

THIRD DIVISION
May 4, 2011

Nos. 1-09-2617, 1-09-2618 (Consolidated)

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	APPEAL FROM THE
Respondent-Appellant,)	CIRCUIT COURT OF
)	COOK COUNTY
)	
v.)	No. 76 C 5980
)	
CLYDE PAYNE and ANDREW HARDIN,)	HONORABLE
Petitioners-Appellees.)	PAUL P. BIEBEL, JR.,
)	JUDGE PRESIDING.

JUSTICE STEELE delivered the judgment of the court.

Presiding Justice Quinn and Justice Neville concurred in the judgment.

ORDER

HELD: The circuit court erred as a matter of law in concluding that the statutory two year limitations period of section 2-1401(c) of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401(c) (West 2008)) could be excused in the interest of justice, where Hardin and Payne petitioned to have their parole terminated 30 years after pleading guilty to murder. Also, the Illinois Supreme Court's decision in *People v. Whitfield*, 217 Ill. 2d 177 (2005), cannot be the basis for a collateral attack on convictions finalized before December 20, 2005.

In 1978, petitioners Clyde Payne and Andrew Hardin pleaded guilty to murder in exchange for indeterminate sentences of not less than 19 and not more than 80 years in prison,

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plus a five-year parole term. In 2008, Hardin and Payne filed a petition for postjudgment relief seeking to reduce their sentences. Specifically, defendants asserted they were not properly admonished that the Parole and Pardon Board (now Prisoner Review Board) would have jurisdiction over them for an extended time period beyond the five-year parole term. The circuit court agreed and modified the sentences to reflect that Hardin and Payne had completed their statutorily mandated parole terms. The State appeals, contending the trial court erred in granting relief because the petitions were untimely and that Hardin and Payne were properly admonished when they pled. For the following reasons, we reverse and remand.

BACKGROUND

The record on appeal discloses the following facts. On October 21, 1976, Hardin and Payne were indicted for the murder of Norman Gibson. On January 31, 1978, the circuit court held a Rule 402 conference (see Ill. S. Ct. R. 402 (eff. Sept. 17, 1970)) in order for Hardin and Payne to withdraw their initial pleas of not guilty and plead guilty to the crime. The circuit court told Hardin and Payne that in exchange for a guilty plea, they would receive a sentence of not less than 20 years and not more than 80 years in prison. The circuit court added:

"[T]he penalty for the offense of murder is an indeterminate number of years in the Illinois penitentiary of not less than fourteen years to any number of years above fourteen years, and that upon release from imprisonment the mandatory parole is five years."

Hardin and Payne advised the circuit court that they wished to plead guilty. After finding a factual basis for the plea and hearing evidence in aggravation and mitigation, the circuit court

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sentenced Hardin and Payne to the Illinois Department of Corrections for not less than 19 years and no more than 80 years.

Hardin was released from the penitentiary on February 6, 2001. Payne was released from the penitentiary on September 13, 2001. Both men continue to serve parole.

On November 21, 2008, Hardin and Payne filed separate petitions for relief from judgment under section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). Hardin and Payne alleged that the circuit court failed to inform them that under the indeterminate sentencing system then the law of Illinois, they could be held to the jurisdiction of the Parole and Pardon Board (now known as the Prisoner Review Board) for a period equal to the maximum 80-year term imposed, in addition to the five year parole stated by the circuit court. They also alleged that the counsel involved in the pleas failed to correct the circuit court's omission. Hardin and Payne asserted that they would not have entered into guilty pleas on January 31, 1978, had they been fully informed. Citing *People v. Whitfield*, 217 Ill. 2d 177, 202 (2005), Hardin and Payne claimed that their due process rights had been violated because their pleas were not knowing and voluntary and they had received more onerous sentences than those for which they had bargained.

On January 22, 2009, the State filed a motion to dismiss the petitions, arguing that the petitions were untimely and that Hardin and Payne had been properly admonished of the correct parole period. On February 27, 2009, Hardin and Payne filed a response, arguing that they presented a sufficient claim to warrant a hearing. Hardin and Payne also argued that their petitions were not untimely because the judgments at issue were void and relief was warranted in

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the interest of justice and good conscience. The State filed its reply on April 3, 2009.

On June 29, 2009, the circuit court held a hearing on the matter. On September 16, 2009, the circuit court issued a memorandum opinion and order granting the petitions and modifying the sentences to reflect that Hardin and Payne had completed their statutorily mandated parole terms. The State filed a timely notice of appeal to this court the same day.

DISCUSSION

I. The Standard of Review

The issue on appeal is whether the circuit court erred in granting Hardin and Payne relief. Section 2-1401 of the Code provides a comprehensive procedure by which final orders, judgments, and decrees may be vacated "after 30 days from the entry thereof." 735 ILCS 5/2-1401(a) (West 2006). Relief under section 2-1401 of the Code is available in criminal as well as civil cases. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). Generally, a petition under section 2-1401 of the Code must set forth allegations supporting the existence of a meritorious claim or defense; due diligence in presenting the claim or defense to the circuit court in the original action; and due diligence in filing the petition. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). Whether a petition under section 2-1401 of the Code should be granted lies within the sound discretion of the trial court depending on the facts and equities presented. *Robinson v. Ryan*, 372 Ill. App. 3d 167, 173 (2007). A trial court abuses its discretion if it fails to apply the proper criteria when it reviews the facts and a reviewing court must consider both the legal adequacy of the manner in which the trial court reached its result as well as whether the result is within the bounds of reason. *Robinson*, 372 Ill. App. 3d at 173.

II. Timeliness

The State argues that Hardin and Payne cannot challenge sentences imposed in 1978 with section 2-1401 petitions filed in 2008. Generally, a petition under section 2-1401 of the Code must be filed no later than two years after the judgment, unless the petitioner is under legal disability or duress, or the ground for relief is fraudulently concealed. 735 ILCS 5/2-1401 (c) (West 2008); *Vincent*, 226 Ill. 2d at 7. If these requirements are not met, the petition "cannot be considered." *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003). However, a request for relief from a void judgment is not affected by the limitations period. 735 ILCS 5/2-1401(f) (West 2008). Also, in a criminal case, the State may waive the limitations period by not raising a timeliness challenge in the trial court. *Pinkonsly*, 207 Ill. 2d at 564.

Hardin and Payne both alleged that their pleas were void. However, it is well established that errors in plea admonishments do not render the judgment of a circuit court void. *People ex rel. Alvarez v. Skryd*, 241 Ill. 2d 34, 42 (2011); see *People v. Jones*, 213 Ill. 2d 498, 509 (2004); *People v. Davis*, 156 Ill. 2d 149, 156-58 (1993).

Interestingly, the circuit court declined to reach the issue of whether the pleas were void, ruling instead the petitions had to be considered in the interest of justice. The circuit court cited no case law for this proposition. Hardin and Payne cite *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 225 (1986), in which the Illinois Supreme Court stated:

"Because a section 2-1401 petition is addressed to equitable powers, courts have not considered themselves strictly bound by precedent, and where justice and good

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conscience may require it a default judgment may be vacated even though the requirement of due diligence has not been satisfied."

Hardin and Payne also cite *Zee Jay, Inc. v. Illinois Insurance Guaranty Fund*, 194 Ill. App. 3d 1098 (1990), where the complaint was dismissed with prejudice for failure to comply with discovery requests. However, it appeared that the failure was due in part to plaintiff's principal operating officer's death prior to the deadline for responding to discovery and plaintiff's counsel failed to advise the court of such passing. *Zee Jay*, 194 Ill. App. 3d at 1104.

Airoom and *Zee Jay* involve the judicial requirement of due diligence, not the statutory two-year limitations period of section 2-1401(c) of the Code. In *Airoom*, the default judgment was entered on October 31, 1983, and Airoom's petition was filed on May 17, 1984. *Airoom*, 114 Ill. 2d at 224. In *Zee Jay*, the case was dismissed on September 16, 1987, and Zee Jay filed its petition on April 20, 1988. Indeed, other cases in which courts have relaxed the due diligence requirement similarly involve delays of less than two years. See *Pirman v. A & M Cartage, Inc.*, 285 Ill. App. 3d 993, 994 (1996) (less than one year); *Yates v. Barnaby's of Northbrook*, 218 Ill. App. 3d 128, 129 (1991) (three months).

The statutory two-year limitations period in section 2-1401(c) of the Code is separate from the requirement of due diligence within that limitations period. Even where the due diligence requirement is met, the petition must be filed within two years or fall within one of the exceptions previously mentioned. *E.g.*, *People v. Madej*, 193 Ill. 2d 395, 402 (2000). Section 2-1401 of the Code should be liberally construed to effectuate justice. *People v. Lawton*, 212 Ill. 2d 285, 298-299 (2004). However, "[i]t is never proper for a court to depart from plain language

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by reading into the statute exceptions, limitations, or conditions which conflict with the clearly expressed legislative intent." (Internal quotation marks omitted.) *People v. Conick*, 232 Ill. 2d 132, 140 (2008) (quoting *People v. Hari*, 218 Ill. 2d 275, 295 (2006)).

Thus, in *People v. Muniz*, 386 Ill. App. 3d 890, 892 (2008), where the defendant filed a similar claim 24 years after the judgment was entered, this court ruled the circuit court erred in granting relief. The *Muniz* court noted the Second District had ruled a similar claim cannot be procedurally defaulted if: (1) the trial court did not inform the defendant about mandatory supervised release (MSR); and (2) the defendant did not learn that he was subject to MSR until he was in prison, sometime after the time to directly appeal had expired. *People v. Welch*, 376 Ill. App. 3d 705, 708-09 (2007). However, the *Muniz* court declined to follow *Welch*, in part because the decision was based on when the defendant allegedly became aware that he had a legal claim involving MSR instead of when he became aware when he would have to serve MSR. *Muniz*, 386 Ill. App. 3d at 894 (citing *Welch*, 376 Ill. App. 3d at 710-11 (Gilleran Johnson, J., dissenting)). We believe this district's decision in *Muniz* is better reasoned.

Moreover, *Muniz* involved the limitations period in section 2-1401(c) of the Code, while *Welch* involved a petition initially filed under section 2-1401 of the Code, but later amended and transformed into a successive petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2002)), which involves different rules for procedural default. *Welch*, 376 Ill. App. 3d at 707. Accordingly, we conclude that the trial court erred as a matter of law in excusing the untimeliness of Hardin and Payne's petitions.

III. The *Whitfield* Claim

Moreover, the circuit court granted relief in these cases based on *Whitfield*, where the Illinois Supreme Court held that the remedy for a defendant who was not advised of an MSR obligation before entering his plea was to modify the sentence to incorporate the MSR in the number of years to which the defendant was sentenced. *Whitfield*, 217 Ill. 2d at 202. However, after the circuit court's decision in this case, the Illinois Supreme Court decided *People v. Morris*, 236 Ill. 2d 345, 366 (2010), which held that *Whitfield* announced a new rule that may not be applied retroactively to cases on collateral review. The court in *Morris* held that *Whitfield* announced a new rule because it was the first time the supreme court held that a faulty MSR admonishment deprived a defendant of due process. *Morris*, 236 Ill. 2d at 361. *Morris* also concluded that *Whitfield* created a new rule because it fashioned an unprecedented, novel remedy. *Morris*, 236 Ill. 2d at 361. Thus, *Morris* held that *Whitfield* may only be applied to cases where the defendant's conviction was finalized after December 20, 2005, the date *Whitfield* was announced.

In this case, Hardin and Payne's convictions were finalized decades before the date on which *Whitfield* was announced. Although the State did not cite *Morris* as supplemental authority on appeal, its application cannot be waived by a party but must be applied as a matter of law. *People v. Demitro*, No. 1-09-2104, slip op. at 3-4 (Ill. App. Dec. 17, 1010). Accordingly, *Whitfield* may not be retroactively applied to grant relief to Hardin and Payne in this case.

CONCLUSION

In sum, the circuit court erred as a matter of law in concluding that the statutory two-year

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limitations period of section 2-1401 of the Code could be excused. Moreover, *Whitfield* can not be retroactively applied to Hardin and Payne's claims involving convictions finalized before December 20, 2005, when the *Whitfield* decision was announced. For all of the aforementioned reasons, we reverse the judgments of the circuit court of Cook County and remand the matter to the trial court to vacate the sentence reduction and reinstate the sentences initially imposed.

Reversed and remanded.