we uphold the denial of his section 2-1401 petition.

¶ 24 Moreover, issues that could have been presented on direct appeal but were not are barred by *res judicata* and may not be relitigated in the section 2-1401 proceeding, which is a separate action and not a continuation of the earlier action. *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 794, 590 N.E.2d 89, 92 (1992).

¶ 25 In the instant case, defendant’s claim he was denied his constitutional right of self-representation at trial could have been raised on direct appeal. Also, the trial court considered and rejected this claim during the postconviction proceedings, and this court affirmed. *Johnson*, 2014 IL App (4th) 120919-U, ¶ 69. Accordingly, it is barred by *res judicata*.

¶ 26 OSAD further asserts that even if defendant’s claim could be considered on the merits, it would fail. We agree.

¶ 27 The sixth amendment to the U.S. Constitution guarantees a criminal defendant the right to counsel. U.S. Const., amend. VI, XIV; Ill. Const. 1970, art. I (amended 1994), §8. However, it also guarantees the right of a criminal defendant to proceed *pro se* so long as he “voluntarily and intelligently elects to do so.” *Faretta v. California*, 422 U.S. 806, 807 (1975). Also, the right of self-representation is not unlimited, and the trial court in its discretion may deny a defendant’s request to represent himself if the request is untimely. *People v. Burton*, 184 Ill. 2d 1, 24, 703 N.E.2d 49, 60 (1998). The request is untimely if it is first made “just before commencement of trial, after trial begins, or after meaningful proceedings have begun.” *Id.*

¶ 28 We review the denial of a criminal defendant’s request to proceed *pro se* for abuse of discretion. See *id.* at 24-25. A court abuses its discretion if its ruling was “arbitrary, fanciful, or unreasonable” or “no reasonable person would have taken the view adopted by the trial court.” *People v. Relwani*, 2018 IL App (3d) 170201, ¶ 27, 99 N.E.3d 152.

¶ 29 Here, the trial court did not abuse its discretion when it denied defendant’s untimely request to proceed *pro se*. Defendant filed his written motion after jury selection, opening statements, and four witnesses’ testimony. Furthermore, due to defendant’s late arrival, he missed several relevant motions and rulings of the court. Under *Burton*, the court had ample reason to deny defendant’s request to proceed *pro se*, and its decision was therefore not

“arbitrary, fanciful, or unreasonable.” *Id.* Accordingly, defendant’s petition, if considered, would fail on the merits.

¶ 30 Finally, OSAD asserts the dismissal of defendant’s petition presents no procedural issues. We agree.

¶ 31 The trial court may *sua sponte* “dispose of a matter when it is clear on its face that the requesting party is not entitled to relief as a matter of law.” *People v. Vincent*, 226 Ill. 2d 1, 12, 871 N.E.2d 17, 25 (2007). In the context of a section 2-1401 petition, the State’s failure to file an answer within 30 days results in admission of all well-pleaded facts. *Id.* at 14. At this point, “the trial court may decide the case on the pleadings, *** including the record of the prior proceedings.” *Id.* at 9. Furthermore, if the petitioner fails to properly serve the State pursuant to Illinois Supreme Court Rule 105 (eff. Jan. 1, 2018) and Rule 106 (eff. Aug. 1, 1985), he cannot later challenge the trial court’s decision on that basis. *People v. Matthews*, 2016 IL 118114, ¶ 15, 76 N.E.3d 1233. This would unjustly “permit a party to assign his own mistakes as errors to reverse a judgment.” (Internal quotation marks omitted.) *Id.* ¶ 13.

¶ 32 Here, the trial court properly dismissed defendant’s petition on its own motion because 30 days had passed, the State did not file an answer, and it found the petition frivolous and without merit. Whether or not the State accepted service is of no consequence. If the State accepted service off-the-record on March 9, the trial court properly construed its subsequent failure to respond as an admission and was permitted to enter a judgment on the pleadings or dismiss the petition with prejudice. *Vincent*, 226 Ill. 2d at 9. As discussed *supra*, the record amply supports the trial court’s finding the petition was legally insufficient as a matter of law. See *id.* at 12. If the State did not accept service, defendant is nonetheless estopped from

challenging the trial court's dismissal on that basis. *Matthews*, 2016 IL 118114, ¶ 15. We therefore conclude there is an absence of procedural issues that merit review.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 35 Affirmed.