

No. 1-10-3681

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. 91 CR 16365
)	
MICHAEL CANNON,)	Honorable
)	John A. Wasilewski,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

- ¶ 1 *Held:* Circuit court's *sua sponte* dismissal of defendant's *pro se* section 2-1401 petition affirmed over his claim that he was entitled to additional sentencing credit.
- ¶ 2 Defendant Michael Cannon appeals from the *sua sponte* dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) by the circuit court of Cook County. He contends that the trial court erred in dismissing his petition where he set forth a meritorious claim that he is entitled to additional sentencing credit.

¶ 3 The record shows, in relevant part, that on January 2, 1991, defendant shot Vickie McKenzie multiple times after questioning why she had told police about his involvement in an armed robbery. On January 15, 1991, an arrest warrant issued against defendant on the charge of aggravated battery. On that same day, the defendant was arrested in Georgia on a fugitive from justice warrant. On July 2, 1991, defendant was extradited to Chicago.

¶ 4 During a pretrial hearing on defendant's motion *in limine* to exclude evidence of other crimes, the parties discussed defendant's arrest warrant during the following exchange:

"MS. SULLIVAN [assistant State's Attorney]: In addition, Judge, actually the Georgia arrest I believe would come in of evidence of other crimes; just as to circumstances surrounding his arrest. I know down there he was charged with drug cases as well upon arrest. I have no intention of going into that at this point. Sole purpose of that is to show, in fact, that he was arrested down in Georgia in the other state.

MR. LAWS [defense counsel]: Judge, the purpose of his arrest being an armed robbery warrant certainly is highly prejudicial. We ask that be excluded.

MS. SULLIVAN: That's fine, Judge. I don't know how they would be able to explain why they were there; why the police officers were there. They were there solely acting on the warrant of an armed robbery. If you just want to limit it to the evidence of a warrant, that's fine with me."

¶ 5 Thereafter, a jury trial ensued where defendant was found guilty of attempted murder and aggravated battery with a firearm, then sentenced to an extended term of 60 years' imprisonment

for attempted murder. This court affirmed that judgment on direct appeal (*People v. Cannon*, No. 1-92-2710 (1994) (unpublished order under Supreme Court Rule 23)), and subsequently affirmed the summary dismissal of defendant's first postconviction petition (*People v. Cannon*, No. 1-95-3993 (1998) (unpublished order under Supreme Court Rule 23)). The record filed in this case also indicates that defendant filed a second postconviction petition and a section 2-1401 petition, which were dismissed by the trial court, and a second section 2-1401 petition, which was recharacterized as a postconviction petition and withdrawn by defendant.

¶ 6 On August 6, 2010, defendant filed the instant *pro se* section 2-1401 petition alleging, as pertinent to this appeal, that his sentence was void because the trial court failed to grant him sentencing credit for the time between January 15, 1991, and June 26, 1991,¹ when he was in the custody of Georgia authorities on an Illinois arrest warrant for armed robbery and awaiting extradition to Illinois. He claimed that because the armed robbery charge was dismissed in favor of the charges of which he was ultimately convicted, and these charges were based on conduct occurring prior to his arrest, the court's failure to give him credit for the period of time in question violated section 5-8-7(c) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-7(c) (West 1992)).² On October 29, 2010, the trial court entered a written order dismissing defendant's petition for failing to show the existence of a meritorious claim.

¶ 7 Defendant now appeals from that order, contending that the circuit court erred in dismissing his petition because he set forth a meritorious claim that he was entitled to additional

¹ Defendant states the wrong date for his extradition, which was July 2, 1991.

² Section 5-8-7(c), which was in effect at the time of defendant's sentencing, is substantively the same as the current section 5-4.5-100(c) of the Code (730 ILCS 5/5-4.5-100(c) (West 2010)).

sentencing credit. He thus requests this court to order the mittimus corrected to reflect an additional 168 days of credit for time served.

¶ 8 The State initially notes that defendant's petition is untimely, and argues that he may not raise a mittimus issue in a section 2-1401 petition on the grounds that his sentence is void.

Defendant replies that the failure to properly calculate sentencing credit renders a sentence void, and that a void sentence can be raised at any time during a collateral proceeding.

¶ 9 The supreme court has held that a sentence that does not comply with statutory guidelines regarding sentencing credit is void and may be challenged at any time. *People v. Roberson*, 212 Ill. 2d 430, 440 (2004) (citing *People v. Arna*, 168 Ill. 2d 107, 113 (1995)). It is also well settled that a section 2-1401 petition alleging a void judgment need not be brought within the ordinary two-year time limitation. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). Thus, defendant's claim is not barred by the statutory limitations period, and we may consider the merits of his claim. *People v. Harvey*, 196 Ill. 2d 444, 448 (2001).

¶ 10 Section 2-1401 is a comprehensive statutory procedure for challenging final orders and judgments more than 30 days after their entry. 735 ILCS 5/2-1401(a) (West 2010); *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003). A petition filed thereunder must be supported by affidavit or other appropriate showing as to matters not of record. 735 ILCS 5/2-1401(b) (West 2010). To obtain relief under section 2-1401, defendant must prove by a preponderance of the evidence, the existence of a defense or claim that would have precluded entry of the judgment in the original action, as well as diligence in discovering the defense or claim and presenting the petition. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). However, an allegation that a judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence (*Sarkissian*, 201 Ill. 2d at 104), thus obviating the need for any further discussion of these matters.

¶ 11 That said, we observe that proceedings under section 2-1401 are subject to the usual rules of civil practice, and, as such, a petition filed thereunder invites responsive pleadings; however, they are not required and a petition is subject to dismissal for want of legal or factual sufficiency. *Vincent*, 226 Ill. 2d at 8-9. Here, the State did not challenge defendant's petition in a motion to dismiss or answer which constituted "an admission of all well-pleaded facts," and made the issue for the trial court whether defendant was entitled to relief as a matter of law. *Vincent*, 226 Ill. 2d at 9-10. The court found that he was not, and dismissed his petition. We review that order *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 12 Defendant claims that he is entitled to 168 days of additional sentencing credit for the time he spent in the custody of Georgia authorities pursuant to section 5-4.5-100(c) of the Code. The State responds that defendant failed to establish that he is entitled to additional sentencing credit where he did not attach support for his claim that an arrest warrant for armed robbery was executed against him on January 15, 1991. In reply, defendant has supplemented the record with a copy of an arrest warrant issued against him for robbery on December 5, 1990, but continues to argue that this is evidence of his arrest for "armed robbery" in Georgia on January 15, 1991.

¶ 13 Pursuant to section 5-8-7(c) of the Code, a defendant arrested on one charge and prosecuted on another charge for conduct that occurred prior to his arrest is entitled to sentencing credit for time spent in custody under the former charge not credited against another sentence. 730 ILCS 5/5-8-7(c) (West 1992). Although defendant claimed that he was entitled to such relief for the time he was in custody in Georgia prior to his extradition, defendant failed to provide factual support for that claim in his petition.

¶ 14 We observe that the record does not clearly disclose which charge served as the basis for defendant's arrest. The record contains an arrest warrant issued against defendant for aggravated battery on January 15, 1991, the date of his arrest, but also contains comments by opposing

counsel at a subsequent pretrial hearing that defendant was arrested on a warrant for armed robbery. The testimony at defendant's trial regarding his arrest provides no clarification of the issue, as it only indicates that he was arrested pursuant to a fugitive from justice warrant. In addition, as noted, defendant adds further uncertainty to the issue by supplementing the record on appeal with an arrest warrant against him for robbery, as opposed to armed robbery, which issued on December 5, 1990.

¶ 15 Moreover, the record further shows that the same attorney comments which defendant relies on as support for his claim that he was arrested for armed robbery also indicate that he was "charged with drug cases" in Georgia upon his arrest. It is therefore conceivable that defendant was charged, convicted, and sentenced for those drug offenses while awaiting his extradition, which would render him ineligible for sentencing credit on the instant offenses pursuant to section 5-8-7(c) of the Code.

¶ 16 By not attaching any materials to his petition to establish otherwise, or to show that he was arrested on an Illinois warrant which brought him within the purview of section 5-8-7(c) of the Code, defendant failed to establish that the sentencing credit allocation was void, or state a legal basis for the relief requested. *Vincent*, 226 Ill. 2d at 7-9. Accordingly, we find no error by the circuit court in dismissing defendant's section 2-1401 petition *sua sponte*. *Vincent*, 226 Ill. 2d at 10.

¶ 17 Affirmed.