

No. 1-11-0659

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. 06 CR 802
)	
DARRYL JOHNSON,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* *Sua sponte* denial of defendant's section 2-1401 petition and motion to reconsider affirmed where allegation that he would not have pleaded guilty had he known that a codefendant, who pleaded guilty to the same charge, received a comparatively lenient sentence, could not deprive the trial court of its jurisdiction to enter judgment against him.

¶ 2 Defendant Darryl Johnson appeals from the *sua sponte* denial of his *pro se* petition for relief from judgment under section 2-1401(f) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(f) (West 2010)), and the denial of his motion to reconsider. He contends that the circuit court erred in denying his section 2-1401 petition where he sufficiently alleged that he would not

have pleaded guilty to delivery of a controlled substance within 1,000 feet of a school had he known that Linda Mason, a codefendant who pleaded guilty to the same charge, received a "comparatively lenient" sentence despite having a similar criminal background and greater degree of participation in the alleged criminal drug conspiracy.

¶ 3 The record shows that defendant and his codefendants, who are not parties to this appeal, were charged by indictment with various offenses, including criminal drug conspiracy (July 22, 2005, to December 13, 2005) and delivery of a controlled substance within 1,000 feet of a school (August 11, 2005) (count 5). Following a plea conference on April 10, 2007, defendant entered a plea of guilty to delivery of a controlled substance within 1,000 feet of a school and the State nolo-prossed the remaining counts.

¶ 4 Before accepting his guilty plea, the trial court admonished defendant that he was charged with delivery of a controlled substance within 1,000 feet of a school, a Class 1 felony, but, because of his criminal background, the court was required to sentence him as a Class X offender to a term of 6 to 30 years' imprisonment with three years term of mandatory supervised release. Defendant indicated that he understood the possible sentencing range and the consequences of pleading guilty to the charged offense, and the trial court found defendant's criminal history sufficient to require Class X sentencing. Defendant confirmed that he was pleading guilty of his own free will and not because of force or any promises apart from the plea agreement.

¶ 5 The trial court then addressed defendant stating, "[Y]ou and your attorneys were present at the 402 conference when the State put forth a factual basis which I deem sufficient at law to support a plea of guilty to *** count five in the original indictment. I enter judgment on that plea." Defendant acknowledged his waiver of a presentence investigation report and the trial court sentenced him to 20 years' imprisonment, then admonished him of his appeal rights, including his right to file a written motion to vacate his plea.

¶ 6 Defendant did not file a postplea motion or otherwise attempt to appeal the judgment entered on his plea conviction. Rather, on April 7, 2010, defendant filed a *pro se* post-conviction petition alleging various claims of ineffective assistance of plea counsel. On June 29, 2010, the circuit court summarily dismissed the petition as frivolous and patently without merit. We affirmed that judgment on appeal after granting the State Appellate Defender's motion for leave to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Johnson*, 2012 IL App (1st) 103047-U.

¶ 7 On July 29, 2010, defendant filed a *pro se* motion to vacate "an illegal sentence/judgment" alleging that his guilty plea was made upon an indictment that failed to state or charge an offense, as required by section 111-3(a)(3) of the Code of Criminal Procedure (725 ILCS 5/111-3(a)(3) (West 2010)). The circuit court denied the motion on September 9, 2010.

¶ 8 On September 23, 2010, defendant filed a *pro se* petition for relief from judgment under section 2-1401(f) of the Code (735 ILCS 5/2-1401(f) (West 2010)). In his petition, defendant alleged that his conviction was void because the State presented perjured testimony to the grand jury in 2005 and failed to charge him with committing the offense on a public way, and that his sentence was grossly disparate to that imposed on codefendant Linda Mason. In a written order, entered on October 28, 2010, the circuit court *sua sponte* denied defendant's section 2-1401 petition, finding that it was untimely and "may be dismissed." The circuit court also found that defendant failed to set forth a claim that would entitle him to relief under section 2-1401, and that his allegation that the State presented perjured testimony to procure his indictment was previously rejected and therefore barred by *res judicata*.

¶ 9 Thereafter, on November 29, 2010, defendant filed a *pro se* motion to reconsider that ruling, alleging that his sentence is void because it is grossly disparate from that of codefendant Linda Mason and, for the first time, that of another codefendant, Michael Clark. On January 28,

2011, the circuit court denied defendant's motion, finding that his claim was without merit. On February 25, 2011, defendant filed a notice of appeal, specifying that he was appealing the circuit court's October 28, 2010, denial of his section 2-1401 petition and the January 28, 2011, denial of his motion to reconsider.

¶ 10 In this court, defendant contends that the circuit court erred in *sua sponte* denying his section 2-1401 petition where it "gave rise" to a claim that he would not have pleaded guilty had he known that codefendant Mason, who pleaded guilty to the same charge, received a "comparatively lenient" sentence despite having a similar criminal background and greater degree of participation in the alleged criminal drug conspiracy. Defendant acknowledges that his petition was filed beyond the two-year statutory limitation period (see 735 ILCS 5/2-1401(c) (West 2010)), but argues that the State must assert the time limitation as an affirmative defense, and in the absence thereof, as here, the circuit court may not dismiss the petition on the basis of timeliness (*People v. Smith*, 386 Ill. App. 3d 473, 476 (2008)).

¶ 11 When the circuit court enters a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, our review is *de novo*. *People v. Moran*, 2012 IL App (1st) 111165, ¶ 12 (citing *People v. Vincent*, 226 Ill. 2d 1, 8 (2007)). Accordingly, we may affirm the order of the circuit court on any basis supported by the record, regardless of the actual grounds relied upon by the circuit court. *People v. Caballero*, 179 Ill. 2d 205, 211 (1997).

¶ 12 We recognize that a circuit court may deny a petition for relief from judgment, on its own motion, on any basis except for timeliness (*People v. Malloy*, 374 Ill. App. 3d 820, 824 (2007)), and, in this case, the circuit court denied defendant's petition finding that it was untimely and "may be dismissed." However, defendant has not addressed the fact that the court then denied his petition on its merits. See *Vincent*, 226 Ill. 2d at 11-19 (circuit court may properly dismiss a section 2-1401 petition on the merits *sua sponte*). Rather, defendant asserts that his petition was

sufficient to survive *sua sponte* denial by the circuit court where he "repeatedly alleged" that the judgment entered on his plea was "void" and sought "involuntary dismissal" of his plea and sentence.

¶ 13 Mindful that we have an independent duty to ascertain our jurisdiction in this appeal and to determine which issue or issues, if any, have been forfeited, when beginning the review of a case (*People v. Smith*, 228 Ill. 2d 95, 106 (2008)), we notice that the instant claim before us, *i.e.*, that defendant's conviction and sentence are "void" and should face "involuntary dismissal" due to a disparity of sentences as it relates to his guilty plea, is not the same claim presented in either his section 2-1401 petition, or motion to reconsider. This court has held that a defendant's failure to include an issue in his section 2-1401 petition results in forfeiture of the issue on appeal (*People v. Bramlett*, 347 Ill. App. 3d 468, 475 (2004)), unless the argument is that a judgment is void (*Moran*, 2012 IL App (1st) 111165, ¶ 13). However, the judgment must actually be void in order to overcome the two-year limitation period (*People v. Lott*, 325 Ill. App. 3d 749, 752 (2001)), and in this case, defendant's argument on appeal does not raise a void-judgment claim (*People v. Santana*, 401 Ill. App. 3d 663, 666 (2010)). Even assuming that defendant entered his plea without knowing the length of the sentence imposed on codefendant Mason, the voluntariness or involuntariness of a guilty plea has no bearing on jurisdiction so that an involuntary plea does not render a conviction void. *Hubbard*, 2012 IL App (2d) 101158, ¶¶ 12, 22. Accordingly, defendant has forfeited this issue on appeal.

¶ 14 For the reasons stated, we affirm the *sua sponte* denial of defendant's section 2-1401 petition and the denial of his motion to reconsider by the circuit court of Cook County.

¶ 15 Affirmed.