

No. 1-10-3349

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 96 CR 18024
	)	96 CR 2288
	)	
GEORGE BROOKS,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAMPKIN delivered the judgment of the court.  
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

**ORDER**

¶ 1 *Held:* Court did not err in dismissing defendant's petitions seeking post-conviction relief and vacatur, where they were filed nearly 10 and 12 years after his guilty-plea conviction and over seven and nine years after he completed his sentence of probation. The limitation periods applicable to the instant petition did not deprive him of his constitutional rights. Were we to reach the merits of the instant petition, defendant's ineffective assistance claim – that trial counsel failed to inform him that his conviction could lead to his deportation – fails for lack of prejudice where, contrary to his allegation that he had a viable unrepresented and uninvestigated defense of illegal search, trial counsel presented a motion to quash that the trial court denied.

¶ 2 Pursuant to a 1998 guilty plea, defendant George Brooks was convicted of possession of cannabis (more than 30, but less than 500, grams) and possession of cannabis (more than 500 grams) with intent to deliver and sentenced to concurrent sentences of 30 months' probation, which he satisfactorily completed in 2001. Defendant filed a post-conviction petition in 2008, which the circuit court dismissed that same year.<sup>1</sup> Defendant filed the instant petition in August 2010, pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) and section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), which the court dismissed in October 2010. On appeal, defendant contends that the court erred in dismissing the instant petition without determining the effect of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), upon the petition. He also contends that the limitation periods in the Act and section 2-1401 violate his constitutional rights, that his 2008 petition and the instant petition were timely filed, and that he has standing to file a petition under the Act.

¶ 3 In case 96 CR 2288, defendant was charged with possession of cannabis (more than 30, but less than 500, grams) allegedly committed on or about December 15, 1995. The arrest arose from the execution of a search warrant on that date at defendant's home, with the warrant based on the account of a "J. Doe" to a police officer that "Doe" bought cannabis from defendant in his home and that defendant had a supply of cannabis there and expressed willingness to sell more.

¶ 4 In case 96 CR 18024, he was charged with cannabis trafficking (2,500 grams or more) and possession of cannabis (more than 5,000 grams) with intent to deliver allegedly committed June 9, 1996. Arlana Coppedge was charged in the same instrument with the same offenses allegedly committed on the same date. In April 1997, defendant filed a motion to quash his

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<sup>1</sup>Defendant filed an appeal from the dismissal of the 2008 petition but voluntarily dismissed the appeal. *People v. Brooks*, No. 1-09-0279 (2010).

arrest and suppress evidence; the motion hearing was commenced and continued in September, and the court denied the motion to quash on November 4, 1997.

¶ 5 On October 26, 1998, following a plea conference, defendant pled guilty to possession in 96 CR 2288 and possession with intent in 96 CR 18024 and was sentenced to concurrent sentences of 30 months' probation, with the cannabis trafficking charge nol-prossed and the possession with intent count amended from more than 5,000 grams to more than 500 grams.<sup>2</sup>

¶ 6 Defendant satisfactorily completed probation on April 25, 2001.

¶ 7 Defendant, through counsel, filed his first post-conviction petition in October 2008. He alleged that he met Coppedge on an airplane flight just before their June 1996 arrest at O'Hare Airport and was helping her carry her luggage through the airport when they were stopped and searched by authorities. He raised no challenge to his December 1995 arrest. Defendant alleged that he told trial counsel he was a resident alien and that he was unaware of the cannabis in the suitcase he had been carrying until the authorities discovered it. Counsel never mentioned the prospect of deportation and advised him that, while he "had available" a motion to quash and a defense based upon the illegality of the search, the case would end more expeditiously if he pled guilty and received probation. Defendant followed that advice. Defendant alleged that he was arrested in 2003 on a federal charge of making a false statement in a passport application, to which he pled guilty and was sentenced in November 2007 to time served with two years' supervised release and a \$100 fine. When he reported for supervised release, he was placed in custody by federal immigration authorities and learned that he could be deported. Defendant alleged that he "had no reason to know of or discover his counsel's negligence" until then. On these allegations, defendant argued that trial counsel rendered ineffective assistance by not

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<sup>2</sup>On the same day, Coppedge pled guilty and received the same disposition as defendant in 96 CR 18024.

investigating the evidence against him and by not advising him of the prospect of deportation for a conviction. He argued that he is under sentence and thus has standing under the Act, and that any delay was not due to his culpable negligence as he only recently became aware of the prospect of deportation. The petition was supported by defendant's affidavit and documents from the federal criminal case.

¶ 8 The court dismissed the petition on December 23, 2008, for lack of standing under the Act as defendant was no longer under sentence when he filed the petition.

¶ 9 In August 2010, defendant (through counsel) filed the instant petition, seeking "relief from the judgment of conviction" pursuant to the Act and section 2-1401 on the same factual allegations as his initial petition. He argued that the petition was properly filed under section 2-1401 as he acted diligently once he learned of the immigration consequences of his plea and conviction. He argued that the petition is proper under the Act as his deportation is a restraint of his liberty arising from his conviction, arguing that the United States Supreme Court had recently held in *Padilla* that immigration consequences of a guilty plea are not mere collateral consequences. The petition was supported by defendant's affidavit.

¶ 10 The court dismissed the instant petition on October 15, 2010, and this appeal followed.

¶ 11 Before proceeding to the merits, we note that the record on appeal does not include a transcript or appropriate substitute (*see* Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) for any of the trial or post-conviction proceedings in this case. As appellant, defendant is obligated to provide us a sufficiently complete record of the trial court proceedings to support his claims of error, so that we must presume in the absence of such a record that the court's orders conformed to the law and had a sufficient factual basis. *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). Conversely, our review is not precluded by the absence of transcripts where the record contains that which is necessary to

dispose of the issues raised under the applicable standard of review. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007).

¶ 12 On appeal, defendant contends that the court erred in dismissing the instant petition without determining the effect of *Padilla* upon the petition. He also contends that the limitation periods in the Act and section 2-1401 violate his constitutional rights, that his 2008 petition and the instant petition were timely filed, and that he has standing to file a petition under the Act.

¶ 13 A petition under the Act may be filed by "[a]ny person imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2010). This has been interpreted to include other sentences not involving physical custody, such as probation and mandatory supervised release, while barring petitions filed by persons who have completed their sentences. *People v. Carrera*, 239 Ill. 2d 241, 245-47 (2010). Immigration consequences of a conviction are not part of the sentence for purposes of standing under the Act. *Id.* at 247-58. Our supreme court expressly considered *Padilla* but concluded that the substantive question of whether a defendant has a viable ineffective-assistance claim is distinct from whether he can present that claim in a petition under the Act. *Id.* at 253-57.

"Because the state has nothing to do with defendant's deportation, and has no control over the actions of the [federal immigration authorities], we cannot say that defendant's possible deportation renders defendant a person 'imprisoned in the penitentiary' as required in order to proceed with his postconviction petition under the Act. Defendant's custody [by a federal agency] is not pursuant to a judgment of a state court. The current constraints on defendant's liberty are imposed by the [federal government]. The constraints of defendant's liberty due to his criminal conviction

expired with defendant's successful completion of his probation, so that defendant is no longer eligible to seek relief under the Act. Here, defendant essentially is seeking to challenge his conviction for purposes of purging his record. \*\*\* [A] postconviction remedy is available only to those that are actually being deprived of their liberty, and not to those who have served their sentences and might wish to purge their records of past convictions." *Id.* at 257.

¶ 14 We see no conflict between the *Padilla* court's substantive focus on the scope of counsel's duty to provide effective assistance and the *Carrera* court's focus on the proper procedure for raising a claim. It is axiomatic that a right or claim, however firmly established, must be asserted in a proper proceeding, so that even a void judgment – the *sine qua non* of a fundamentally flawed judgment that generally can be challenged anywhere at any time – cannot be challenged in an improperly-commenced proceeding. *People v. Vinokur*, 2011 IL App (1st) 090798, at ¶ 16, citing *People v. Flowers*, 208 Ill. 2d 291, 308 (2003). The fact that immigration consequences of a conviction are not merely collateral for purposes of the advice counsel must provide a defendant does not render immigration consequences "imprison[ment] in the penitentiary" for purposes of invoking the Act. Thus, we shall follow *Carrera*, and we see no error – and in particular no disregard of *Padilla* – in the trial court following *Carrera*. Since defendant's sentence of probation was completed in April 2001, over seven years before his 2008 petition and nine years before the instant petition, he has lacked standing to bring a petition under the Act ever since.

¶ 15 The instant petition was filed under section 2-1401 as well as the Act. In general, a petition under section 2-1401 "must be filed not later than 2 years after the entry of the order or judgment" not including "[t]ime during which the person seeking relief is under legal disability

or duress or the ground for relief is fraudulently concealed." 735 ILCS 5/2-1401(c), (f) (West 2010). To show fraudulent concealment, a defendant must allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitation period. *People v. McDonald*, 405 Ill. App. 3d 131, 138 (2010). Defendant has not provided any basis to conclude that, since his guilty-plea conviction, either the State or trial counsel fraudulently – that is, affirmatively or actively – concealed the prospect of deportation for the pled offenses.

¶ 16 Defendant challenges the limitation periods in the Act and section 2-1401 as a deprivation of his constitutional rights to due process and equal protection, arguing that they effectively bar him and similarly-situated defendants from raising the fundamental constitutional claim recognized in *Padilla*. In particular, he argues that "it is likely that the defendant will not become aware of the severe immigration consequences of a plea before the time limitation" expires as such immigration consequences "often do not become evident until years later, upon the initiation of removal proceedings," and that the fundamental nature of a *Padilla* claim subjects any limitation period that could bar such a claim to strict scrutiny.

¶ 17 The *Carrera* court addressed the issue obliquely but cogently by noting that their "defendant has a remedy to challenge his conviction, so long as the challenge is made while defendant is serving the sentence imposed on that conviction." *Carrera*, 239 Ill. 2d at 259. Similarly, a defendant has a remedy to raise his *Padilla*-based claim so long as he commences his challenge before the limitation periods expire. As to the process constitutionally due in post-conviction cases, the United States Supreme Court has held that a State's procedures violate due process only if they offend a principle of justice so rooted in the traditions and conscience of the nation as to be ranked as fundamental, or transgress a recognized principle of fundamental

fairness in operation; that is, if they are fundamentally inadequate to vindicate the substantive rights at issue. *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S. Ct. 2308, 2320 (2009). *Osborne* describes a defendant's constitutional right to proper post-conviction procedures as "limited" (*Id.*) and does not apply strict scrutiny to challenges to post-conviction procedures. Defendant's strict scrutiny argument confounds the fundamental substantive right to effective assistance of counsel described in *Padilla* with the limited procedural right to viable post-conviction remedies described in *Osborne*.

¶ 18 Applying the test set forth in *Osborne*, we do not find a constitutional shortcoming in the limitation periods in the Act or section 2-1401. The concept or existence of a limitation period does not generally offend any root principles of justice. That is particularly so for the Act, the declared purpose of which is the assertion of constitutional challenges to criminal convictions. 725 ILCS 5/122-1(a)(1), 122-2 (West 2010). Defendant's proposition, that a fundamental constitutional right subjects to strict scrutiny any limitation period that may bar it, would essentially nullify the limitation period in the Act on its face.

¶ 19 We also reject defendant's argument that the Act and section 2-1401 are, due to their limitation periods, fundamentally inadequate to vindicate the substantive right recognized in *Padilla*. Defendant asserts that "often" defendants will not learn of the potential for deportation until removal proceedings commence, by which time the limitation period in the Act and section 2-1401 will "likely" have expired. However, what is "often" or "likely" true is not always or even predominantly so. Because a defendant is clearly aware of his own conviction and usually aware that he is not a citizen, and the immigration consequences of convictions arise under Federal statutes that are a matter of public record, a non-citizen convicted of a crime could investigate, or consult an attorney regarding, any immigration consequences of his conviction before such consequences become manifest. A defendant's curiosity about any immigration

consequences of his conviction need not arise from his personal knowledge of his particular circumstances, as he could become aware of similar cases in the media or from acquaintances. In sum, there is nothing inherent or fundamental to a non-citizen being convicted of a crime that bars him from learning of possible immigration consequences of that conviction while he still has time to file a petition under the Act or section 2-1401.

¶ 20 Lastly, were we to consider defendant's petitions on their merits, we would conclude that he has failed to show the requisite prejudice for his ineffective-assistance claim. See *Padilla*, 130 S. Ct. at 1486-87 (remanding for determination of prejudice). Prejudice is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 1482. In the context of a negotiated guilty plea, a defendant must show a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial; that said, whether the error was prejudicial "depends largely on whether the defendant would have likely succeeded at trial." *People v. Gutierrez*, 2011 IL App (1st) 093499, at ¶ 20, citing *People v. Pugh*, 157 Ill. 2d 1, 15 (1993). While we accept at face value defendant's assertion that he would not have pled guilty had he known he could face deportation for his conviction, the record belies his allegation that counsel did not investigate his defense though he "had available" a motion to quash and a defense of illegal search. Counsel in fact filed such a motion, the motion hearing was commenced and continued, and the court denied the motion.<sup>3</sup> We therefore conclude that defendant's petition fails to show that the outcome of proceedings would likely have been different, to defendant's favor, but for counsel's deficient representation.

¶ 21 Accordingly, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.

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<sup>3</sup>Similarly, defendant alleged in his petitions and maintains on appeal that trial counsel did not heed his request to seek the court's leave to travel abroad. However, the court on November 26, 1997, denied defendant permission to travel to his native Jamaica.

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