

NOTICE  
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2012 IL App (4th) 100792-U

Filed 5/11/12

NO. 4-10-0792

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
DONALD E. NOBLES,	)	No. 78CF154
Defendant-Appellant.	)	
	)	Honorable
	)	Lisa Holder White,
	)	Judge Presiding.

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JUSTICE APPLETON delivered the judgment of the court.  
Justices McCullough and Cook concurred in the judgment.

**ORDER**

¶ 1 *Held:* Because defendant's convictions and sentences for murder (Ill. Rev. Stat., ch. 38, ¶ 9-1(a)(1)) are not void, the two-year period of limitation in section 2-1401(c) of the Code of Civil Procedure (735 ILCS 5/2-1401(c) (West 2010)) bars defendant's petition for relief from judgment.

¶ 2 Defendant, Donald E. Nobles, is serving a term of life imprisonment for the murder of Clyde Davis (Ill. Rev. Stat. 1977, ch. 38, ¶ 9-1(a)(1)) and a concurrent 40-year term of imprisonment for the murder of Rosalyn Nesbitt (*id.*). He filed a petition for relief from these judgments (735 ILCS 5/2-1401(a) (West 2008)), and on the State's motion, the trial court dismissed the petition. Defendant appeals.

¶ 3 The office of the State Appellate Defender (OSAD) has moved to withdraw from representing defendant in this appeal, because, in OSAD's opinion, the appeal is clearly devoid of merit. See *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987) (the Federal Constitution does not

require compliance with the strict procedures in *Anders v. California*, 386 U.S. 738 (1967), when appointed defense counsel moves to withdraw from representing the defendant in a collateral proceeding as opposed to a direct appeal as of right); *People v. Lee*, 251 Ill. App. 3d 63, 64-65 (1993) ("[A] post-conviction petitioner is entitled to representation only as provided by State law [citation], which, in Illinois, is reasonable representation [citation]."). Defendant has filed a *pro se* brief in response to OSAD's motion, and the State has filed a brief in response to defendant's brief. After reviewing the arguments and the record, we conclude that OSAD is correct in its assessment of the merits of this appeal. Therefore, we grant OSAD's motion to withdraw from representing defendant in this appeal, and we affirm the trial court's judgment.

¶ 4

## I. BACKGROUND

¶ 5

### A. Consolidation of the Charges

¶ 6

On April 11, 1978, in Macon County case Nos. 78-CF-154 and 78-CF-155, a grand jury indicted defendant for the murders of Davis and Nesbitt. One of the indictments alleged that defendant strangled Davis to death on April 4, 1978, and the other indictment alleged that he shot Nesbitt to death the same day.

¶ 7

On June 5, 1978, defense counsel filed a motion to consolidate the charges in Macon County case Nos. 78-CF-154 and 78-CF-155. The trial court granted the motion on September 15, 1978.

¶ 8

### B. The Guilty Verdicts and the Sentences, Affirmed on Direct Appeal

¶ 9

On November 6, 1978, in a consolidated trial, the jury found defendant guilty of the murders of Davis and Nesbitt.

¶ 10

On December 15, 1978, the trial court sentenced defendant to life imprisonment for

murdering Davis and to a concurrent term of 40 years' imprisonment for murdering Nesbitt.

¶ 11 On direct appeal, we affirmed the convictions and sentences. *People v. Nobles*, 83 Ill. App. 3d 711, 717 (1980).

¶ 12 C. Collateral Proceedings

¶ 13 Over the 30 years following our affirmance in his direct appeal, defendant has filed the following claims.

¶ 14 1. *First Postconviction Petition*

¶ 15 In May 1980, defendant filed a postconviction petition. One of the allegations in the petition was that "trial counsel [had been] incompetent for failing to sever the two unrelated murders." The trial court appointed counsel to represent defendant, but nothing further was done.

¶ 16 2. *Second Postconviction Petition*

¶ 17 In December 1984, defendant filed his second postconviction petition. This petition, which was captioned "*pro se*," alleged only that the State had violated defendant's constitutional rights by excusing all potential jurors who opposed the death penalty.

¶ 18 At the same time the petition was filed, an attorney entered his appearance for defendant, *pro bono*.

¶ 19 The trial court summarily dismissed the petition, and we affirmed the dismissal. *People v. Nobles*, No. 4-85-0048 (Apr. 25, 1986) (unpublished order under Illinois Supreme Court Rule 23).

¶ 20 3. *Third Postconviction Petition*

¶ 21 In January 1989, defendant filed his third *pro se* postconviction petition. In this petition, he again alleged that his trial counsel had rendered ineffective assistance by failing to sever

the murder trials. He also alleged that trial counsel had rendered ineffective assistance by failing to tender instructions on voluntary manslaughter and that the trial court had erred by considering victim-impact evidence in the sentencing hearing.

¶ 22 The trial court summarily dismissed the petition on the ground that it "show[ed] no new matters that were not and could not have been presented in prior proceedings." Defendant appealed.

¶ 23 On appeal, we considered the preclusive effect of the previous postconviction proceedings. Defendant argued they should have no preclusive effect because, despite the appointment of counsel in the first postconviction proceeding, the petition in that proceeding never was addressed. *People v. Nobles*, No. 4-89-0093, slip order at 3 (Feb. 15, 1990) (unpublished order under Supreme Court Rule 23). As for the second postconviction proceeding, he argued that the petition in that proceeding was *pro se* and that although *pro bono* counsel had appeared, counsel never filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984)). *Id.* We inferred, however, that even though the second postconviction petition was captioned "*pro se*," it actually had been prepared with the assistance of *pro bono* counsel, given that "[t]he petition and accompanying documents were professionally done and include[d] almost 250 pages of appendix to support its legal arguments." *Id.* at 3-4. So, because "the record clearly indicate[d] counsel [had] met the requirements of the rule," we deemed the omission of a Rule 651(c) certificate to be harmless. *Id.* at 4.

¶ 24 Because defendant had received the assistance of counsel in the preparation of his second postconviction petition, we held the second petition to be an amendment of the first petition. *Nobles*, No. 4-89-0093, slip order at 4. We reasoned that "[d]efendant had the opportunity and

assistance of counsel at that time to include," in the amended petition (the second petition), "all the allegations of error he desired" and that his choice to raise only one issue in the amended petition, *i.e.*, the dismissal of potential jurors opposed to the death penalty, should not prevent the final judgment on the amended petition from having *res judicata* effect, both as to the claim that defendant raised and as to any other claim he could have raised, including the consolidation of the murder charges and the failure to tender an instruction on involuntary manslaughter. *Id.*

¶ 25 Even though we held that *res judicata* barred the claims in the third postconviction petition, we went ahead and addressed the substantive merits of those claims, for the purpose of stating alternative reasons to affirm the trial court's judgment. We reasoned that the consolidation of the murder charges was a reasonable strategy by trial counsel, consistent with his aim to present an insanity defense. *Nobles*, No. 4-89-0093, slip order at 5-6. Arguably, the more bizarre defendant's behavior appeared, the more likely the jury would believe in the "alleged cocaine-induced psychosis." *Id.* at 5. Shooting to death one's girlfriend (Nesbitt) and afterward, within the same 24-hour period, strangling to death one's cell mate (Davis) certainly fit the description of "bizarre." *Id.* at 5-6.

¶ 26 As for the claim that trial counsel should have tendered an instruction of involuntary manslaughter, we had already considered and rejected a similar argument on direct appeal: the record was devoid of any evidence that defendant had shot Nesbitt and strangled Davis, "because he believed that the force used was necessary to prevent great bodily harm or death to himself or another." *Nobles*, No. 4-89-0093, slip order at 7 (citing Ill. Rev. Stat. 1987, ch. 38, ¶ 7-1).

¶ 27 Finally, as for defendant's claim that the trial court had erred in considering victim-impact evidence in the sentencing hearing, defendant relied on *Booth v. Maryland*, 482 U.S. 496

(1987), a case that clearly was distinguishable. *Nobles*, No. 4-89-0093, slip order at 7. *Booth* barred the use of victim-impact evidence in a capital sentencing hearing, but in defendant's case, the jury had "been unable to unanimously agree on the death sentence." *Id.* Because defendant's sentencing hearing was noncapital, *Booth's* prohibition of victim-impact evidence did not apply to his sentencing hearing. *Id.* Thus, we affirmed the summary dismissal of the third postconviction petition. *Id.* at 8.

¶ 28

#### 4. *Fourth Postconviction Petition*

¶ 29 In June 2000, defendant filed his fourth postconviction petition. In this petition, he alleged that he had suffered a violation of his constitutional rights in two ways. First, the police had put Davis in a one-man cell with him, knowing that Davis was a catatonic schizophrenic who had escaped from a nursing home and who had "exhibited bizarre behavior, such as dropping his pants[] and exposing his genitals whenever you called his name[] and clapping his hand over his mouth." Exhausted from police interrogations and still feeling the effects of the cocaine and angel dust he had taken before his arrest, defendant begged the police "not to place the mental [*sic*] disturb, Clyde Davis[,] with him." The police disregarded that request, causing defendant to be convicted of the murder of Davis.

¶ 30 Second, the petition alleged that, by putting a mentally disordered man in the cell that defendant occupied, the police violated a regulation of the Illinois Department of Corrections as well as defendant's right to due process.

¶ 31 The trial court summarily dismissed the petition as untimely and as frivolous and patently without merit.

¶ 32 Defendant appealed, and OSAD moved to withdraw pursuant to *Finley*. We granted

OSAD's motion and affirmed the trial court's judgment. *People v. Nobles*, No. 4-00-0652 (Jan. 17, 2003) (unpublished order under Supreme Court Rule 23). We held that because defendant could have alleged the negligence of jail officials earlier, before his fourth postconviction petition, section 122-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-3 (West 2000)) barred the claim. *Nobles*, No. 4-00-0652, slip order at 2-3.

¶ 33 *5. Petition for Habeas Corpus*

¶ 34 In September 2000, defendant filed a petition for *habeas corpus*, in which he alleged that his sentence of life imprisonment was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the trial court, rather than a jury, had found that his actions in murdering Davis were accompanied by exceptionally brutal and heinous behavior. In April 2003, defendant filed an amended petition for *habeas corpus*, without substantive changes. The trial court granted the State's motion to dismiss the petition, and defendant appealed.

¶ 35 OSAD again filed a motion to withdraw pursuant to *Finley*, and we granted the motion and affirmed the trial court's judgment. *People v. Nobles*, No. 4-03-0355 (Oct. 24, 2005) (unpublished order under Supreme Court Rule 23). We quoted our holding in *People v. Helton*, 321 Ill. App. 3d 420, 424 (2001), that " '*Apprendi* does not apply retroactively to cases on collateral review.' " *Nobles*, No. 4-03-0355, slip order at 2.

¶ 36 *6. "Motion for Relief From Void Judgment"*  
*(the Pleading Under Consideration in This Appeal)*

¶ 37 In December 2009, defendant filed a pleading entitled "Motion for Relief From Void Judgment." Invoking section 2-1401(a) of the Code of Civil Procedure (735 ILCS 5/2-1401(a) (West 2008)), the motion alleged that the murder convictions and prison sentences were "void"

because it was a violation of section 111-4(a) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1977, ch. 38, ¶ 111-4(a)) as well as a "travesty of justice" to consolidate the unrelated murder charges for trial.

¶ 38 In July 2010, the State moved to dismiss defendant's "Motion for Relief from Void Judgment." (The State's motion does not cite the sections of the Code of Civil Procedure authorizing the requested dismissal.) According to the State, defendant's "Motion for Relief from Void Judgment" deserved to be dismissed for three reasons: (1) defendant's motion was untimely in that he filed it more than two years after the entry of the judgment (see 735 ILCS 5/2-1401(c) (West 2010)); (2) the judgments are not void, given that the trial court had subject-matter jurisdiction and personal jurisdiction; and (3) defendant's contention that the court had "erred" in consolidating the purportedly unrelated murder charges for trial was "farcical," considering that defendant was the party who had requested the consolidation.

¶ 39 In a docket entry dated September 20, 2010, the trial court stated it had reviewed defendant's "Motion for Relief from Void Judgment," the State's motion for dismissal, and defendant's response to the State's motion for dismissal. Without explanation, the court granted the State's motion.

¶ 40 This appeal followed.

## ¶ 41 II. ANALYSIS

### ¶ 42 A. The Hybrid Nature of the State's Motion for Dismissal

¶ 43 Because a trial court's authority to dismiss a pleading in a civil case does not come *ad hoc* from a state of nature, a motion for dismissal ought to identify the section of the Code of Civil Procedure that authorizes the proposed dismissal. If more than one section of the Code of Civil

Procedure does so, the motion should be divided into parts, each part appearing under a heading corresponding to the applicable section of the Code of Civil Procedure. 735 ILCS 5/2-619.1 (West 2010).

¶ 44 Section 2-1401 (735 ILCS 5/2-1401 (West 2010)) says nothing about dismissing a pleading. Hence, one must look elsewhere in the Code of Civil Procedure for authority to dismiss a petition for relief from judgment. Section 2-615 (735 ILCS 5/2-615 (West 2010)) and section 2-619 (735 ILCS 5/2-619 (West 2010)) would seem to be two relevant candidates. In its motion for dismissal, the State appeared to rely partly on section 2-619(a)(5) (735 ILCS 5/2-619(a)(5) (West 2010)) as authority for the proposed dismissal of defendant's "Motion for Relief From Void Judgment." Section 2-619(a)(5) provides that, upon motion by the opposing party, a court may dismiss an action on the ground that it "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2010). As the State argued in its motion for dismissal, the deadline for filing a petition for relief from judgment was "not later than 2 years after the entry of the order or judgment," and defendant had missed that deadline by almost 30 years. 735 ILCS 5/2-1401(c) (West 2010).

¶ 45 If the judgments in the murder cases were void, the two-year deadline in section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2010)) would be inapplicable. 735 ILCS 5/2-1401(f) (West 2010). The State argued, however, in its motion for dismissal, that because the trial court had possessed both subject-matter jurisdiction and personal jurisdiction over defendant in the murder cases, his characterization of the judgments as "void" was merely an incorrect legal conclusion. In this respect, the State appeared to assert the legal insufficiency of defendant's "Motion for Relief From Void Judgment": its failure to allege facts leading to the legal conclusion that the judgments

in the murder cases were indeed void. See 735 ILCS 5/2-615 (West 2010); *Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App. 3d 722, 735 (2009) ("Illinois is a fact-pleading state, and conclusions of law and conclusory factual allegations unsupported by specific facts are not deemed admitted [for purposes of a motion for dismissal pursuant to section 2-615].").

¶ 46 The remaining reason the State gave for dismissing defendant's "Motion for Relief From Void Judgment" was that the "error" of which defendant complained, *i.e.*, consolidating the murder charges for trial, was an "error" that he himself had invited through his trial counsel. Defendant's trial counsel had moved for the consolidation of the murder charges. This particular argument by the State pointed to a fact external to (not mentioned in) the "Motion for Relief From Void Judgment," namely, trial counsel's motion for consolidation, and therefore seemed to rely on section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2010)). That section provides that, upon motion, a trial court may dismiss an action on the ground that "the claim asserted against defendant" (in this context, the State) "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *Id.* The affirmative matter, of course, was trial counsel's motion to consolidate the murder charges for trial. This affirmative matter defeated the section 2-1401 action because it was futile for defendant to complain of an error that he, through his attorney, had procured. See *People v. Clarke*, 391 Ill. App. 3d 596, 622 (2009).

¶ 47 Regardless of whether the authority for the dismissal of defendant's "Motion for Relief From Void Judgment" was section 2-619(a)(9), section 2-615, or section 2-619(a)(5), we review the dismissal *de novo*. See *Napleton v. Great Lakes Bank, N.A.*, 408 Ill. App. 3d 448, 450 (2011); *Park v. Northeast Illinois Regional Commuter R.R. Corp.*, 2011 IL App (1st) 101283, ¶ 10; *Water Tower Realty Co. v. Fordham 25 E. Superior, L.L.C.*, 404 Ill. App. 3d 658, 662 (2010);

*People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008).

¶ 48 B. Issues That OSAD Has Explored and Rejected

¶ 49 OSAD considered raising the following issues on defendant's behalf but ultimately concluded that each of these issues was clearly a dead end.

¶ 50 1. *Did the Trial Court Follow the Proper Procedures in Granting the State's Motion for Dismissal?*

¶ 51 OSAD considered whether the trial court followed the proper procedures in granting the State's motion to dismiss the "Motion for Relief from Void Judgment." Apropos this issue, OSAD considered whether any set of facts could ever be proved that would entitle defendant to recover. See *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 280 (1982) ("We have repeatedly held that a motion to dismiss should not be granted unless it clearly appears that no set of facts could ever be proved that would entitle the plaintiff to recover."). OSAD concludes that "[t]here [is] no set of fact which could ever be proved, nor legal argument made based upon the claim raised, that would allow [defendant] relief."

¶ 52 We agree, but, arguably, there was a procedural defect in the proceedings below (although, given the lack of objection by defendant, it would be unreasonable to blame the procedural defect on the trial court). The State failed to follow correct procedures. For one thing, in its motion for dismissal, the State cited neither section 2-615 nor section 2-619 (let alone any subsection of section 2-619). "Meticulous practice dictates that movants clearly state the section of the Code [of Civil Procedure] under which a motion to dismiss is brought." *Wheaton v. Steward*, 353 Ill. App. 3d 67, 69 (2004). Also, the State did not divide its motion into parts, one part corresponding to section 2-615 and the other part corresponding to section 2-619. See 735 ILCS 5/2-



¶ 56

*3. Are the Judgments and Convictions in the Murder Cases  
Void, as Defendant Asserts?*

¶ 57

Section 2-1401(f) provides: "Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief." 735 ILCS 5/2-1401(f) (West 2010). The two-year period of limitation in section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2010)) is, of course, "contained in" section 2-1401. It follows that, under section 2-1401(f), the two-year period of limitation does not "affect" a person's right to obtain relief from a "void order or judgment." 735 ILCS 5/2-1401(f) (West 2010). Defendant asserts that his convictions and sentences for the murders of Nesbitt and Davis are void.

¶ 58

OSAD sees no basis for that assertion, and neither do we. We have explained that "[a] void judgment is one entered by a court (1) without jurisdiction or (2) that exceeded its jurisdiction by entering an order beyond its inherent power." (Internal quotation marks omitted.) *People v. Gregory*, 379 Ill. App. 3d 414, 419 (2008). Item (1) refers to personal jurisdiction, and item (2) to subject-matter jurisdiction. It would be absurd to contend that the trial court lacked personal jurisdiction over defendant. "A criminal defendant confers personal jurisdiction on the trial court when he appears personally before it." *People v. Speed*, 318 Ill. App. 3d 910, 915 (2001).

¶ 59

As for the other way a judgment can be void, *i.e.*, the trial court's lack of "inherent power," that does not mean merely the presence of error, constitutional or otherwise. *Speed*, 318 Ill. App. 3d at 916. "When a court with inherent power to enter an order commits a procedural error while exercising that power, the error does not render the court's judgment void, but merely voidable." *Id.*

¶ 60

Rather, a trial court lacks "inherent power" to render a judgment in a criminal case

only if (1) "the circumstances alleged do not constitute the offense charged[,] as it is defined in the statute[,] and nothing short of alleging entirely different facts could cure the defect" (*People v. McCarty*, 94 Ill. 2d 28, 38 (1983)); or (2) the sentence is "wholly unauthorized by statute" (*People v. Sweeney*, 2012 IL App (3d) 100781, ¶ 24). First, in the context of the murder cases, no one could reasonably dispute that intentionally and without lawful justification shooting someone to death with a .357 magnum or strangling someone to death with one's bare hands conforms to the legislative description of murder (Ill. Rev. Stat. 1977, ch. 38, ¶ 9-1(a)(1)). Second, no one could reasonably dispute that 40 years' imprisonment and life imprisonment are within the range of punishment that the legislature has authorized for murder (never mind whether defendant believes that, under the facts and law, he deserves those sentences—which is a wholly separate issue, unrelated to voidness). See Ill. Rev. Stat. 1977, ch. 38, ¶ 1005-8-1(b)(1).

¶ 61 Those two premises, along with the trial court's acquisition of personal jurisdiction over defendant, definitively end the discussion regarding voidness. All the errors that defendant raises in his brief—lack of service of the section 2-1401 petition on the State, the consolidation of the murder indictments, the failure to give a voluntary-manslaughter instruction, and the *Apprendi* violation—do not make his convictions and sentences void. It follows that the two-year period of limitation in section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2010)) bars defendant's inaptly titled "Motion for Relief From Void Judgment"—inaptly titled because the judgments in the murder cases are not void.

¶ 62 *4. Do the Doctrines of Invited Error, Procedural Forfeiture, and Res Judicata Bar Defendant's Claims?*

¶ 63 OSAD further concludes that the doctrines of invited error, procedural forfeiture, and

*res judicata* bar the claims in defendant's "Motion for Relief From Void Judgment." Although we do not necessarily disagree, we need not discuss these alternative doctrines, considering that the expired period of limitation in section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2010)) clearly bars defendant's petition for relief from judgment. "[W]here a section 2-1401 petition is filed beyond two years after the judgment was entered, it cannot be considered." *People v. Caballero*, 179 Ill. 2d 205, 210 (1997).

¶ 64

### III. CONCLUSION

¶ 65 For the foregoing reasons, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment. We award the State \$50 in costs.

¶ 66 Affirmed.