

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).

2019 IL App (4th) 160873-U

NO. 4-16-0873

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 22, 2019

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
JEROME MOORE,)	No. 00CF72
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

PRESIDING JUSTICE HOLDER WHITE delivered the judgment of the court. Justices Turner and Harris 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 asserting no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 4, 2000, a grand jury indicted defendant, Jerome Moore, on two counts of aggravated battery (720 ILCS 5/12-4(b)(6) (West 1998)). The indictment alleged defendant knowingly struck a correctional institution employee in the face, knowing the said employee was engaged in the execution of his official duties. Count I alleged defendant knowingly caused

bodily harm to the correctional institution employee; count II alleged defendant knowingly made physical contact of an insulting or provoking nature.

¶ 5 On May 22, 2000, defendant pleaded guilty to both counts. The trial court asked defendant numerous times whether he understood the proceedings and made an express finding that defendant understood the nature of the charge, the possible sentences, and the rights he waived by pleading guilty. The court found a sufficient factual basis and accepted defendant's plea as knowing and voluntary. The court entered a finding of guilty on count I and sentenced defendant to four years' imprisonment to run consecutively to prior convictions for attempt (murder) and aggravated battery. Defendant did not move to withdraw his guilty plea nor did he file an appeal.

¶ 6 On September 23, 2016, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2014)). In his petition, defendant alleged he had proof he had a severe mental illness at the time of the offense that was not raised by his defense attorney, which would have resulted in a different judgment. Defendant attached to his petition a "Mental Health Treatment Plan" from the Pontiac Correctional Center suggesting defendant suffers from schizophrenia and antisocial personality disorder. The earliest date listed in the treatment plan is in 2014. In his petition, defendant also cites the proportionate penalties clause of the Illinois Constitution.

¶ 7 The State did not file a responsive pleading to defendant's petition, and on October 25, 2016, the trial court *sua sponte* dismissed defendant's petition. The court found defendant failed to make a clear showing he was under a legal disability or duress, making his petition untimely. The court further noted, timeliness aside, defendant failed to set forth even the basic elements of a 2-1401 petition and did not attach any affidavits, records, or other evidence

apart from the undated and unsigned treatment plan. Defendant filed a timely notice of appeal, and OSAD was appointed to represent defendant.

¶ 8 In August 2018, OSAD filed a motion for leave to withdraw as counsel on appeal. On its own motion, this court granted defendant leave to respond to OSAD’s motion on or before September 27, 2018. Defendant failed to do so. After examining the record, we grant OSAD’s motion and affirm the trial court’s judgment.

¶ 9 II. ANALYSIS

¶ 10 OSAD outlines the following potential issues for review in its motion to withdraw: (1) whether defendant’s petition raised a meritorious claim he was unfit to plead guilty and (2) whether defendant’s petition raised a meritorious claim that his sentence violated the proportionate penalties clause of the Illinois Constitution.

¶ 11 A. Standard of Review

¶ 12 The purpose of a petition for relief from judgment pursuant to section 2-1401 of the Civil Code (735 ILCS 5/2-1401 (West 2014)) is “to bring before the trial court facts not appearing in the record that, if known at the time the court entered judgment, would have prevented the judgment’s entry.” *People v. Bramlett*, 347 Ill. App. 3d 468, 473 (2004). To obtain relief, defendant must prove, by a preponderance of the evidence, (1) a meritorious claim or defense, (2) due diligence in presenting the claim in the original action, and (3) due diligence in filing the section 2-1401 petition. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). A section 2-1401 petition may be dismissed for want of legal or factual sufficiency. *Id.* at 8. We review *de novo* the trial court’s dismissal of a petition for relief under section 2-1401 of the Civil Code. *Id.* at 13.

¶ 13 As an initial matter, we note the trial court improperly dismissed defendant’s petition on timeliness grounds. Section 2-1401 requires that petitions be filed not later than two

years after the entry of judgment, excluding “[t]ime during which the person seeking relief is under legal disability or duress.” 735 ILCS 5/2-1401(c) (West 2014). The two-year period is a time limitation, not a jurisdictional prerequisite, and must be asserted as an affirmative defense by the State. *People v. Malloy*, 374 Ill. App. 3d 820, 824 (2007). “If the trial court dismisses a petition for relief from judgment, on its own motion, on the basis of timeliness, that dismissal is erroneous.” *Id.*

¶ 14 Here, the State did not respond to defendant’s petition and therefore did not raise any affirmative defense. Despite this, the trial court, *sua sponte*, found defendant “failed to make a clear showing that he was under a legal disability or duress and thus his motion was not timely filed.” However, because the trial court found that, even excusing timeliness, defendant’s petition still failed to set forth a proper cause of action for 2-1401 relief, we review *de novo* the dismissal of defendant’s petition. See *Vincent*, 226 Ill. 2d at 13.

¶ 15 **B. Whether Defendant’s Petition
Set Forth a Meritorious Claim He Was Unfit to Plead Guilty**

¶ 16 OSAD asserts it can make no colorable argument defendant’s petition set forth a meritorious claim that the trial court would not have accepted defendant’s guilty plea had it known of his mental illness. We agree.

¶ 17 The standards used to determine whether a defendant is fit to enter a guilty plea are the same standards used to determine whether a defendant is fit to stand trial. *People v. Heral*, 62 Ill. 2d 329, 334 (1976). A defendant is presumed fit and will be considered unfit only if, because of the defendant’s mental condition, “the defendant is unable to understand the nature and purpose of the proceedings against him or her, or to assist in his or her defense.” *People v. Easley*, 192 Ill. 2d 307, 318 (2000).

¶ 18 Defendant must show, by a preponderance of the evidence, that the trial court “would have found a *bona fide* doubt of his fitness and ordered a fitness hearing if it had been apprised of the evidence now offered.” *Id.* at 319. Relevant factors to consider include defendant’s irrational behavior, his demeanor at the hearings, and prior medical opinions on defendant’s competence to stand trial. *Id.* A defendant may be fit despite the fact he or she suffers from a mental illness. *Id.* at 322. “The issue is not mental illness, but whether defendant could understand the proceedings against him and cooperate with counsel in his defense.” *Id.* at 323.

¶ 19 Even taking as true defendant’s allegation he was mentally ill at the time of his guilty plea and his mental illness was unknown to the trial court, defendant’s petition fails to set forth a meritorious claim entitling him to section 2-1401 relief. Our supreme court is clear on this matter: mental illness alone does not raise a *bona fide* doubt as to defendant’s fitness. See *e.g.*, *Easley*, 192 Ill. 2d at 322 (“The fact that a defendant suffers from mental disturbances or requires psychiatric treatment does not necessarily raise a *bona fide* doubt as to the defendant’s ability to understand the proceedings and to assist counsel in the defense.”).

¶ 20 The issue is not mental illness; the issue is whether defendant could understand the proceedings against him. *Id.* at 323. Defendant’s petition makes no allegation nor does it provide any evidence that he could not understand the proceedings against him. In fact, the record indicates the trial court asked defendant numerous times if he understood the proceedings, to which defendant responded affirmatively.

¶ 21 Thus, we agree with OSAD that no colorable argument can be made that defendant’s petition raised a meritorious claim he was unfit to enter a guilty plea.

¶ 22

C. Whether Defendant's Petition
Set Forth a Meritorious Proportionate Penalties Claim

¶ 23 OSAD asserts it can make no colorable argument defendant's petition set forth a meritorious proportionate penalties claim. We agree.

¶ 24 Paragraph five of defendant's petition states, "Art. I, Sec. 11 of the Illinois Constitution (1970) require[s] that all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." As mentioned above, the purpose of a section 2-1401 petition is "to bring before the trial court facts not appearing in the record that, if known at the time the court entered judgment, would have prevented the judgment's entry." *Bramlett*, 347 Ill. App. 3d at 473 (2004).

¶ 25 Here, absent is a factual allegation or attempt to bring before the trial court facts not appearing in the record. Rather, defendant merely spells out the first sentence of Article I, Section 11 of the Illinois Constitution. See Ill. Const. 1970, art. I, § 11. As such, defendant's petition failed to set forth factual allegations supporting a meritorious proportionate penalties claim and any argument by OSAD to the contrary would be without merit.

¶ 26

III. CONCLUSION

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

¶ 28

Affirmed.