

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).

2011 IL App (4th) 100609-U

Filed 12/19/11

NO. 4-10-0609

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Woodford County
MICHAEL T. FOY,)	No. 03CF7
Defendant-Appellant.)	
)	Honorable
)	John B. Huschen,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* OSAD's motion to withdraw as appellate counsel is granted and the trial court's dismissal of defendant's petition for relief from judgment is affirmed.
- ¶ 2 Defendant, Michael T. Foy, appeals the trial court's dismissal of his petition for relief from judgment. On appeal, the office of the State Appellate Defender (OSAD) was appointed to represent him. OSAD has filed a motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), alleging an appeal would be frivolous and without merit. We grant OSAD's motion and affirm the court's dismissal of defendant's petition.
- ¶ 3 On April 21, 2003, defendant entered an open plea of guilty to aggravated robbery (720 ILCS 5/18-5(a) (West 2002)). On June 23, 2003, the trial court sentenced him to an extended term of 20 years in prison. Within 30 days of his sentencing, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence. Defense counsel also filed a motion

for reconsideration of sentence, arguing defendant's sentence was excessive due to the court's failure to consider a statutory mitigating factor. At a hearing on the motions, defense counsel withdrew defendant's *pro se* motion and the matter proceeded on counsel's motion to reconsider sentence. The court denied the motion and defendant appealed.

¶ 4 On May 25, 2005, this court issued a summary order remanding the cause to the trial court due to defense counsel's failure to file a certificate pursuant to Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Foy*, No. 4-03-0863 (2005) (unpublished summary order under Supreme Court Rule 23(c)(2)). On remand, defense counsel filed his Rule 604(d) certificate and, following a hearing, the court denied defendant's motion to reconsider sentence. Defendant appealed.

¶ 5 On appeal, defendant argued the trial court improperly sentenced him to an extended term of imprisonment and his sentence was wholly excessive and inappropriate as a matter of law. On January 11, 2007, this court entered an order affirming the lower court's judgment. *People v. Foy*, No. 4-05-0771 (2007) (unpublished order under Supreme Court Rule 23).

¶ 6 On October 21, 2009, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). His petition consisted solely of challenges to the two-year period of mandatory supervised release (MSR) he is required to serve following the expiration of his prison sentence. Specifically, defendant argued (1) he was not properly admonished regarding the applicable MSR term at his sentencing; (2) upon completion of his sentence, any action by the Illinois Department of Corrections (DOC) or the prisoner review board concerning MSR was outside the scope of

their jurisdiction; (3) the MSR term violated constitutional guarantees against double jeopardy; (4) the MSR term violated the separation of powers doctrine; (5) the MSR term violated his procedural due process rights; (6) the MSR term violated his right to equal protection of the laws; and (7) the MSR term was an unconstitutional bill of attainder. On June 29, 2010, the circuit court dismissed defendant's petition because it was untimely filed and he failed to demonstrate the existence of a meritorious claim, due diligence in presenting his defense, or due diligence in filing his petition.

¶ 7 This appeal followed. As stated, OSAD was appointed to represent defendant on appeal. On June 9, 2011, it filed a motion to withdraw as appellate counsel. The record shows service of the motion on defendant. This court granted defendant leave to file additional points and authorities but he has failed to respond.

¶ 8 "Relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition as provided in" section 2-1401 of the Code. 735 ILCS 5/2-1401(a) (West 2008). "Relief under section 2-1401 is predicated upon 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." *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871 N.E.2d 17, 22 (2007).

¶ 9 A section 2-1401 petition "must be filed not later than 2 years after the entry of the order or judgment." 735 ILCS 5/2-1401(c) (West 2008). Exceptions to the time limitation apply where the defendant shows he was under legal disability or duress, or that his alleged ground for relief is fraudulently concealed. *Vincent*, 226 Ill. 2d at 7, 871 N.E.2d at 22. Additionally, "the two-year limitations period does not apply to petitions brought on voidness grounds."

People v. Wuebbels, 396 Ill. App. 3d 763, 765, 919 N.E.2d 1122, 1124 (2009). "An order is void where the court that entered the judgment lacked (1) jurisdiction of the (a) parties or (b) subject matter or (2) the inherent power to make or enter the order." *Wuebbels*, 396 Ill. App. 3d at 766, 919 N.E.2d at 1125. The dismissal of a section 2-1401 petition is subject to *de novo* review. *People v. Laugharn*, 233 Ill. 2d 318, 322, 909 N.E.2d 802, 804 (2009).

¶ 10 Here, defendant's 2-1401 petition was filed in October 2009, more than six years after the trial court imposed sentence and entered its judgment. As a result, his petition was untimely filed. Defendant failed to allege his untimeliness should be excused due to legal disability, duress, or fraudulent concealment of his grounds for relief. Further, the record contains no basis for such findings.

¶ 11 Additionally, as OSAD contends, there is also no reasonable basis for arguing that the trial court's judgment was void. In his 2-1401 petition, defendant challenged only the two-year MSR term. However, "[t]he imposition of MSR is statutorily required." *People v. Rinehart*, 406 Ill. App. 3d 272, 278, 943 N.E.2d 698, 704 (2010); 730 ILCS 5/5-8-1(d) (West 2002). For a Class 1 felony, the appropriate MSR term is two years. 730 ILCS 5/5-8-1(d)(2) (West 2002). In this instance, defendant pleaded guilty to aggravated robbery, a Class 1 felony. 720 ILCS 5/18-5(a), (b) (West 2002). Defendant was sentenced to 20 years in prison and, pursuant to statute, he was required to serve a two-year MSR term. The court acted within its statutory authority when imposing defendant's sentence and defendant did not argue, nor does the record show, that the trial court lacked either personal or subject matter jurisdiction. Moreover, we note defendant's sentence was affirmed by this court on direct appeal.

¶ 12 Here, the trial court properly dismissed defendant's 2-1401 petition as untimely.

Although it is unnecessary for this court to address the issues defendant presented in his petition, we find, as argued by OSAD, that they are frivolous and without merit. In particular, we note defendant's contention that he did not receive proper MSR admonishments is refuted by the record. When a defendant pleads guilty, the trial court must admonish him regarding the minimum and maximum sentence prescribed by law, including the applicable MSR term. Ill. S. Ct. R. 402(a)(2) (eff. July 1, 1997); *People v. Whitfield*, 217 Ill. 2d 177, 195, 840 N.E.2d 658, 669 (2005). Here, the record shows defendant entered an open plea of guilty. At the plea hearing, the trial court properly advised him that, if he were to be sentenced to a term of imprisonment, he would also be required to serve a two-year MSR period following his discharge from DOC. Defendant asserted he understood the court's admonishment and, following further admonishments and presentation of the State's factual basis, the court accepted defendant's plea. The court committed no error.

¶ 13 For the reasons stated, we grant OSAD's motion and affirm the trial court's judgment.

¶ 14 Affirmed.