

plaintiff's 2007 *habeas* petition before he had an opportunity to file a reply to defendant's motion to dismiss, (2) erred in determining his *habeas* claims were not the proper subject of *habeas* relief, (3) erred in finding his *habeas* petition was barred by *res judicata*, and (4) erred by sentencing him to a term of imprisonment exceeding the maximum term authorized by statute. We dismiss this appeal to the extent it seeks review of the trial court's December 2007 dismissal of plaintiff's *habeas* petition, and we affirm the court's denial of plaintiff's section 2-1401 petition.

I. BACKGROUND

In January 2000, plaintiff was convicted of burglary, attempted burglary, and possession of burglary tools and sentenced to 30 years' imprisonment on the burglary charge. The trial court found the two lesser class convictions merged into the burglary conviction. Plaintiff was subject to mandatory Class X sentencing due to prior convictions.

1. *Plaintiff's Direct Appeal*

In June 2001, the First District appellate court affirmed plaintiff's conviction and mandatory Class X sentence. See *People v. Donatelli*, No. 1-00-0953 (June 28, 2001) (unpublished order under Supreme Court Rule 23). In December 2001, the supreme court denied plaintiff's petition for leave to appeal. See *People v. Donatelli*, 197 Ill. 2d 568, 763 N.E.2d 773 (2001).

2. *Plaintiff's Postconviction Petition*

Thereafter, plaintiff filed a postconviction petition. In September 2001, the trial court dismissed the petition as frivolous or patently without merit. Plaintiff appealed, arguing that because the statutory maximum unextended sentence for burglary was 7 years' imprisonment, his 30-year sentence was void. The First District affirmed the trial court's dismissal finding plaintiff was extended-term eligible because of his prior convictions and his Class X sentence was constitutional. *People v. Donatelli*, No. 1-02-3004 (December 31, 2003) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied plaintiff's petition for leave to appeal. See *People v. Donatelli*, 209 Ill. 2d 587, 813 N.E.2d 225 (2004).

3. *Plaintiff's Habeas Corpus Petition*

In October 2007, plaintiff filed a *habeas corpus* petition seeking his discharge from the Danville Correctional Center. In his petition, plaintiff repeated his argument the trial court exceeded its authority in sentencing him beyond the maximum term authorized.

On December 7, 2007, defendant filed a motion to dismiss plaintiff's *habeas* petition, arguing plaintiff's claims were barred by *res judicata*.

On December 10, 2007, prior to plaintiff filing a response to defendant's motion, the trial court granted defen-

dant's motion. Plaintiff did not appeal the court's order. Instead, on December 27, 2007, he filed a response to defendant's motion. In a letter to the circuit court clerk dated May 28, 2008, and filed May 30, 2008, plaintiff requested the status of his 2007 *habeas* petition and defendant's motion to dismiss. In a May 31, 2008, letter to the circuit clerk, filed June 4, 2008, plaintiff acknowledged his claim had been dismissed. However, plaintiff did not file a notice of appeal at that time.

4. *Plaintiff's Section 2-1401 Petition*

On March 9, 2009, plaintiff filed a motion for relief from judgment under section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2008)) from the trial court's December 10, 2007, order dismissing plaintiff's *habeas* petition. In June 2009, plaintiff filed a motion for default judgment arguing defendant did not respond to his 2-1401 petition. Before the court issued an order regarding either motion, plaintiff filed an August 17, 2009, notice of appeal with this court from the trial court's (1) December 10, 2007, order granting dismissal of plaintiff's *habeas corpus* petition and (2) inaction on his section 2-1401 petition and motion for default judgment.

5. *Trial Court's Rulings*

On September 28, 2009, the trial court entered an order striking plaintiff's August 17, 2009, notice of appeal as un-

timely. The court found plaintiff did not take an appeal from the court's December 10, 2007, denial of his *habeas corpus* petition and instead filed a section 2-1401 petition.

Specifically, the court found the following:

"1. The pleadings in this case are an amalgamation of various petitions and motions; none of which appear to have ever been addressed.

2. The first pleading filed was entitled *Habeas Corpus Complaint*, allegedly against the Warden of the Danville Correctional Center.

3. Although allegedly a *habeas corpus* petition, the pleading actually attacks the constitutionality of Class X sentencing provisions for multiple conviction Class 2 offenders. Alternatively, Petitioner argues that his specific sentence of 30 years is somehow not a determinative sentence. These specific issues were addressed in the appeal of his original conviction; a copy of which is attached as Exhibit A to [plaintiff's] Petition.

4. Neither claim is the proper subject

of *habeas corpus* relief.

5. The State filed a Motion to Dismiss the petition on December 10, 2007, and the [trial court] entered an order dismissing the petition on December 10, 2007.

6. Petitioner filed a written response to the motion on December 27, 2007; 17 days after the order finding his claims barred by *res judicata*.

7. Petitioner has since taken no appeal from the denial of his *habeas corpus* petition and instead filed a [section] 2-1401 Petition for Relief From Judgment on March 9, 2009.

8. From the docket[,] it appears that Petition has not been addressed[] and now Petitioner has filed a Notice of Appeal from orders which have not been entered; thereby necessitating the striking of the Notice."

The court also denied plaintiff's 2-1401 petition because the petition (1) failed "to set forth with sufficient specificity, allegations demonstrating the existence of a meritorious claim," (2) did not "allege or indicate there were any facts outside [of] the record which were unknown to the court and would have prevented entry of the original judgment," and (3) the "issues

raised in the dismissed motion[] were properly dismissed[] and the Order was not appealed."

On October 27, 2009, plaintiff filed a motion to reconsider the trial court's September 28, 2009, order. On March 12, 2010, the court denied the motion, finding plaintiff "simply disagrees with the Court's order; which is not the proper basis for a motion to reconsider."

On March 25, 2010, plaintiff filed a notice of appeal from the trial court's March 12, 2010, order.

This appeal followed.

II. ANALYSIS

On appeal, plaintiff, proceeding *pro se*, argues the trial court (1) violated his due process rights by granting defendant's motion to dismiss his 2007 *habeas* petition before he had an opportunity to file a reply to defendant's motion to dismiss, (2) erred in determining his *habeas* claims were not the proper subject of *habeas* relief, (3) erred in finding his *habeas* petition was barred by *res judicata*, and (4) erred by sentencing him to a sentence exceeding the maximum term authorized by statute. Plaintiff requests this court (1) remand his section 2-1401 petition and (2) reverse the trial court's erroneous December 10, 2007, order granting defendant's motion to dismiss his *habeas* petition.

Defendant argues (1) this court lacks jurisdiction over

the portion of plaintiff's appeal concerning the trial court's December 2007, order dismissing plaintiff's *habeas* petition and (2) the court correctly denied plaintiff's section 2-1401 petition where plaintiff did not demonstrate a meritorious claim because he did not allege facts outside the record which were unknown to the court and which would have prevented the denial of his *habeas* petition.

A. Jurisdiction

As a threshold issue, we address defendant's argument this court lacks jurisdiction over the portion of plaintiff's appeal concerning the trial court's dismissal of his 2007 *habeas* petition.

Supreme Court Rule 303(a) (eff. May 30, 2008) provides a notice of appeal generally must be filed within 30 days after the entry of a final judgment. Supreme Court Rule 303(d) (eff. May 30, 2008) provides for filing a late notice of appeal when there is a showing of reasonable excuse; however, late notice must be filed within 30 days after the expiration of the original time for filing an appeal.

In this case, the trial court dismissed plaintiff's *habeas corpus* petition on December 10, 2007. Pursuant to Rule 303(a), plaintiff had 30 days from December 10, 2007, to file his notice of appeal. He failed to do so. Even if we were to accept plaintiff was not provided notice of the petition's dismissal,

the record shows he was in fact aware of the dismissal by May 31, 2008. However, he did not attempt to appeal the order at that point. Instead, plaintiff waited until August 12, 2009, to file his first notice of appeal from the trial court's December 10, 2007, dismissal of his *habeas corpus* petition. Plaintiff's failure to file a timely notice of appeal deprives this court of jurisdiction to hear those portions of plaintiff's appeal pertaining to his *habeas corpus* petition. *Lowenthal v. McDonald*, 367 Ill. App. 3d 919, 925, 856 N.E.2d 1118, 1123-24 (2006); see also *Creek v. Clark*, 88 Ill. 2d 54, 58, 429 N.E.2d 1199, 1201 (1981) (where no notice of appeal has been filed, an appellate court lacks jurisdiction to address the merits). Thus, we dismiss this appeal to the extent it seeks review of the trial court's December 2007 judgment.

We note plaintiff *did* file a timely notice of appeal from the trial court's denial of his motion to reconsider the dismissal of his section 2-1401 petition. Accordingly, we address this portion of plaintiff's appeal below.

B. Section 2-1401

A section 2-1401 petition is generally used to correct errors of fact unknown to the petitioner and the court when judgment was entered, which, if then known, would have precluded its entry. *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000). A section 2-1401 petition is "not designed to

provide a general review of all trial errors nor to substitute for direct appeal.'" *Haynes*, 192 Ill. 2d at 461, 737 N.E.2d at 182, quoting *People v. Berland*, 74 Ill. 2d 286, 314, 385 N.E.2d 649, 662 (1978). "Issues which could have been raised in a motion for rehearing or on direct appeal are *res judicata* and may not be relitigated in [a] section 2-1401 proceeding ***." *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 794, 590 N.E.2d 89, 92 (1992). The denial of a petition seeking relief from judgment under section 2-1401 is subject to *de novo* review. *People v. Vincent*, 226 Ill. 2d 1, 14, 871 N.E.2d 17, 26 (2007).

While not a model of clarity, defendant's *pro se* petition alleged, *inter alia*, (1) the trial court erred by ruling on his October 2007 petition for *habeas* relief after defendant moved to dismiss it but before he had an opportunity to respond to defendant's motion to dismiss, (2) defendant's motion to dismiss falsely stated the claims in his *habeas* petition were barred by *res judicata*, and (3) *res judicata* does not apply, but if it does it should not be applied because "fundamental fairness so requires."

However, a section 2-1401 petition is not the proper petition for such claims. A section 2-1401 petition is a "forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time of trial, which, if then known, would have

prevented the judgment." *People v. Johnson*, 352 Ill. App. 3d 442, 444, 816 N.E.2d 636, 638 (2004). In this case, plaintiff's petition does not make factual arguments but rather sets forth legal arguments, *i.e.*, the court erred in dismissing his *habeas* petition. However, such arguments do not amount to newly discovered evidence potentially affecting the final outcome of the case. As a result, the trial court did not err in denying plaintiff's section 2-1401 petition.

III. CONCLUSION

For the reasons stated, we dismiss this appeal inasmuch as it seeks review of the trial court's December 10, 2007, dismissal of plaintiff's *habeas* petition, and we affirm the court's denial of plaintiff's section 2-1401 petition.

Appeal dismissed in part; judgment affirmed.