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breached when he did not receive a 200-day sentencing credit toward his consecutive sentence for intimidation which, he claims, was promised to him in an off-the-record Supreme Court Rule 402 conference.

The record shows, in relevant part, that defendant was charged with two counts of intimidation for threatening Robin Sain with physical harm if she did not continue to date him, or dated anyone else, while he was incarcerated. 720 ILCS 5/12-6(a)(1) (West 2004). During a hearing on August 8, 2006, the court held an off-the-record Rule 402 conference at defendant's request. When proceedings resumed, defense counsel informed the court that defendant would be entering a plea of guilty in exchange for a consecutive sentence of 42 months' imprisonment, and credit for 200 days.

Defendant subsequently asked the court, "[I]s there a way I get a copy of my time that's credit?" The court responded that the credit would be indicated on his mittimus, but defendant requested it on a separate form. The court replied, "Do you want to write up the form, I'll sign it. 200 days on consecutive sentencing, it depends on how they grade that out. It may be that you get double time for your other sentencing." Defendant acknowledged that he understood this. When the court ultimately announced defendant's sentence, it stated, "I'll grant credit for

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the 200 days you've been in custody, and this is to run consecutive with 05 CR 12956."

Defendant timely filed a *pro se* motion to withdraw his guilty plea alleging, *inter alia*, that his attorney had not represented his best interests, and told him that if he did not take the plea offer, he would receive the maximum sentence because she would not put up a good defense. At the hearing on that motion, defendant was represented by counsel, who informed the court that defendant was claiming that his guilty plea was unknowing and involuntary. Defendant specifically claimed that he pleaded guilty with the understanding that his sentence would be concurrent with his other convictions, and that trial counsel failed to inform him that his sentence would be consecutive.

Counsel also informed the court that defendant had an ongoing concern about his sentencing credits, stating:

"There are two orders for sentencing credits on this case, 2324, for 200 days and one on 05-12956, and that's a 230 day credit. On this case [the intimidation case] there was a 200 days credit, and we ask you aggregate those and issue an aggregate order for those credits."

The State responded that defendant was consistently told that sentencing would be consecutive and that his protestation to

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the contrary was belied by the record. The court denied defendant's motion, finding that both the mittimus and the record indicated that defendant's sentence was consecutive. The court also declined to aggregate the sentencing credit orders, stating, "I believe my order I already made is it's up to the Department of Corrections whether it's an aggregate order." Defendant appealed that judgment, and also filed a *pro se* "motion to reconsider motion to withdraw plea of guilty and vacate judgment," a *pro se* motion for order *nunc pro tunc* seeking 200 days of credit for time spent in presentence custody on his intimidation conviction, and a *pro se* motion for reduction of sentence, each of which was denied by the circuit court.

On appeal, this court affirmed defendant's conviction for intimidation, but vacated his sentence and remanded for a new sentencing hearing. In doing so, we found that the trial court failed to rely on a presentence investigation report or make an on-record finding of defendant's criminal history prior to sentencing, in accordance with the requirements of section 5-3-1 of the Unified Code of Corrections (730 ILCS 5/5-3-1 (West 2006)). *People v. Bobo*, No. 1-07-0986 (2009) (unpublished order under Supreme Court Rule 23).

Meanwhile, on March 17, 2009, defendant filed a *pro se* section 2-1401 petition alleging, *inter alia*, a breach of his plea agreement in that he did not receive the agreed-upon 200-day

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sentencing credit in exchange for his guilty plea, and requesting that the 200 days be aggregated to his other sentencing credit. Defendant attached to his petition a sentencing credit order, a copy of his mittimus, and a certified statement of his conviction. Each document indicated that he received 200 days of credit for time served in his intimidation case, and the latter two indicate that his sentence was consecutive to case number 05 CR 12956.

On June 16, 2009, the trial court dismissed defendant's section 2-1401 petition *sua sponte*. In its written order, the court found that defendant had failed to advance a claim or defense establishing his entitlement to relief under section 2-1401, and that he was not entitled to double sentencing credit because it was a consecutive sentence.

Thereafter, on July 8, 2009, the trial court conducted a sentencing hearing pursuant to the remand ordered in his direct appeal. The court provided the parties an opportunity to present evidence in aggravation and mitigation, and invited defendant to speak in allocution. Defendant asked the court whether there was a breach of his plea agreement, stating:

"I made agreement that these 200 days would be credited to me along with the 230 days, I made an agreement to take that plea only for those reasons, and in the transcript it say

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[sic] that I agreed to that agreement for the
200 days, and I didn't get that 200 days."

The court responded that he did receive credit for those 200 days, but that because his intimidation sentence was consecutive, he could not receive double credit. The court then imposed a sentence of 42 months' imprisonment, and awarded defendant 200 days of sentencing credit, clarifying that he would not receive double credit because the sentence was consecutive.

On July 10, 2009, defendant filed a notice of appeal from the order of August 8, 2006. He subsequently filed a motion for a supervisory order in the supreme court, and on August 5, 2010, the supreme court entered said order directing this court to allow the notice of appeal filed on July 10, 2009, (No. 1-09-1946) to stand as an appeal from the June 16, 2009, order dismissing defendant's section 2-1401 petition, as well as the orders designated in the notice of appeal.

In this court, defendant solely challenges the dismissal of his section 2-1401 petition. Defendant first contends that his negotiated plea agreement was "void" where he was promised in an off-the-record Rule 402 conference that he would receive a 200-day sentencing credit toward his consecutive sentence for intimidation, but was precluded by statute from receiving double credit on that sentence. He maintains that his claim is corroborated by the record which shows that such a conference was

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held, and that the trial court informed him both in court and in a written order that he was to receive 200 days of sentencing credit.

Section 2-1401 is a comprehensive statutory procedure for challenging final orders and judgments more than 30 days after their entry. 735 ILCS 5/2-1401(a) (West 2008); *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003). A petition filed thereunder must be supported by affidavit or other appropriate showing as to matters not of record. 735 ILCS 5/2-1401(b) (West 2008). To obtain relief under section 2-1401, defendant must prove by a preponderance of the evidence, the existence of a defense or claim that would have precluded entry of the judgment in the original action, as well as diligence in discovering the defense or claim and presenting the petition. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). Section 2-1401 does not, however, affect any existing right to relief from a void order or judgment, or to employ any existing method to procure such relief. 735 ILCS 5/2-1401(f) (West 2008).

Defendant claims that he is excused from alleging a meritorious defense and due diligence here because he has alleged that his plea agreement is void. Although defendant did not include this claim in his section 2-1401 petition, and the circuit court did not address it, he is not precluded from raising this issue in this appeal of the denial of his section 2-

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1401 petition. *People v. Thompson*, 209 Ill. 2d 19, 28 (2004), and cases cited therein.

Proceedings under section 2-1401 are subject to the usual rules of civil practice, and, as such, a petition filed thereunder invites responsive pleadings; however, they are not required and a petition is subject to dismissal for want of legal or factual sufficiency. *Vincent*, 226 Ill. 2d 1, 8-9. Here, the State did not challenge defendant's petition in a motion to dismiss or answer it. This constituted "an admission of all well-pleaded facts," and made the issue for the trial court whether defendant was entitled to relief as a matter of law. *Vincent*, 226 Ill. 2d at 10. The court found that he was not, and dismissed his petition. We review that dismissal *de novo*. *Vincent*, 226 Ill. 2d at 18.

Defendant contends that he was promised in an off-the-record Rule 402 conference that he would receive a 200-day sentencing credit which would be applied as double credit toward his consecutive sentence for intimidation. Defendant, however, has not provided an affidavit or other appropriate showing of the substance of the off-the-record Rule 402 conference held by the trial court to substantiate his claim (735 ILCS 5/2-1401(b) (West 2008)), and the record refutes the existence of such a promise.

The record shows that a Rule 402 conference was held and the terms of the agreement reached were set forth on the record. In

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accordance with those terms, defendant was ultimately granted 200 days of sentencing credit on his intimidation conviction, but was not entitled to the double credit he sought because the sentence was consecutive.

Defendant, nonetheless, asks this court to infer a promise made during the Rule 402 conference that he would receive 200 days of sentencing credit to be applied as double credit to his consecutive sentencing. We observe that the trial court was without authority to grant double credit on defendant's consecutive sentence (*People v. Latona*, 184 Ill. 2d 260, 270-71 (1998)); and, furthermore, that his claim is clearly refuted by the record, which shows that the only reference regarding double credit was the trial court's explanation to defendant that he would receive 200 days of credit on his consecutive sentence, but that double credit on his other sentencing would depend "on how they grade that out." In light of the fact that defendant clearly acknowledged his understanding of that caveat at the time he asked for and received the separate order for 200 days credit in this case (06-2324), his claim that his plea agreement was breached, *i.e.*, void, is without foundation because the credit was not aggregated.

Accordingly, we find that the circuit court properly dismissed defendant's petition for relief from judgment under section 2-1401 for failure to advance a claim or defense

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establishing his entitlement to relief under section 2-1401
(*Vincent*, 226 Ill. 2d at 7-8), and we affirm that order.

Affirmed.