

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) 160926

NO. 4-16-0926

FILED
April 25, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
FALANZO M. HIXSON,)	No. 99CF1850
Defendant-Appellant.)	
)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

JUSTICE KNECHT 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 and affirm the trial court’s dismissal of defendant’s section 2-1401 petition that was filed almost 16 years after judgment was entered.

¶ 2 This case comes to us on the motion of the Office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground no meritorious issues can be raised in this case. We grant OSAD’s motion to withdraw and affirm the trial court’s judgment.

¶ 3 I. BACKGROUND

¶ 4 In December 1999, defendant was charged with five counts of first degree murder for the November 12, 1999, shooting death of Jerry Brinegar. At the proceedings before the grand jury, David Griffet, an inspector with the Illinois State Police, testified, in part, he was a detective assigned to the investigations division of the Champaign Police Department when the

shooting occurred. According to Griffet, while investigating Brinegar's murder, he spoke with Andre Gordon. Griffet testified he "was aware that Task Force X agents had done a recent drug investigation in the ten hundred block of North Hickory where a controlled buy resulted in nine ounces of crack cocaine and approximately 40 thousand dollars ***." Griffet testified Gordon acted as "the undercover informant for the task force at the time" and "ha[d] provided information to the task force in the past[.]"

¶ 5 In April 2000, a jury trial was held on the charges. At trial, Griffet, testified, on November 12, 1999, while investigating the shooting, he went to the residence of Gordon, who had functioned as an informant for him. Griffet testified he knew Gordon for approximately 3½ years. They met when Griffet was patrolling the northeast part of Champaign. Gordon lived in the same neighborhood in which the shooting occurred. Griffet decided to locate Gordon because Gordon, two weeks earlier, worked with the task force on a controlled buy. Griffet went to Gordon's residence and asked to speak with Gordon privately. Griffet told Gordon there had been a shooting and asked if Gordon knew who may be responsible. Griffet mentioned the Crimestoppers reward of \$1000 for help in the case and offered to help ensure Gordon would be compensated. The two agreed to meet in the parking lot of a furniture store. When the two met, Gordon asked for consideration for his mother who had pending drug charges. Griffet called the officer in charge of the drug case against Gordon's mother. After Gordon talked to that officer, Gordon produced the murder weapon to Griffet and identified defendant as the shooter.

¶ 6 Gordon testified at trial. During questioning, Gordon denied having worked with Griffet before November 12, 1999:

"Q. Now prior to your interaction with Griffet on

November 12, the day you talked to him about [defendant], had you worked with Griffet before that date and given him information regarding other matters?

A. What [has] that got to do with this?

Q. I just want to know if you had worked with Griffet prior to that day?

A. Well, no.”

¶ 7 The jury found defendant guilty of first degree murder. The trial court sentenced defendant to 55 years’ imprisonment.

¶ 8 Defendant pursued a direct appeal of his conviction and sentence. Among the claims on appeal, defendant argued he was not proved guilty beyond a reasonable doubt. This court affirmed the conviction. *People v. Hixson*, No. 4-00-0718 (Dec. 5, 2002) (unpublished order under Illinois Supreme Court Rule 23).

¶ 9 In April 2004, defendant filed his initial postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2002)). In that petition, defendant alleged, in part, he was denied the effective assistance of counsel when counsel failed to investigate whether Gordon was given any consideration for his testimony. Defendant alleged Gordon testified at trial he was not offered a reward for his cooperation and was not promised anything concerning his mother’s drug charges. Defendant alleged the trial testimony of Griffet indicates he “offered Gordon \$1,000.00 for information relating to the shooting” and “Gordon requested only \$500.” Defendant alleged Griffet further testified to seeking some consideration regarding Gordon’s mother’s drug charges.

¶ 10 The trial court summarily dismissed the petition. On appeal, this court found counsel was not ineffective for not impeaching Gordon. We observed “the jury was given evidence to support the proposition Gordon fingered defendant to obtain the cash reward and leniency for his mother and/or himself on pending drug charges.” Although Gordon denied any offers, Griffet’s testimony diluted the effectiveness of Gordon’s even though Gordon was not “technically impeached.” We concluded the jury had the opportunity to judge the credibility of both witnesses and defendant was not prejudiced by the failure to impeach Gordon. *People v. Hixson*, No. 4-04-0642 (May 3, 2006) (unpublished order under Illinois Supreme Court Rule 23).

¶ 11 In June 2016, defendant filed a petition for leave to file a successive postconviction petition, arguing his 55-year sentence is a *de facto* life sentence that violates the eighth amendment’s prohibition against cruel and unusual punishment. In July 2016, the trial court allowed leave and ordered the filing of the successive postconviction petition. In September 2016, the trial court summarily dismissed defendant’s successive postconviction petition. The appeal from the summary dismissal is pending before this court.

¶ 12 Also in June 2016, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)). In this petition, defendant alleged his conviction was void because the State committed fraud on the trial court by knowingly using false testimony. Defendant alleged Gordon’s testimony at trial contradicted Griffet’s testimony before the grand jury and the State failed to correct Gordon’s false testimony. In the alternative, defendant argued, assuming Gordon testified truthfully, Griffet lied during grand jury proceedings.

¶ 13 In his petition, defendant argued the two-year time limit on his section 2-1401

petition should be stayed because the State fraudulently concealed the grand jury transcript from him. Defendant further argued the two-year limit did not apply, as the judgment was void and could be attacked at any time.

¶ 14 Defendant attached an affidavit to his petition. In the affidavit, defendant averred defense counsel requested the grand jury transcripts on December 9, 1999. According to defendant, the State did not produce the transcripts and told defense counsel to file another request, which counsel did not do. Defendant wrote multiple letters to “reporters of the court, clerks, State’s Attorney[,] and [j]udge” but was not given the transcripts. Defendant stated he obtained a copy of the transcripts in December 2015.

¶ 15 In response, the State moved to dismiss defendant’s petition. The State argued the petition was untimely. The State denied fraudulently concealing the grand jury transcripts, asserting the discovery affidavit, filed on December 29, 1999, demonstrates defense counsel was provided a copy of the grand jury transcripts. Additionally, the State argued any inconsistencies between the testimony of Gordon and Griffet were known at the time of trial and Griffet’s testimony was the same at trial and before the grand jury. The State further maintained the transcripts were made public in 2004 when they were filed with the Champaign County Clerk of the Court.

¶ 16 Defendant filed a response to the State’s motion. Defendant reiterated his claims and asserted the State was required to correct the false representation.

¶ 17 In October 2016, the trial court agreed with the State and dismissed defendant’s petition. The court found the petition was not timely filed, as the two-year time limit was not tolled by fraudulent concealment. The court concluded defendant failed to point to any

affirmative act by the State that prevented him from obtaining the grand jury transcripts. The court found defendant could have exercised reasonable diligence to obtain the transcripts after they were made public in 2004. The court further found the fraud allegations did not render the judgment void, as the fraud alleged did not divest the trial court of subject-matter jurisdiction. The court further concluded *res judicata* applied to defendant's claim as he could have raised the issue on direct appeal or in an earlier proceeding.

¶ 18 In his motion to reconsider, defendant argued he could not have obtained the grand jury transcripts from the circuit clerk because Illinois law requires leave of court for their release. Defendant then argued he tried to obtain those transcripts and attached multiple exhibits in support of this claim. The exhibits include a May 7, 2001, letter to a court reporter in which defendant requested the transcript. Another exhibit, dated May 15, 2001, includes a letter from the court reporter to defendant, stating a copy of the trial transcripts were mailed by the circuit clerk to defendant in October 2000. The letter further states grand-jury transcripts may be released only to the state's attorney's office. Exhibit E is an affidavit from defendant stating he requested grand jury transcripts from the state's attorney's office, which informed him they did not have the transcripts. Defendant further averred he filed a motion to obtain the transcripts in the trial court, but the motion was denied.

¶ 19 The trial court denied the motion to reconsider. The court reasoned, in part, defendant's trial counsel had the transcripts at the end of December 1999 or the beginning of January 2000 and appellate counsel would have had the transcripts in 2003. The court further found no material issue of fact, concluding defendant "provided assumptions, speculations[,] and nothing else" to support his petition.

¶ 20 This appeal followed. The trial court appointed OSAD to represent defendant on appeal. In August 2018, OSAD moved to withdraw as counsel on appeal and served a copy on defendant. On its own motion, this court granted defendant leave to file additional points and authorities on or before October 2, 2018. Defendant filed none.

¶ 21 II. ANALYSIS

¶ 22 A. The Standard of Review and Applicable Law

¶ 23 The purpose of a section 2-1401 petition is to call the trial court’s attention to factual matters that were unknown at the time judgment was rendered by the court and the party seeking relief. *People v. Pinkonsly*, 207 Ill. 2d 555, 566, 802 N.E.2d 236, 243 (2003). Section 2-1401(c) mandates petitions must be filed within two years of the judgment from which the party seeks relief. 735 ILCS 5/2-1401(c) (West 2016). Courts may relax the strict time limit only upon “a clear showing” the individual seeking relief is under legal disability or duress or the ground for relief was fraudulently concealed. *People v. Caballero*, 179 Ill. 2d 205, 211, 688 N.E.2d 658, 660-61 (1997); see also 735 ILCS 5/2-1401(c) (West 2016) (stating “[t]ime 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”). Our review of a trial court’s dismissal of a section 2-1401 petition is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 24 B. The Timeliness of Defendant’s Petition

¶ 25 OSAD maintains no argument can be made the trial court erred in finding the petition was filed beyond the two-year limit. We agree. The final judgment challenged by defendant was entered on July 28, 2000. Defendant filed his 2-1401 petition on June 27, 2016,

nearly 14 years after the statutory deadline expired.

¶ 26 OSAD contends any argument an exception to the two-year limit applies is frivolous. OSAD maintains the record refutes defendant's contention the State fraudulently concealed the grand jury transcripts, preventing him from discovering the alleged ground for relief. In his petition, defendant asserts Griffet's testimony at the grand jury proceedings contradicts Gordon's testimony at trial.

¶ 27 To establish fraudulent concealment to toll the two-year statute of limitations, defendant must allege facts showing "his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief," as well as facts demonstrating defendant's good faith and reasonable diligence in attempting to uncover such matters within the limitations period. *People v. Coleman*, 206 Ill. 2d 261, 290, 794 N.E.2d 275, 293 (2002) (quoting *People v. McLaughlin*, 324 Ill. App. 3d 909, 918, 755 N.E.2d 82, 90 (2001)). Our supreme court stresses defendant must identify "affirmative acts or representations designed to prevent discovery of the *** ground for relief." *Coleman*, 206 Ill. 2d at 290-91 (quoting *Crowell v. Bilandic*, 81 Ill. 2d 422, 428, 411 N.E.2d 16, 18 (1980)).

¶ 28 Here, defendant has not alleged or pointed to any facts that demonstrate the State affirmatively acted in any manner to prevent discovery of the alleged ground for relief. Instead, the record demonstrates the State affirmatively acted in a manner to disclose the grand jury transcripts. On December 29, 1999, the State provided defendant's counsel with a copy of the transcripts. In 2004, the transcripts were made public with the Champaign County circuit clerk. Any argument defendant is entitled to toll the statute of limitations until 2016 on the alleged fraudulent concealment of the grand jury transcripts is frivolous.

¶ 29 In addition, as OSAD states, defendant’s alleged failure to access the grand jury transcripts did not prevent him from discovering his claim the State presented perjured testimony by Griffet or, in the alternative, by Gordon. The testimony at trial demonstrates the two gave contradictory testimony on whether they worked together before this case and on whether Gordon was offered a reward for his assistance and cooperation. The grand jury testimony reveals no further discrepancy but substantially mirrors Griffet’s testimony at trial. In his original postconviction petition, defendant pointed to these facts and argued counsel provided ineffective assistance by not impeaching Gordon with Griffet’s testimony. Defendant was already aware of the facts underlying his perjury claim. The grand jury testimony provides no new information.

¶ 30 C. Whether the Underlying Judgment is Void

¶ 31 OSAD maintains any argument the judgment below is a void judgment that can be raised at any time is frivolous. OSAD contends defendant’s conviction is not void. OSAD emphasizes defendant’s argument that the prosecutor knowingly used false evidence and perpetrated a fraud on the court does not involve a “fraud that prevents a court from acquiring jurisdiction or provides merely colorable jurisdiction” and the conviction is thus not void.

¶ 32 A judgment is void in one of the following circumstances: (1) when the judgment is entered by a court lacking jurisdiction over the subject matter or the parties; (2) when it is entered by a court lacking the inherent power to enter judgment; or (3) when the judgment was produced by a fraud that prevented a court from acquiring jurisdiction. *Settlement Funding, LLC v. Brenston*, 2013 IL App (4th) 120869, ¶ 32, 998 N.E.2d 111. Courts have distinguished cases in which the fraud “occurs after the court’s valid acquisition of jurisdiction, such as through false testimony or concealment.” *Id.* The latter fraud renders the judgment only “voidable” and subject

to collateral attack pursuant to the procedure set forth in section 2-1401. *In re Marriage of Noble*, 192 Ill. App. 3d 501, 509, 548 N.E.2d 518, 523 (1989).

¶ 33 Defendant's argument regarding the State's alleged knowing use of perjured testimony is not a fraud that prevented the court's valid acquisition of jurisdiction. Instead, the purported fraud occurred after the trial court acquired jurisdiction. There is no colorable argument the judgment is void on this ground.

¶ 34 OSAD further points to defendant's argument Griffet provided perjured testimony during the grand jury proceedings. OSAD, citing *People v. Benitez*, 169 Ill. 2d 245, 255-56, 661 N.E.2d 344, 349-50 (1996), maintains this argument does not render the judgment void, as jurisdiction is conferred by constitutional provisions and not by the information or indictment. In his section 2-1401 petition, defendant alleged "[t]he succession of constitutional violations goes like this: Grand Jury Perjury [to] Void Indictment [to] Fraud on the Court [to] Causing Loss of Subject Matter Jurisdiction [to] Void Judgment."

¶ 35 We agree the allegation the charges were based on perjured testimony does not render defendant's conviction void. *Benitez* plainly rejects the contention jurisdiction is destroyed when the defendant was not properly charged with a crime. *Id.* at 255-56. The court held "jurisdiction is not conferred by information or indictment, but rather by constitutional provisions." *Id.* at 256. The alleged fraud did not prevent jurisdiction to attach. The judgment is not void. Argument to the contrary is frivolous.

¶ 36 D. Procedural Considerations

¶ 37 OSAD last contends there is no arguable basis to assert the judgment violated procedural rules. We agree. The trial court allowed the State to respond to defendant's petition

and provided defendant a meaningful opportunity to respond.

¶ 38

III. CONCLUSION

¶ 39 We agree no meritorious issue can be raised on appeal. We grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment.

¶ 40

Affirmed.