

2013 IL App (2d) 111321-U
No. 2-11-1321
Order filed February 4, 2013

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06-CF-75
)	
JOHN D. HOMATAS,)	Honorable
)	Kathleen O. Kauffmann,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's section 2-1401 petition: he did not establish a voidness as to his MSR term, his eligibility for good-conduct credit, or an alleged proportionate-penalties violation, and his remaining claims did not allege voidness at all and thus were untimely.

¶ 2 Defendant, John D. Homatas, appeals the dismissal of his *pro se* petition filed under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was convicted of four counts of aggravated driving under the influence (625 ILCS 5/11-501(d)(1)(F) (West 2006)) for causing the deaths of April Simmons and John Chiariello, three counts of reckless homicide in relation to the same victims as well as Simmons's unborn child (720 ILCS 5/9-3(a), 3.2(a) (West 2006)), and two misdemeanor counts of driving under the influence (625 ILCS 5/11-501(a)(6) (b-2) (West 2006)). The trial court found that the convictions of aggravated DUI merged, and it sentenced defendant on one of those counts to 12 years' imprisonment. It sentenced defendant to concurrent terms of four years' imprisonment for the reckless homicide convictions and concurrent terms of six months' imprisonment for the misdemeanor driving under the influence convictions. Defendant filed a direct appeal, arguing that the trial court erred in denying a motion to suppress his statements and that he was denied effective assistance of counsel for various reasons. This court affirmed defendant's convictions. *People v. Homatas*, No. 2-07-1157 (2008) (unpublished order under Supreme Court Rule 23). On October 25, 2011, defendant filed a section 2-1401 petition, alleging various claims related to his sentence. On December 14, 2011, the trial court dismissed the petition, stating that the claims lacked merit, were untimely, and barred because the claims were not made in defendant's direct appeal.

¶ 5 Defendant's petition raised the following claims: (1) his aggravated DUI and reckless homicide convictions and sentences violate the proportionate penalties clause and the one-act, one-crime rule; (2) his sentences for the reckless homicide convictions should be reduced from 85% of time served to 50%; and (3) the trial court abused its discretion in sentencing him on the mistaken belief that he would receive good-conduct credit for participating in vocational, educational, and substance abuse programs. The State filed a response, arguing that defendant's petition lacked merit and was untimely. In its oral ruling, the trial court specifically stated that it declined to

recharacterize defendant's petition as a postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). It went on to make the following findings. The sentences imposed on the aggravated DUI and reckless homicide counts did not violate the proportionate penalties clause as there were no identical elements in those charges. Even if this was a meritorious claim, the trial court stated, defendant had raised the issue in his motion to reconsider his sentence but failed to raise it in his direct appeal. Therefore, defendant forfeited the issue. Defendant also misapplied the one-act, one-crime rule to the facts of his case, failing to raise a meritorious claim. Further, he failed to raise the issue on appeal and it was therefore barred by *res judicata*. Regarding the argument that he should have to serve only 50% of the 4-year reckless homicide sentences, the trial court determined that it was moot given that defendant was to serve his 12-year sentence concurrently. Even so, the trial court stated that defendant did not cite to any law directly supporting this argument. The trial court also ruled that there was no evidence presented to support defendant's argument that the trial court abused its discretion in sentencing him. Additionally, defendant could have raised this issue in his direct appeal and failed to do so, thereby forfeiting the issue. Finally, as to all of defendant's claims, the trial court stated that defendant failed to demonstrate due diligence in filing the petition. The trial court then ordered that defendant's petition failed to "raise a meritorious claim or defense," that defendant "failed to exercise due diligence in raising several of his arguments in the original action and/or on appeal," and finally that defendant "failed to timely file" his petition. It therefore dismissed the petition. Defendant timely appealed and filed a *pro se* brief.

¶ 6 On appeal, defendant argues for the first time that his two-year mandatory supervised release term is unconstitutional and was improperly added to his sentence by the Department of Corrections.

He also renews his arguments that: (1) his aggravated DUI and reckless homicide convictions violate the proportionate penalties clause and the one-act, one-crime rule; (2) he should serve 50%, not 85%, of his sentences for the reckless homicide counts because a change in the statute should be applied retroactively to his sentences; and (3) the trial court abused its discretion when it sentenced him under the mistaken belief that he would be eligible for good-time credit if he participated in educational and substance abuse programs.

¶ 7

II. ANALYSIS

¶ 8 When a trial court dismisses a section 2-1401 petition, we review that dismissal *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). Section 2-1401 allows for relief from final judgments more than 30 days after their entry, and petitions must be filed “ ‘not later than 2 years after the entry of the order or judgment.’ ” *People v. Laugharn*, 233 Ill. 2d 318, 322 (2009) (quoting 735 ILCS 5/2-1401(c) (West 2004)). The time period may be tolled for periods of legal disability or duress or where the ground for relief is fraudulently concealed. *Id.* To be entitled to relief under section 2-1401, the petitioner must set forth factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986).

¶ 9 We first address defendant’s MSR argument, which he raises for the first time on appeal. Defendant states that his MSR term was improperly added to his sentence by the Department of Corrections and that the MSR statute is unconstitutional. He argues that these reasons render his sentence void, allowing attack at any time. We disagree with defendant. Defendant’s sentence, including the two-year MSR, was authorized by statute whether or not the trial court sufficiently

admonished him concerning the MSR period. *People v. Santana*, 401 Ill. App. 3d 663, 666 (2010). Further, our supreme court has held that MSR statutes are within the legislature's powers. *People ex rel. Scott v. Israel*, 66 Ill. 2d 190, 194 (1977). Finally, because MSR is part of the sentence imposed by the trial court (730 ILCS 5/5-8-1(d) (West 2006)), it is not imposed by the Department of Corrections. Thus, defendant's sentencing order is not void.

¶ 10 Moving on, we consider the timeliness of defendant's section 2-1401 petition. The final sentencing order has not been made part of this record. However, the trial court stated in its oral ruling on defendant's petition that he sought relief from "the judgment entered against him in this case on October 26, 2007." Further, defendant included in his appendix a copy of the transcript of the court's pronouncement of his sentence, dated October 26, 2007. Defendant had two years from that date to timely file a section 2-1401 petition. His petition was filed beyond that time period. Defendant does not allege that he was under any legal disability or duress or that any claim was fraudulently concealed from him, and therefore there is no reason for the two-year limitation to be extended. Defendant's petition may be saved only if the sentencing order was void for any reason.

¶ 11 A judgment is void only if the court that entered it lacked jurisdiction. *People v. Davis*, 156 Ill. 2d 149, 155 (1993). A voidable judgment is one that is entered erroneously by a court having jurisdiction and is not subject to collateral attack. *Id.* at 155-56. Having jurisdiction or the power to render a judgment does not mean that the judgment rendered must be the correct one, as the power to decide carries with it the power to decide wrong as well as right. *Id.* at 156. We already concluded that defendant's MSR argument did not render the sentencing order void. We similarly conclude that defendant's argument that his aggravated DUI and reckless homicide convictions violated the one-act, one-crime rule because they contained identical elements would not, even if a

valid argument, render his sentencing order void. See *id.* at 157 (holding the defendant's improper conviction on lesser included offense did not render order void). Finally, the same logic applies to defendant's argument that the trial court sentenced him under the mistaken belief that he was eligible for good-time credit if he participated in educational and substance abuse programs when he was not. The fact remains that the trial court had proper jurisdiction to enter the judgment whether it did so correctly or incorrectly. Accordingly, on these issues, defendant's section 2-1401 petition was untimely because he filed it more than two years after the judgment was entered.

¶ 12 Two of defendant's claims may be raised at any time. First, defendant's argument that he was entitled to 50% of time served rather than 85% because of a change in the statute, if true, would render his sentence void because the trial court would have exceeded its authority by ordering the 85%. However, defendant's argument that the statutory change should apply retroactively to him, changing his time to be served from 85% to 50% for the reckless homicide convictions, lacks merit. As the State points out, section 90 of Public Act 96-1200 provided that it "shall not be construed to invalidate any sentence imposed before the effective date of this amendatory Act *** because *** the amendatory changes made by this amendatory Act *** shall be applied prospectively." Pub. Act 96-1200, § 90 (eff. July 22, 2010) (amending 730 ILCS 5/3-6-3 (West 2010)).

¶ 13 Second, defendant's proportionate penalties argument may be raised at any time. *People v. Williams*, 2012 IL App (1st) 100126, ¶ 48. Defendant argues that he cannot be sentenced more harshly for the aggravated DUI conviction where the reckless homicide counts contain the same elements but a shorter sentencing range. This argument fails because reckless homicide may be committed without the offender being under the influence of drugs or alcohol, which is a requisite element of aggravated DUI. The two offenses, therefore, are substantively different as they do not

contain identical elements. See *People v. Gancarz*, 228 Ill. 2d 312, 315-316, 323 (2008) (explaining that the substantive statutory change in 2003 removed a section of the reckless homicide statute that contained element of being under the influence of alcohol or drugs and added it to the aggravated DUI statute, along with the associated 3- to 14-year-sentence). Thus, defendant's claims that he was subject to 50% of time served and that his convictions violate the proportionate penalties clause lacked merit and were properly dismissed.

¶ 14

III. CONCLUSION

¶ 15 Based on the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 16 Affirmed.