

No. 1-09-2848

**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).

SIXTH DIVISION  
MARCH 18, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 4216
	)	
JAMES HUMPHRIES,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROBERT E. GORDON delivered the judgment of the court.

JUSTICES CAHILL and McBRIDE concurred in the judgment.

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**O R D E R**

*HELD:* Circuit court's order denying untimely motion to vacate a prior conviction is vacated and cause dismissed for lack of jurisdiction.

Defendant James Humphries appeals from an order of the circuit court of Cook County denying his motion to vacate a prior conviction. On appeal, defendant contends that his motion was,

"in effect," a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)), and that the court erred in denying it *sua sponte* without allowing the 30-day period for the filing of responsive pleadings to elapse.

The record shows that on June 28, 1999, defendant was sentenced to two years' imprisonment on his bench conviction of aggravated battery. Defendant did not directly appeal that judgment or file any collateral challenges to it.

On August 26, 2009, however, defendant filed a *pro se* motion entitled "Defendant's Motion to Vacate Prior Convictions." Defendant claimed that he was presently incarcerated in federal prison serving a sentence of 188 months for the offense of "felon in possession of [a] firearm." He requested the court to vacate his prior conviction "in the best interest of justice," because it was impacting his custody classification, interfering with his participation in rehabilitation programming, and had been used to enhance his sentence for the federal offense.

On September 17, 2009, the court denied defendant's motion *sua sponte*. The court found that defendant had failed to provide any grounds for vacating his conviction and characterized his motion as "baseless" and "frivolous." Defendant now appeals that decision, claiming that his motion was effectively a petition for relief from judgment, and, as such, could not be dismissed until

the 30-day period for the filing of responsive pleadings had elapsed.

The record shows that defendant was sentenced to a two-year term of imprisonment in 1999, and filed a motion to vacate that judgment 10 years later. Since more than 30 days had elapsed since sentence was imposed on his conviction, and no basis had been established to extend the limitation period for post-judgment motions (Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009)), the trial court was divested of jurisdiction to entertain his motion, and no longer had authority to consider it. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003).

Defendant seeks to overcome this procedural impediment by arguing on appeal that his motion is "in effect" a section 2-1401 petition. By characterizing his claim in this manner, he acknowledges that it will not be found in the motion presented to the circuit court. *People v. Taylor*, 237 Ill. 2d 68, 76 (2010). This is borne out by the record, which clearly shows that defendant presented a "motion to vacate," and that the circuit court considered it as such when entering its ruling.

In this respect, we find the case at bar analogous to *Keener v. City of Herrin*, 235 Ill. 2d 338, 341-42 (2009), where the circuit court granted plaintiff's motion to reconsider nearly one year after the court had granted defendant's motion to dismiss. The appellate court's jurisdiction to hear the merits of the case

turned on whether the motion could be properly characterized as a section 2-1401 petition, and if there was support in the record that the circuit court granted such a petition. *Keener*, 235 Ill. 2d at 348. The supreme court found none, observing that the circuit court never mentioned that it was ruling on a section 2-1401 motion, and that nothing in the record suggested that the opposing party was properly served with process under section 2-1401 in the manner prescribed by Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985). *Keener*, 235 Ill. 2d at 348-49. Because the circuit court did not have jurisdiction to grant the untimely motion, the supreme court held that the appellate court had no jurisdiction to review that judgment and dismissed the appeal. *Keener*, 235 Ill. 2d at 350-51.

We reach the same conclusion here where there is no indication in the record that defendant filed a section 2-1401 motion, or that the court considered it to be one; and, further, where defendant did not serve process on the State in compliance with Rule 106, or attempt to comply with any of the other requirements of section 2-1401. In addition, we observe that defendant did not claim that his conviction was void, and given the time frame between the judgment and the filing of the motion, showing that he would have completed his sentence, any issue regarding the conviction was moot. *People v. S.L.C.*, 115 Ill. 2d 33, 39 (1986).

Notwithstanding, defendant argues that as a *pro se* defendant lacking legal expertise, he was prone to choosing the wrong method to attack his conviction. In support of his argument, defendant cites *People v. Smith*, 386 Ill. App. 3d 473, 476, 479 (2008), where the reviewing court found that it was error for the trial court to deny defendant's section 2-1401 petition based on untimeliness, and also abused its discretion in failing to recharacterize it as a post-conviction petition because it was the only logical construction that would preserve the court's jurisdiction over the petition. Here, by contrast, the circuit court had clearly lost jurisdiction of the case since more than 10 years had passed since judgment was entered on his conviction, and, during which, he would have served his sentence. Thus, unlike *Smith*, recharacterizing defendant's untimely motion to vacate his prior conviction would not preserve the court's jurisdiction, and, therefore, would be without effect.

For the reasons stated, we conclude that the circuit court did not have jurisdiction to deny defendant's motion to vacate on September 17, 2009, and, as a result, we have no jurisdiction to review the propriety of that order. *Keener*, 235 Ill. 2d at 350-51; *Flowers*, 208 Ill. 2d 291, 303. Accordingly, we vacate the order entered by the circuit court of Cook County on September 17, 2009, and dismiss this cause.

Appeal dismissed.