

NOTICE
Decision filed 02/28/18. 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.

2018 IL App (5th) 150023-U
NOS. 5-15-0023 & 5-15-0466 (cons.)
IN THE
APPELLATE COURT OF ILLINOIS

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).

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Marion County.
)	
v.)	No. 96-CF-119
)	
KENNETH E. RHODES,)	Honorable
)	Mark W. Stedelin,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's claims are not exempt from the two-years-to-file requirement of section 2-1401 petitions for relief of judgment. His petition was filed well beyond the two-year requirement and was not excused from that limitation because the allegations raised by the defendant did not state a void claim. We affirm.

¶ 2 Defendant, Kenneth E. Rhodes, appeals the circuit court's dismissal of his petition for postjudgment relief. The Office of the State Appellate Defender (OSAD) was appointed to represent 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). Defendant was given proper notice

and granted an extension of time to file briefs, objections, or any other document supporting his appeal. Defendant filed a response. We considered OSAD's motion to withdraw as counsel on appeal. We examined the entire record on appeal and defendant's brief. We 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 Marion County.

¶ 3

BACKGROUND

¶ 4 Following a jury trial presided over by Judge Patrick J. Hitpas, defendant was convicted of criminal sexual assault. On June 5, 1997, the circuit court sentenced defendant to life in prison pursuant to section 33B-1(a) of the Criminal Code of 1961 (720 ILCS 5/33B-1(a) (West 1996)).

¶ 5 On August 25, 2014, defendant filed a petition for postjudgment relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)) alleging (1) that the circuit court erred in sentencing him as a habitual offender because criminal sexual assault was not a Class X offense, and (2) that because Judge Hitpas was not a resident of Marion County he had no subject matter jurisdiction in a Marion County trial, making defendant's conviction and sentence void. The State filed a motion to dismiss, arguing that the section 2-1401 petition was untimely and that defendant's claims were meritless. The circuit court granted the State's motion. On May 22, 2015, defendant filed a second section 2-1401 petition wherein he alleged sentencing errors including double enhancement of his sentence and various other issues regarding his sentencing, which was dismissed as well.

¶ 6 Defendant appeals both dismissals. This court consolidated both appeals under No. 5-15-0023. OSAD then filed a petition for leave to withdraw.

¶ 7 ANALYSIS

¶ 8 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(b) (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)). While section 2-1401 is a civil remedy, it applies to criminal cases as well as to civil cases. *Id.* at 8 (citing *People v. Sanchez*, 131 Ill. 2d 417, 420 (1989)).

¶ 9 Section 2-1401 petitions "are subject to the usual rules of civil practice." *Id.* (citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279 (1982)). The petition is a complaint "inviting responsive pleadings." *Id.* (citing *Ostendorf*, 89 Ill. 2d at 279). It is subject to motions to dismiss for failure to state a cause of action or because it shows " 'that the petitioner is not entitled to relief.' " *Id.* (quoting *Klein v. La Salle National Bank*, 155 Ill. 2d 201, 205 (1993)). A failure to answer the petition "constitutes an

admission of all well-pleaded facts." *Id.* at 9 (citing *Robinson v. Commonwealth Edison Co.*, 238 Ill. App. 3d 436, 442 (1992)). When no reply is filed, "the trial court may decide the case on the pleadings, affidavits, exhibits and supporting material before it, including the record of the prior proceedings." *Id.* (citing *Ostendorf*, 89 Ill. 2d at 286). The court may dismiss a petition *sua sponte*. *Id.* at 13.

¶ 10 "[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 2014). "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). "[O]ur supreme court has 'consistently held that a judgment is void if and only if the court that entered it lacked jurisdiction.'" *People v. Moran*, 2012 IL App (1st) 111165, ¶ 15 (quoting *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 16). "Generally, once a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired. Accordingly, a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law or both." *People v. Davis*, 156 Ill. 2d 149, 156 (1993) (citing 22 C.J.S. *Criminal Law* § 176 (1989)).

¶ 11 Prior to our supreme court's decision in *People v. Castleberry*, 2015 IL 116916, a sentence which did not conform to statutory requirements was considered void. *Castleberry* abolished the so-called void sentencing rule, and in *People v. Price*, 2016 IL

118613, our supreme court held that *Castleberry* applied retroactively to cases on collateral review. Thus, even if defendant's sentence was improper under section 33B-1(c) of the Criminal Code of 1961 (720 ILCS 5/33B-1(c) (West 1996)), it was not void and could not be attacked under section 2-1401(f) of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2014)). Defendant's sentence, however, was not improper. The sentencing argument defendant advanced in his section 2-1401 petition was premised on the mistaken belief that he was subject to being adjudicated a habitual criminal only if his third conviction was for a Class X offense. However, the habitual criminal statute makes clear that he was also subject to its provisions if his third conviction was for criminal sexual assault.

¶ 12 With respect to defendant's claim regarding Judge Hitpas, "a judgment is void only if the court that entered it lacked jurisdiction. [Citation.] Jurisdiction lies in the court itself, not in an individual judge." *People v. Rios*, 2013 IL App (1st) 121072, ¶ 15. The circuit court's jurisdiction is granted by the constitution. Ill. Const. 1970, art. VI, § 9; *Rios*, 2013 IL App (1st) 121072, ¶ 15. A criminal matter is a matter over which a circuit court has jurisdiction. See *Rios*, 2013 IL App (1st) 121072, ¶ 16. Assuming, *arguendo*, that Judge Hitpas should not have been sitting as a judge over defendant's trial, he was acting under color of law, was an officer *de facto*, and a conviction and sentence cannot be collaterally attacked on those grounds. See *id.* ¶ 17. Thus, even if Judge Hitpas did not properly preside over defendant's trial, this impropriety did not render defendant's conviction and sentence void.

¶ 13

CONCLUSION

¶ 14 Because defendant cannot show that his sentence and conviction are void, he is subject to the two-year limitation on the time to file section 2-1401 petitions. As defendant waited nearly two decades to file his petitions, the circuit court properly dismissed them. OSAD's motion for leave to withdraw is granted, and the circuit court of Marion County's order is affirmed.

¶ 15 Motion granted; judgment affirmed.