

No. 1-09-3227

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
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 00 CR 3448
)	
TRAVOY WILLIAMS,)	Honorable
)	John J. Fleming,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

ORDER

Held: Defendant was precluded from utilizing a petition filed under section 2-1401 (735 ILCS 5/2-1401 (West 2008)) as a vehicle to challenge the forfeiture of his appeal from the dismissal of his postconviction petition. This court affirmed the judgment of the circuit court, dismissing defendant's section 2-1401 petition.

¶ 1 Defendant Travoy Williams appeals from the dismissal of his petition filed under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). Therein, defendant alleged that the order dismissing his petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) was void because the clerk of the court failed to notify him of the dismissal within the requisite 10-day period (725 ILCS 5/122-2.1 (West 2008)).

On appeal, defendant contends his section 2-1401 petition raised a meritorious claim with respect to his postconviction petition and should not have been dismissed. We affirm.

¶ 2 Defendant is currently serving a term of natural life in prison after a jury found him guilty of murdering two people and of the aggravated discharge of a firearm. Defendant filed a direct appeal attacking the admission of gunshot residue evidence and attacking the State's closing argument. This court affirmed his convictions. *People v. Williams*, No. 1-03-3097 (2005) (unpublished order under Supreme Court Rule 23).

¶ 3 On June 15, 2006, defendant filed a *pro se* postconviction petition again arguing a number of trial defects and also ineffective assistance of trial and appellate counsel. On August 18, 2006, the trial court summarily dismissed the petition as frivolous and patently without merit. The clerk mailed notice of this summary dismissal to defendant on September 8, 2006.

¶ 4 Records from the circuit clerk's office, of which we may take judicial notice, reflect that defendant's notice of appeal was recorded as filed on October 2, 2006. *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 726 (2009). The records also reflect that the "late notice of appeal" was denied by the circuit court shortly thereafter.

¶ 5 This court's records show that on March 20, 2008, more than 18 months after the dismissal of defendant's postconviction petition, defendant filed a *pro se* motion for leave to file a late notice of appeal therefrom. Defendant stated that he did not receive notice of the summary dismissal until September 14, 2006. He also stated that he subsequently filed a notice of appeal on September 26, and alleged the untimely filing was not due to his culpable negligence because he did not have access to the law library until then. He noted the circuit clerk failed to notify him of the dismissal of his postconviction petition within the requisite 10-day period. Defendant later attempted to inquire about the status of the notice of appeal; when it was unclear, he filed his motion for late notice of appeal with this court.

¶ 6 The State filed a response to defendant's motion. The State argued that defendant failed to file a notice of appeal from the dismissal of his postconviction petition within 30 days, or by September 18, 2006, as required by Supreme Court Rule 606(b) (eff. Sept. 1, 2006). The State further argued that defendant failed to file a timely motion for a late notice of appeal. The State argued that under Supreme Court Rule 606(c) (eff. Sept. 1, 2006), defendant's motion for a late notice of appeal was due six months from the expiration of time for filing a notice of appeal. The State argued that because defendant had failed to file the motion in a timely manner, the appellate court lacked jurisdiction to consider his appeal.

¶ 7 This court, after considering the State's response, denied defendant's motion for late notice of appeal as untimely.

¶ 8 In 2009, defendant filed the section 2-1401 petition at issue. He alleged the judgment dismissing his postconviction petition was void, because the clerk mailed notice of the dismissal beyond the 10 days required by statute.

¶ 9 The circuit court denied the petition. The court stated that a section 2-1401 petition "is not a substitute for [a] direct appeal," and further, that defendant failed to timely appeal the postconviction petition.

¶ 10 Defendant now challenges the dismissal of his section 2-1401 petition. Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). A petition must be filed within two years of that order or judgment, unless it alleges a claim of voidness, which can be raised at any time. See *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). Relief under section 2-1401 is predicated on proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition. *Vincent*, 226 Ill. 2d at 8. We

review the dismissal of a section 2-1401 petition on the pleadings *de novo*. *Id.* at 18.

¶ 11 Defendant maintains he stated a cognizable claim in his section 2-1401 petition that the delay in notification caused him to forfeit the appeal of his postconviction petition and resulted in prejudice.

¶ 12 Initially, we note that *People v. Robinson*, 217 Ill. 2d 43, 58-59 (2005), which defendant cites, does not dictate that the clerk's tardy notice results in a void order. A void order is one entered absent jurisdiction; because the postconviction court clearly had jurisdiction in this case, defendant has rightly abandoned the voidness argument on appeal. See *In re M.W.*, 232 Ill.2d 408, 414 (2009) (order cannot be void when a court has the power to hear and determine the case, or subject matter jurisdiction, and the power to bring defendant into the adjudicative process, or personal jurisdiction).

¶ 13 Defendant nevertheless cites *Robinson* for the proposition that the clerk's tardy notice precluded him from timely filing an appeal. In *Robinson*, the supreme court addressed the consequence of a clerk's failure to timely notify the postconviction petitioner regarding the dismissal of his petition. After discussing whether the statute at issue was mandatory or directory, the court essentially held that only when the clerk's failure to timely notify the defendant prejudices his right to appeal will the circuit court's judgment be invalidated and the petition docketed for further review under the Act. *Robinson*, 217 Ill. 2d at 57-59. The court held that although the clerk's notice was late, the defendant in that case still had 20 days to file his notice of appeal within the requisite 30-day period and in fact did so. As a result, he suffered no prejudice. *Id.* at 57.

¶ 14 Defendant argues this case is factually distinguishable from *Robinson*, in that he was not allowed sufficient time to file his notice of appeal, and thus, he is entitled to a remedy. He argues that section 2-1401 is the appropriate vehicle to challenge the dismissal of his

postconviction petition and cites *People v. Lawton*, 212 Ill. 2d 285 (2004), in support. For the reasons discussed below, we disagree with both defendant's claim of prejudice and his claim that section 2-1401 is the appropriate avenue to pursue his claim.

¶ 15 In *Lawton*, the supreme court addressed whether section 2-1401 was the proper vehicle for a defendant declared a sexually dangerous person to challenge the effectiveness of his trial attorney, where that same attorney also represented the defendant on direct appeal. *Id.* at 293. The court, after noting that proceedings under the Sexually Dangerous Persons Act (725 ILCS 205/0.01 *et seq.* (West 2002)) are civil in nature, emphasized that such defendants do not have recourse under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2002)). *Id.* at 297. The court noted that although section 2-1401 of the Code is ordinarily used to correct errors of fact, petitions filed under the statute may also be used to challenge judgments claimed to be defective for legal reasons. *Id.* at 297. The court determined that relief under the liberally-construed statute should be granted when necessary to achieve justice. *Id.* at 298. In light of the statute's purpose and the defendant's inability to otherwise collaterally bring his claim, the supreme court declared that persons subject to the Sexually Dangerous Persons Act may utilize section 2-1401 of the Code to assert claims of ineffective assistance of counsel. *Lawton*, 212 Ill. 2d at 299.

¶ 16 Defendant argues that this court should follow *Lawton* and grant him relief under section 2-1401 of the Code "to achieve justice and to correct an otherwise unresolvable wrong." Defendant's reliance on *Lawton* is misplaced. Unlike in *Lawton*, the defendant here was not without a remedy to appeal the dismissal of his postconviction petition. Rather, he failed to exercise his right to appeal, both within the requisite 30 days and within the prescribed period for filing a late notice of appeal. Thus, any prejudice he suffered was the result of his own dilatory practices.

¶ 17 Defendant's notice of appeal from his postconviction petition was due September 18, 2006 (see *People v. Lesure*, 408 Ill. App. 3d 12, 13 (2011)). The clerk mailed notice of the dismissal order to defendant on September 8. The notice stated, consistent with Rule 606(b), that defendant had 30 days from the date the dismissal order was entered (August 18, 2006) to file his notice of appeal. According to defendant's *pro se* motion for leave to file a late notice of appeal from the dismissal of his postconviction petition, he received the clerk's notice on September 14, 2006. Defendant therefore had four days to file the appeal with the clerk of the circuit court. Yet, according to his own motion, he did not do so until September 26, when he was allowed access to the law library. He filed the notice of appeal eight days too late. The circuit court denied defendant's untimely notice of appeal. Although four days is an admittedly short window for action, defendant has not described a condition at the prison that prevented him from filing a notice of appeal. Additionally, defendant has not explained why access to the law library was necessary for the relatively easy task of preparing a notice of appeal. See *Robinson*, 217 Ill. 2d at 57 (observing "it is not difficult to prepare a notice of appeal"). Accordingly, we cannot conclude from the allegations in defendant's section 2-1401 petition that the clerk's failure to comply with section 122-2.1 of the Act was the cause of defendant's failure to file a timely notice of appeal.

¶ 18 Even if we assumed defendant's attempts to file a timely notice of appeal were thwarted by a lack of timely notice, he has provided no explanation for his failure to exercise the remedy that remained available. Under Rule 606(c), a defendant may file a motion for late notice of appeal with this court within 30 days of the expiration period for filing the notice of appeal, provided he cites a reasonable excuse for failing to timely file a notice of appeal. Alternatively, a defendant may file a motion for a late notice of appeal with this court within six months of the expiration period for filing the notice of appeal, provided he submits an affidavit showing the

appeal is meritorious and that the failure to timely file a notice of appeal was not due to his culpable negligence. Ill. S. Ct. R. 606(c) (eff. Sept. 1, 2006). In this case, as previously stated, the time for filing a notice of appeal expired on September 18, 2006. The record does not reflect that defendant availed himself of the first option under Rule 606(c); that is, defendant appears to have filed his notice of appeal with the circuit court rather than this court. As a result, defendant was required to file his motion for late notice of appeal within six months, or by March 19, 2007. Defendant did not do so until March 20, 2008, about 12 months after the late notice of appeal was due. However, at that time, this court no longer retained jurisdiction over the case. See *People v. Price*, 404 Ill. App. 3d 324, 328-29 (2010).

¶ 19 On these facts, defendant's initial claim of prejudice, that the circuit clerk's tardy notice caused him to forfeit his appeal, thus fails. Even if the clerk's tardy notice had caused defendant to forfeit his appeal in the circuit court, it did not preclude the filing of a late notice of appeal in this court. That is, defendant still had up to six months from the time his notice of appeal was due to file his late notice of appeal, in compliance with Supreme Court Rule 606(c) (eff. Sept. 1, 2006). If defendant disagreed with this court's determination on his late notice of appeal, his remedy lay in an appeal to our supreme court. See *People v. Lyles*, 217 Ill. 2d 210, 216 (2005) (noting supreme court's supervisory powers). This case is not one where defendant lacked an available remedy to challenge the dismissal of his postconviction petition or the clerk's failure to timely notify him of that dismissal. Defendant had avenues to appeal the dismissal; he simply failed to exercise them. We therefore reject his claim that section 2-1401 of the Code is the only available vehicle to bring his claim, as equity does not demand such a result.

¶ 20 In reaching this conclusion, we also reject defendant's request to remand this case with directions to the circuit court to recharacterize his section 2-1401 petition as a postconviction petition. Under section 122-1(d) of the Act (725 ILCS 5/122-1(d) (West 2008)), the circuit court

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would have had no obligation to evaluate defendant's pleading to determine whether it alleged a postconviction claim. See *People v. Stoffel*, 239 Ill. 2d 314, 327 (2010). The pleading was clearly labeled a section 2-1401 petition and did not raise a claim of constitutional deprivation. Defendant, therefore, is foreclosed from claiming the court erred in failing to treat the pleading as a postconviction petition. See *Stoffel*, 239 Ill. 2d at 327.

¶ 21 Based on the foregoing, we affirm the judgment of the circuit court dismissing defendant's section 2-1401 petition.

¶ 22 Affirmed.