

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).

NO. 4-10-0145

Filed 6/10/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ROBERT J. CAVETTE,	)	No. 05CF92
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

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JUSTICE TURNER delivered the judgment of the court.  
Justices Appleton and Cook concurred in the judgment.

**ORDER**

*Held:* (1) Where defendant's mandatory-supervised-release argument on appeal was different from the one he asserted in his section 2-1401 petition, defendant forfeited the issue on appeal.

(2) Regardless of forfeiture, the trial court's dismissal of defendant's section 2-1401 petition was proper where defendant failed to assert any facts demonstrating diligence in discovering and bringing his sole claim.

In December 2009, defendant, Robert J. Cavette, filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2008)), asserting that, during his guilty-plea hearing, the trial court never admonished him about serving a period of mandatory supervised release. The State filed a response to the motion, requesting the petition be dismissed because the court did admonish defendant about mandatory supervised release. In February 2010, the Champaign County circuit court dismissed with prejudice defendant's section 2-1401 petition because the basis asserted by defendant in

support of his petition was contradicted by the record.

Defendant appeals, asserting the trial court erred by dismissing his petition. We affirm.

## I. BACKGROUND

In January 2005, the State charged defendant with burglary (720 ILCS 5/19-1(a) (West 2004)) and aggravated battery (720 ILCS 5/12-4(b)(6) (West 2004)) for his actions on January 15, 2005. On April 5, 2005, the trial court held defendant's plea hearing. Defendant pleaded guilty to the two charges pursuant to a plea agreement, under which defendant would plead guilty to both charges and the State would not recommend a sentence of more than 20 years' imprisonment. At the hearing, the court admonished defendant the burglary charge would normally be a Class 2 felony but due to his prior convictions he would be subject to Class X sentencing. After stating the possible penalties for a Class X sentence, the court stated "[a]ny time in prison could be followed by three years of mandatory supervised release." As to the aggravated-battery charge, defendant was subject to extended-term sentencing, and the court again informed defendant of the possible penalties and noted "[a]ny time in prison could be followed by a year of mandatory supervised release." After admonishing defendant and hearing a factual basis for the guilty pleas, the court accepted defendant's guilty pleas and set the matter for a sentencing hearing.

At the May 2005 sentencing hearing, the trial court sentenced defendant to a 20-year prison term for burglary to run concurrent with a 5-year term for aggravated battery. In June 2005, defendant filed a motion to withdraw his guilty plea. At the August 2005 hearing on the motion, defendant withdrew his motion to withdraw and made an oral motion to reconsider his

sentence, which the court denied. Defendant appealed, and this court vacated the trial court's judgment on defendant's motion to reconsider his sentence and remanded the cause for admonishments in accordance with Illinois Supreme Court Rule 605(c) (eff. Oct. 1, 2001) and to allow defendant the opportunity to strictly comply with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Cavette*, No. 4-05-0721 (October 17, 2006) (unpublished order under Supreme Court Rule 23).

On remand, defendant filed a motion to withdraw his guilty plea, in which he asserted ineffective assistance of counsel. After an August 2007 hearing, the trial court denied defendant's motion. Defendant again appealed. The only issue he raised on appeal was his entitlement to an additional day of sentence credit. This court agreed with defendant and affirmed his conviction and sentence as modified and remanded with directions for the entry of a judgment order reflecting the additional day of sentence credit. *People v. Cavette*, No. 4-07-0689 (June 4, 2008) (unpublished summary order under Supreme Court Rule 23).

In May 2008, defendant filed his *pro se* postconviction petition, raising a claim of ineffective assistance of trial counsel. The next month, the trial court summarily denied defendant's petition. Defendant appealed the *sua sponte* denial of his postconviction petition, and this court affirmed the trial court's judgment. *People v. Cavette*, No. 4-08-0618 (June 10, 2009) (unpublished order under Supreme Court Rule 23).

In September 2009, defendant sought leave to file a second postconviction petition, seeking to raise the claim he was not aware of the three-year period of mandatory supervised release. In October 2009, the trial court denied defendant's request for leave to file a second postconviction petition. Defendant appealed the denial, and this court dismissed the

appeal on defendant's motion. *People v. Cavette*, No. 4-09-0826 (December 7, 2009) (unpublished motion order under Supreme Court Rule 23).

On December 9, 2009, defendant filed the section 2-1401 petition at issue in this appeal. In his *pro se* petition, defendant argued his due-process rights were violated and he did not receive the benefit of his bargain because the trial court never admonished him about a period of mandatory supervised release that he would serve in addition to his prison term. In support of his argument, he cited the supreme court's *People v. Whitfield*, 217 Ill. 2d 177, 840 N.E.2d 658 (2005). Defendant also attached a transcript of the April 5, 2005, plea hearing to his petition. In his prayer for relief, defendant requested that his 20-year prison sentence be reduced to 14 years and his 5-year sentence be reduced to 4 years. The next day, the State filed a response, requesting the dismissal of defendant's section 2-1401 petition because the transcript of the hearing showed the court admonished defendant about a three-year term of mandatory supervised release.

On February 1, 2010, the trial court entered a docket entry, dismissing defendant's section 2-1401 petition with prejudice. The court noted defendant's basis for his claim for relief was contradicted by the transcript of the proceedings. On February 23, 2010, defendant filed a notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008). See *People v. Kane*, 404 Ill. App. 3d 132, 139, 935 N.E.2d 1116, 1122 (2010) (noting section 2-1401 provides a civil remedy that extends to criminal cases and in such proceedings the usual rules of civil practice apply). Thus, this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

## II. ANALYSIS

On appeal, defendant contends the trial court's MSR admonishment was improper.

The State asserts defendant has forfeited this issue because the only issue he raised in his section 2-1401 petition was the court's failure to give any MSR admonishment. Our supreme court has noted that, when beginning to review a case, one of the two most important tasks is to determine which, if any, issues have been forfeited. *People v. Smith*, 228 Ill. 2d 95, 106, 885 N.E.2d 1053, 1059 (2008). Thus, we first address the issue of forfeiture.

This court has held a defendant's failure to include an issue in his or her section 2-1401 petition results in the forfeiture of the issue on appeal. See *People v. Bramlett*, 347 Ill. App. 3d 468, 475, 806 N.E.2d 1251, 1256 (2004). Defendant argues the State's reading of his section 2-1401 petition is "hypertechnical." We disagree with defendant.

This court has long distinguished *Whitfield*, where the trial court never mentioned a term of mandatory supervised release, from cases in which the trial court mentioned a term of mandatory supervised release in setting forth the maximum and minimum penalties for the charged offense. See *People v. Holt*, 372 Ill. App. 3d 650, 652-53, 867 N.E.2d 1192, 1195 (2007); *People v. Jarrett*, 372 Ill. App. 3d 344, 352, 867 N.E.2d 1173, 1180 (2007); *People v. Borst*, 372 Ill. App. 3d 331, 334, 867 N.E.2d 1181, 1184 (2007). In paragraphs three and eight of his section 2-1401 petition, defendant used the terms "at no time" and "never" in stating the trial court failed to admonish him regarding a period of mandatory supervised release. Not once in his petition did defendant suggest the trial court mentioned a period of mandatory supervised release but its statement was inadequate to comply with Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997). Accordingly, we find defendant's petition did not include an argument the trial court's mandatory-supervised-release admonishment was inadequate.

Defendant notes the exception to the forfeiture doctrine that allows for the

consideration of arguments that a judgment is void. See *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1205 (2004) (stating (1) a defendant may attack a void judgment at any time or in any court, either directly or collaterally, and (2) an argument a judgment is void is not subject to forfeiture). However, defendant's argument on appeal does not raise a void-judgment claim. See *People v. Santana*, 401 Ill. App. 3d 663, 666, 931 N.E.2d 273, 277-78 (2010) (finding the failure to provide appropriate mandatory-supervised-release admonishments before a guilty plea is entered does not render the judgment void). Thus, the void-judgment exception to forfeiture does not apply here. Accordingly, defendant has forfeited his sole issue on appeal.

Regardless of forfeiture, we find defendant's petition was properly dismissed because it failed to state a cause of action for relief under section 2-1401. See *People v. Vincent*, 226 Ill. 2d 1, 8-9, 871 N.E.2d 17, 23 (2007) (noting that, if the petition is insufficient as a matter of law, the pleading may be challenged at any time); see also *Zerjal v. Daech & Bauer Construction, Inc.*, 405 Ill. App. 3d 907, 911, 939 N.E.2d 1067, 1071 (2010) (noting a reviewing court may affirm a dismissal under section 2-619 of the Procedure Code (735 ILCS 5/2-619 (West 2008)) on any proper basis found in the record). To state a cause of action for relief under section 2-1401, the defendant must show (1) a defense or claim that would have precluded entry of the judgment in the original action and (2) diligence in both discovering the defense or claim and presenting the petition. *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22. Here, defendant's petition does not assert any facts demonstrating diligence in discovering and presenting the mandatory-supervised-release claim. Defendant's plea hearing was in April 2005, and he filed numerous documents both directly and collaterally attacking his plea and sentence. The issue of what is a proper or improper mandatory-supervised-release admonishment after *Whitfield*, which

was decided in December 2005, has been a contentious issue in the appellate courts for many years and remains one even after the supreme court's clarification in *People v. Morris*, 236 Ill. 2d 345, 925 N.E.2d 1069 (2010). See *People v. Dorsey*, 404 Ill. App. 3d 829, 834-36, 942 N.E.2d 535, 540-42 (2010). Thus, defendant could have discovered and presented any mandatory-supervised-release issue long before December 2009. This court has found a defendant's failure to offer an explanation for the lengthy delay in bringing the petition renders the defendant's section 2-1401 petition fatally defective on its face and insufficient, as a matter of law, to support the relief requested. *Bramlett*, 347 Ill. App. 3d at 474, 806 N.E.2d at 1255-56. Thus, defendant's failure to present any facts showing diligence defeats his section 2-1401 claim.

Accordingly, we conclude the trial court's dismissal of defendant's section 2-1401 petition was proper.

### III. CONCLUSION

For the reasons stated, we affirm the Champaign County circuit court's dismissal of defendant's section 2-1401 petition. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

Affirmed.