

No. 1-11-1059

**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.	)	No. 91 CR 22460
	)	
GEORGE ANDERSON,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE DELORT delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Defendant's motion to vacate his murder conviction as void was barred by the doctrine of *res judicata* as he had previously raised this identical claim with the appellate court which had rejected it.
- ¶ 2 Defendant George Anderson appeals from the order of the trial court dismissing his petition for relief from judgment. He contends that his conviction for first degree murder is void because he was convicted on an "incorrect theory of law," *i.e.*, that he was legally accountable for the actions of an adversary in a gun battle that killed an 11-year-old bystander. The State responds that defendant's claim is barred by the doctrine of *res judicata* because we rejected the

same argument in his 2010 appeal of the dismissal of his fourth postconviction petition. We affirm.

¶ 3 We summarized the facts in our disposition of defendant's most recent appeal (see *People v. Anderson*, 401 Ill. App. 3d 134 (2010)) and repeat them here only to the extent necessary for an understanding of this appeal.

¶ 4 On the afternoon of August 21, 1991, 11-year-old Jeremiah Miggins was in his neighbor's yard when he was caught in crossfire and killed. Several members of warring gangs were arrested and charged with the victim's shooting death. Codefendants Michael Sutton and Jerome Johnson were determined to be the principal offenders, and they were convicted in separate trials on charges related to the shooting.

¶ 5 In a separate bench trial, defendant was charged with first-degree murder and attempted first-degree murder for his role in the shooting. At trial, the State advanced the theory that defendant was accountable for Johnson's actions. The State argued that: defendant knew Johnson was armed when he drove Johnson to retrieve his stolen vehicle; defendant and Johnson expected an armed confrontation; defendant and Johnson used a vehicle not owned by either to avoid detection when driving to the scene; and defendant drove Johnson from the scene after the shooting. The State argued that defendant was accountable for Johnson's actions and that it was foreseeable that someone would respond to the shooting by shooting back and foreseeable that an innocent bystander would be killed. Defendant asserted that he simply drove Johnson to pick up his car and did not know he was armed or that a confrontation was likely.

¶ 6 Testimony at trial was provided by an eyewitness who was not involved in the shooting, two men associated with codefendant Sutton, detectives who investigated the scene, an assistant State's Attorney and defendant. In addition, the State entered defendant's custodial statement into evidence. Defendant testified at trial that he assumed Johnson had a gun when they left to

retrieve Johnson's car, but he did not see a gun. Defendant testified that he signed his custodial statement, in which he stated that he knew Johnson had a gun with him because they anticipated trouble, but claimed that he did not understand what he was signing because he was too nervous.

¶ 7 On November 30, 1994, the trial court found defendant guilty of first-degree murder and two counts of attempted first-degree murder. The trial court commented on the evidence as follows:

"The Court believes that the evidence shows clearly that Mr. Anderson took an active part in this particular shooting, he was not just there. The fact the evidence shows the movement of the car, the placement of the car. The statement itself indicates that Mr. Anderson knew what was going on with the shooting. And the Court believes that Mr. Sutton along with Mr. Anderson went there for the purpose of a shooting, to do harm to those other individuals."

¶ 8 The trial court subsequently determined that defendant was eligible for the death penalty based on a prior murder conviction, but sentenced him to life imprisonment and consecutive 25-year terms for his attempted first-degree-murder convictions. This court rejected defendant's direct appeal in which he argued that the State failed to prove him guilty beyond a reasonable doubt. *People v. Anderson*, No. 1-95-0500 (1996) (unpublished order under Supreme Court Rule 23). We stated that, in examining the record in a light most favorable to the State, "[d]efendant's actions and post-arrest statement support the trial court's findings that defendant knew the co-defendant was armed and intended to commit a shooting, and that defendant actively participated in the offense by driving the getaway car." *Anderson*, No. 1-95-0500, order at 1–2.

¶ 9 Defendant filed four unsuccessful postconviction petitions. See *Anderson*, 401 Ill. App. 3d at 136-38. In his brief challenging the dismissal of his fourth postconviction petition, defendant argued that his conviction was void because he was held accountable for the actions of an adversary. This court affirmed the trial court's dismissal of the petition and found that defendant was convicted under an accountability theory for Johnson's actions. *People v. Anderson*, 401 Ill. App. 3d at 141.

¶ 10 On June 21, 2010, defendant filed a *pro se* motion to "vacate and void" his conviction, arguing that his conviction was invalid because he was held accountable for the actions of an adversary. The trial court treated defendant's motion as a motion to vacate pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). On September 1, 2010, the trial court dismissed the motion in a written order. The trial court concluded that defendant's claim was barred by the doctrine of *res judicata* because defendant was "simply repackaging a previously rejected claim." Defendant filed a motion to reconsider which the trial court denied, and defendant timely appeals.

¶ 11 On appeal, defendant contends that a conviction based on accountability for an adversary is grounded in an incorrect theory of the law, and his conviction was based on accountability for an adversary. Defendant acknowledges that he *raised* this issue in nearly identical form in his last appeal, but, in anticipation of the State's response, defendant contends that *res judicata* does not bar his claim because it was not *actually decided* by this court. The State responds that *res judicata* bars defendant's claim.

¶ 12 The trial court treated defendant's motion as a petition to vacate a judgment pursuant to section 2-1401 of the Code. In his motion to reconsider, defendant argued that this was incorrect because his pleading did not "invoke" section 2-1401. Defendant did not, however, identify an alternative statutory or common law cause of action which could be used to challenge a void

conviction. On appeal, defendant has abandoned his argument that the trial court erred when it treated his "motion to void and vacate" as being brought pursuant to section 2-1401.

Accordingly, we will treat the pleading as petition to vacate a void judgment pursuant to section 2-1401(f).

¶ 13 Section 2-1401 is a civil remedy, but its scope extends to criminal cases as well. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). If 30 days pass without a response from the State, a section 2-1401 petition filed by a criminal defendant becomes "ripe for adjudication" and the trial court may dismiss it *sua sponte*. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). We review the dismissal of a section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 14 Ordinarily a section 2-1401 petition must be filed within two years after judgment, and must allege due diligence in both discovering the defense and presenting the petition. *Vincent*, 226 Ill. 2d at 7-8. However, the two-year limitation does not apply when a petition alleges that the judgment is void. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001). Nevertheless, the doctrine of *res judicata* bars a defendant from using a section 2-1401 petition to obtain relief for points previously raised at trial or in other collateral proceedings. *People v. Addison*, 371 Ill. App. 3d 941, 945 (2007).

¶ 15 Defendant argues that *res judicata* does not apply to his claim because although it was raised in his previous appeal, it was not "actually decided." See *People v. Silagy*, 116 Ill. 2d 357, 365 (1987). The State on the other hand argues that *res judicata* applies because the issue was "raised and decided" in defendant's previous appeal. See *People v. Blair*, 215 Ill. 2d 427, 443 (2005) citing *People v. West*, 187 Ill. 2d 418, 425 (1999). Admittedly, there is some difference among cases regarding formulation of the *res judicata* rule; with some cases using the "raised" formulation (see *People v. Haynes*, 192 Ill. 2d 437, 461 (2000)) and others using the "decided" formulation (see *People v. Towns*, 182 Ill. 2d 491, 502 (1998)). However, we need not decide

whether this variation in language reflects varying standards of review, because *res judicata* bars defendant's claim under either formulation.

¶ 16 It is undisputed that defendant previously raised the issue of whether his conviction was void because it was based on accountability for an adversary. This court made a clear finding contrary to defendant's theory on that issue stating: "Defendant was convicted under an accountability theory for the actions of [codefendant] Johnson." *People v. Anderson*, 401 Ill. App. 3d at 141. We maintain that is still the case today.

¶ 17 Defendant would have us ignore this holding on the basis that it was made during a discussion of a different issue. We are loathe to adopt a formulation of *res judicata* so strict that a reviewing court's failure to discuss an issue at some length eliminates the bar against relitigation. Doing so would simply invite piecemeal litigation where a defendant could reformulate and raise an issue time and time again until this court had addressed every possible permutation of the claim. Instead, we must give effect to this court's affirmance whether issued after an exhaustive discussion of every issue raised in a defendant's brief, a discussion of the issues deemed relevant by this court, or even in a summary disposition. If a defendant believes that this court has misconstrued or overlooked an issue, the rehearing procedure (see Illinois Supreme Court Rule 367 (eff. Dec. 29, 2009)) or an appeal to our supreme court provides an adequate remedy. Even an incorrect ruling by a reviewing court is not an exception to the bar of *res judicata*. See *People v. Shriner*, 262 Ill. App. 3d 10, 15 (1994) ("[A]dopting defendant's claim that a petitioner may avoid application of the *res judicata* doctrine by claiming that an issue was incorrectly decided in the direct appeal would eviscerate the *res judicata* doctrine's application to post-conviction proceedings."); *People v. Dominguez*, 366 Ill. App. 3d 468, 474-75 (2006) (In order to relax the doctrine based on fundamental fairness, "[a]t a minimum, there must

be some compelling fact beyond the mere allegation that, on direct appeal, the issue was resolved incorrectly.").

¶ 18 We find that the issue defendant raised was, in fact, "decided" in the prior appeal, albeit without significant discussion by this court. Defendant did, in fact, avail himself of the remedy of filing a petition for leave to appeal. See *People v. Anderson*, No. 110527 (September 29, 2010) (denying leave to appeal). Accordingly, *res judicata* bars relitigation of the issue.

¶ 19 We recognize that even *res judicata* does not serve as an absolute bar in criminal proceedings when fundamental fairness so dictates. See *People v. Harper*, 345 Ill. App. 3d 276, 285 (2003) (sentence in excess of statutory maximum); *People v. Rodriguez*, 355 Ill. App. 3d 290, 297 (2005) (change in law). However, we need not consider whether we need relax the bar in this case, because defendant has not argued in favor of application of a fundamental fairness exception, and in any event, such a claim would not be viable.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County dismissing defendant's petition for relief from judgment.

¶ 21 Affirmed.