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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Carroll County.
)	
Plaintiff,)	
)	
v.)	No. 77-CF-11
)	
STEVEN V. CHESNEY,)	
)	
Defendant-Appellant)	Honorable
)	John F. Joyce,
(Illinois State Police, Appellee).)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Where trial court did not have jurisdiction to modify the judgment, and where a response to a contempt petition did not constitute a section 2-1401 petition, appeals are dismissed for lack of jurisdiction.

¶ 2 In 1978, defendant, Steven V. Chesney, was convicted of burglary and theft (for entering a barn and taking a hog waterer valued at less than \$150) and sentenced to two years of probation.

¶ 3 More than 30 years later, in 2011, Governor Pat Quinn pardoned defendant. Defendant successfully petitioned the court to have his records expunged by the Department of the Illinois State

Police (Department). The Department did not expunge defendant's records, however, and instead sealed them. Defendant petitioned the trial court to find the Department in contempt. The trial court declined to hold the Department in contempt, but ordered the Department to seal the records. The court subsequently denied defendant's motion to clarify, and defendant appeals.

¶ 4 On appeal, defendant does not argue that the Department should be held in contempt. Rather, he contends that the gubernatorial pardon erased his arrest and conviction such that his records must be expunged, not merely sealed. Further, he argues that, to the extent the Criminal Identification Act (Act) (20 ILCS 2630/1 *et seq.* (West 2010)) permits for sealing, rather than expungement, of records following a pardon, it is unconstitutional. For the following reasons, however, we dismiss for lack of jurisdiction.

¶ 5

I. BACKGROUND

¶ 6

A. Relevant Statutory Provisions

¶ 7 Under the Act, "expunge" means to "physically destroy the records or to return them to the petitioner and to obliterate the petitioner's name from any official index or public record, or both." 20 ILCS 2630/5.2(a)(1)(E) (West 2010). In contrast, to "seal" means "to physically and electronically maintain the records, unless the records would otherwise be destroyed due to age, but to make the records unavailable without a court order ***. The petitioner's name shall also be obliterated from the official index required to be kept by the circuit court clerk under [the Clerks of Courts Act]***." 20 ILCS 2630/5.2(a)(1)(K) (West 2010).

¶ 8 Further, in pertinent part, section 5.2(e) of the Act provides:

"Whenever a person who has been convicted of an offense is granted a pardon by the Governor which specifically authorizes expungement, he or she may, upon verified petition

to the Chief Judge of the circuit where the person had been convicted *** have a court order entered *expunging the record of arrest from the official records of the arresting authority* and order that *the records of the circuit court clerk and the Department be sealed* until further order of the court upon good cause shown or as otherwise provided herein ***. All records *sealed by the Department* may be disseminated by the Department only to the arresting authority, the State's Attorney, and the court upon a later arrest for the same or similar offense or for the purpose of sentencing for any subsequent felony. ***." (Emphases added.) 20 ILCS 2630/5.2(e) (West 2010).

¶ 9

B. Underlying Facts

¶ 10 In May 1977, defendant was arrested by the Carroll County Police Department and charged with burglary and theft. In 1978, he was convicted and sentenced to two years of probation.

¶ 11 Defendant was not subsequently convicted of any other criminal offenses or municipal ordinance violations. On April 22, 2011, Governor Pat Quinn granted defendant's petition for executive clemency. The order stated that defendant was granted a "pardon," that he was "hereby acquitted and discharged of and from all further imprisonment and restored to all the rights of citizenship which may have been forfeited by the conviction." The final sentence on the order reads: "Grant Pardon With Order Permitting Expungement Under The Provisions Of 20 ILCS 2630/5.2(e)." Defendant was notified that he was required to pursue the expungement order through the circuit court.

¶ 12 On June 13, 2011, defendant filed with the circuit court a petition to expunge his arrest records from the Carroll County Police Department, the Carroll County Circuit Clerk, and the Department.

¶ 13 In an August 2, 2011, letter, the Department acknowledged receipt of defendant's petition to expunge. The letter noted that the Act defines the specific circumstances under which a criminal record can be sealed or expunged and that his records were evaluated based on the Act's sealing and expungement provisions. As a result of that evaluation, the Department had "no objection" to the petition, which the letter defined as meaning that the Department would "take the appropriate action to *expunge or seal* the arrest event once the court order is received." (Emphasis added.) The second page of the letter lists each of defendant's charges and states that, based upon the Act, the Department had no objection "to sealing" the arrest and it directed "Please ensure the court order directs the [Department] to 'seal' the arrest transaction."

¶ 14 That same day, on August 2, 2011, the court entered an order to expunge (that appears to have been drafted by defendant's counsel, as his name, address, and phone number appear on the bottom, left corner of the last page). In part, the order directed the Department to expunge all of defendant's records, including all photographs, fingerprints, and all other records of identification taken as a result of the underlying arrest.

¶ 15 About six months after the order was entered, in February 2012, defendant filed a petition asking the court to hold the Department in contempt for failing to expunge his records. Specifically, defendant alleged that the Department had received the court's order requiring expungement of his records. Nevertheless, on around September 26, 2011, defendant's counsel received correspondence from the Department that it had complied with the order and *sealed* defendant's records pursuant to section 5.2 of the Act. Further, in October 2011, a Department representative informed defense counsel that, as the Act required the Department to only seal the records, it would not expunge them. Defendant alleged that, because the Department had only sealed the records, he was stopped and

sequestered when traveling internationally for company business and questioned about the charges. Defendant argued that the Department's position was contrary to the court's order, and he noted that the Department never: (1) objected to the petition; (2) moved to vacate or modify the order; or (3) appealed the order.

¶ 16 On April 9, 2012, the Department filed a "response" to defendant's contempt petition. The response contained a certificate of service reflecting service upon defense counsel by U.S. Mail. No affidavits were attached thereto. The Department alleged that, on September 22, 2011, and pursuant to section 5.2(e) of the Act, it sealed its records of defendant's arrest and conviction. The Department noted that section 5.2(e) directed it to only seal, not expunge, the records. Further, it distinguished section 5.2(e) with section 5.2(b)(6) of the Act (20 ILCS 2630/5.2(b)(6) (West 2010)), which, it alleged, permitted the Department to expunge the records only when the conviction was set aside based upon a finding of innocence. As the record did not reflect that defendant's conviction was set aside based upon a finding of innocence, and, as the gubernatorial pardon directed that defendant may petition for expungement under section 5.2(e), it had followed the authorized expungement procedure. Accordingly, the Department argued, to the extent the trial court's order had directed the Department to expunge defendant's records under section 5.2(e), it was void. The Department requested the court to deny the contempt petition and "grant all other relief this court deems just and proper."

¶ 17 On May 1, 2012, defendant filed a reply in which he argued that the Department's position was waived because it did not object to the expungement petition. As such, defendant asked the court to order the Department to comply with the August 2, 2011, expungement order.

¶ 18 On June 25, 2012, the court issued a memorandum opinion in which it noted that it appeared that the legislature and the Department interpreted the statute differently. The court noted that “expungement” means to destroy or obliterate and to “strike out wholly.” It further noted that the Act includes an exception that permits dissemination of records *only* upon a court order. “It appears to this Court that if these records are being disseminated without Court order where they are being picked up on computers, that defeats the purpose of this statute and that the sealing is not doing what the legislature intended.” Accordingly, the court ruled that the Department: (1) would *not* be held in contempt; and (2) was directed to “seal” defendant’s records “in such a manner that they will not be disseminated for public consumption unless a court order is issued.”

¶ 19 On July 24, 2012, defendant moved to clarify the court’s June 25, 2012, order. Specifically, defendant noted that the court ordered the Department to seal the records, but the Department had already done so. The problem, according to defendant, was that sealing allowed the records to remain available to law enforcement personnel without a court order. Accordingly, as the court’s June 25, 2012 order was seemingly intended to prevent defendant from being stopped and questioned while traveling, a goal sealing would not achieve, defendant sought an *expungement* order.

¶ 20 On October 5, 2012, the court filed a supplemental memorandum of opinion. It noted that it interpreted the term “seal” to mean that “only upon a Court order can a record that was ordered to be expunged be accessed by the public or law enforcement personnel.” Accordingly, the court ordered that the Department “is directed to ‘seal’ [defendant’s] records in such a manner that the record will be removed from public access and law enforcement access unless court ordered to be disseminated.”

¶ 21 On November 6, 2012, defendant appealed from the court's June 25, and October 5, 2012, orders. The notice of appeal asks this court to: (1) reverse the circuit court's denial of defendant's contempt petition; and (2) modify the court's orders to direct the Department to expunge defendant's records. On November 26, 2012, defendant filed an identical, second notice of appeal.¹ We consolidated the appeals.

¶ 22

II. ANALYSIS

¶ 23 Both parties, focusing on the timeliness of the notices of appeal, agree (for differing reasons) that this court has jurisdiction over this appeal. For the following reasons, we conclude that they are mistaken. *Buffa v. Haideri*, 362 Ill. App. 3d 532, 536 (2005) (we have an independent obligation to verify our jurisdiction over this appeal).

¶ 24 To review, there is no dispute that the Department received notice of defendant's petition to expunge: it did not object. There is no dispute that the Department received the August 2, 2011, expungement order. It did not move to reconsider the order, object that the order erroneously ordered expungement, as opposed to sealing, nor did it appeal. Accordingly, the August 2, 2011, order was final long before defendant filed his February 2012 contempt petition. As such, the trial court had no jurisdiction to subsequently modify the underlying order. See *e.g.*, *Beck v. Steep*, 144 Ill. 2d 232, 238 (1991) (unless a timely postjudgment motion is filed, a trial court loses jurisdiction

¹Defendant notes that the Act provides that an order issued thereunder does not become final until 30 days after it is served upon all parties. 20 ILCS 2630/5.2(d)(11) (West 2010). Thus, because he served the October 5, 2012, order upon the Department on October 10, 2012, the order became final on November 9, 2012. As such, defendant filed a second notice of appeal on November 26, 2012.

to vacate or modify its judgment 30 days after entry of the judgment); *Holwell v. Zenith Electronics Corp.*, 334 Ill. App. 3d 917, 922 (2002) (absent a timely filed postjudgment motion within 30 days after the entry of judgment, “the trial court lacks the necessary jurisdiction to amend, modify, or vacate its judgment”). Nevertheless, on June 25, 2012, the court did modify the underlying order where it ruled on the contempt petition by both: (1) finding that the Department was not in contempt; *and* (2) ordering the Department to *seal* defendant’s records. The latter part of this order substantively modified the August 2, 2011, order, which had instead ordered *expungement*.²

¶25 Indeed, the substantive change prompted defendant to file his motion to “clarify,” which was, in substance, a motion to reconsider or modify. See, e.g., *People v. Helgesen*, 347 Ill. App. 3d 672, 677 (2004) (substance, not title, controls a motion’s identity); *R&G, Inc. v. Midwest Region Foundation for Fair Contracting, Inc.*, 351 Ill. App. 3d 318, 324 (2004) (same). Specifically, in the motion to “clarify,” defendant essentially asked the court to modify the order to require, as before, that the Department *expunge* the records, explaining that sealing and expungement had different meanings and effects. On October 5, 2012, the court denied the motion, leaving the June 25, 2012, modification unchanged. However, because more than 30 days had passed since entry of the judgment and there was no post-trial motion directed against the judgment, the court lacked

²We further note that the order in no way reflects an intent to *nunc pro tunc* correct a technical error or to have the order reflect the court’s original intent. See *Beck*, 144 Ill. 2d at 238 (a *nunc pro tunc* order corrects the record of judgment but does not alter the actual judgment; it may not be used to “supply omitted judicial action, to correct judicial errors under the pretense of correcting clerical errors, or to cure a jurisdictional defect”); *Holwell*, 334 Ill. App. 3d at 922 (same).

jurisdiction to enter the June 25, 2012, modification and it is void. See *Keener v. City of Herrin*, 235 Ill. 2d 338, 345-46 (2009).

¶ 26 We note that the only mechanism by which the trial court could have re-gained jurisdiction (such that its modification is not void) is if we characterize the Department's response to defendant's contempt petition as a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). See, e.g., *Jones v. Unknown Heirs or Legatees of Maymee C. Fox*, 313 Ill. App. 3d 249, 252 (2000) (once jurisdiction is lost, the only means of challenging the judgment is through a collateral attack, such as by filing a petition under section 2-1401); see also *Beauchamp v. Zimmerman*, 359 Ill. App. 3d 143, 147 (2005) (because the plaintiff did not seek reconsideration or file an appeal from the order within 30 days, section 2-1401 was his only option to seek relief from the order). Section 2-1401 has "stringent" requirements for the petitioner; to be entitled to relief, the petitioner must affirmatively set forth specific facts showing, by a preponderance of the evidence: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief. *Beauchamp*, 359 Ill. App. 3d at 147-48. Further, the petition must be supported by affidavit or other showing of matters not of record. 735 ILCS 5/2-1401 (West 2010); *Beauchamp*, 359 Ill. App. 3d at 148.

¶ 27 On appeal, the Department asks us to treat its response to the contempt petition as a section 2-1401 petition. However, the Department's response to the contempt petition did not, in any way, purport to comply with section 2-1401's "stringent" requirements. For example, it did not set forth any facts purporting to establish, by a preponderance of the evidence, due diligence in both discovering the defense or claim and in presenting the petition, nor did it frame its statutory

argument as a meritorious defense or claim warranting relief from the judgment under section 2-1401. *Keener*, 235 Ill. 2d at 349-50. Other facts suggesting that the Department's filing was simply a response, not a section 2-1401 petition, include that it was: (1) entitled a "response," to the contempt petition, not a "2-1401 petition;" (2) not accompanied by affidavit or other matters not of record (735 ILCS 5/2-1401(b) (West 2010)); and (3) not noticed in compliance with Illinois Supreme Court Rule 106 (see *Keener*, 235 Ill. 2d at 349). Again, we note that nowhere in the body of the response did the Department assert that it was seeking relief under section 2-1401, or even relief from the judgment. The response simply asserted that the Department should not be held in contempt and, generically, for "any other relief the court deemed just." Finally, we also note that the trial court never indicated that it was treating the response as a section 2-1401 petition, nor did it assert that it was granting relief pursuant to section 2-1401. See *id.* at 349.

¶ 28 On appeal, the Department notes that the response argued that section 5.2(e) of the Act mandates only that it seal, not expunge, defendant's records. As such, it argues that the response established a meritorious defense warranting relief from judgment because the order requiring expungement was void. First, we note that it was not for the Department to unilaterally interpret the order, determine it was void, and simply not follow it. See *Beasley v. Hanrahan*, 29 Ill. App. 3d 508, 510-11 (1975) ("All orders are presumed valid and will stand until corrected on review or set aside by some form of authorized and permissible direct attack. We hold that an administrative officer may not take it upon himself to decide which orders are valid and which are not[.]").

¶ 29 Second, while we do not necessarily disagree with the Department's position with respect to its statutory interpretation (*i.e.*, that section 5.2(e) provides that the Department shall "seal" the records), it is incorrect that the court's order is void. An erroneous order is not necessarily void. A

void order is one “entered by a court without jurisdiction of the subject matter or the parties, or by a court that lacks the inherent power to make or enter the order involved.” *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 379-80 (2005); *J.P. Morgan Mortgage Acquisition Corp. v. Straus*, 2012 IL App (1st) 112401, ¶ 11 (“a judgment is void and may be collaterally attacked only where there is a total lack of either subject matter or personal jurisdiction in the court”). Because of the “disastrous consequences which follow,” orders and judgments should be characterized as void only when no other alternative is possible. *Sperry*, 214 Ill. 2d at 380; see also *Straus*, 2012 IL App (1st) 112401 at ¶ 12 (“the trend of more recent authority favors the finality of judgments over alleged defects in validity”). Circuit courts have jurisdiction over all justiciable matters, and a court does not lose jurisdiction simply by making a mistake in determining the facts, the law, or both. *Dovalina v. Conley*, 2013 IL App (1st) 103127, ¶ 31; see also *In re Marriage of David*, 367 Ill. App. 3d 908, 916 (2006) (rejecting argument that an order was void and noting that a court does not “exceed its jurisdiction merely because it overlooks or misapplies” statutory provisions). Instead, a judgment entered erroneously by a court having jurisdiction is considered voidable; it is not, however, subject to collateral attack under section 2-1401. *Dovalina*, 2013 IL App (1st) 103127 at ¶ 30; *Straus*, 2012 IL App (1st) 112401 at ¶ 11 (“where there is simply an erroneous judgment and the trial court is not divested of jurisdiction, an order is not void, but voidable. A voidable order is not subject to collateral attack, but only to direct appeal”). Here, the trial court had jurisdiction under the Act to rule on the expungement petition and the Department’s argument is simply that the court misapplied the statute. As such, the order is not void, but voidable, and is not subject to attack under section 2-1401.

¶ 30 The Department also asserts that the record reflects that it was diligent, and it suggests that the expungement order was confusing. We disagree. First, the order stated simply that, except for certain exceptions that clearly did not apply to defendant, the Department must expunge the records. Second, and again, the Department did not within 30 days file any postjudgment motions challenging the alleged statutory error in the underlying order, nor did it appeal. Third, and in any event, these arguments were not presented in the response to the contempt petition, again refuting the notion that the response was a section 2-1401 petition.

¶ 31 Finally, the Department argues that, even if due diligence was lacking, it was appropriate for the circuit court to modify the August 2, 2011, order to conform with the law. The problem, however, is that, unlike here, the cases the Department cites for that proposition did not concern whether a motion or pleading should be construed as section 2-1401 petition; rather, all involved petitions that were undisputedly properly filed under section 2-1401. See *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 214 (1986); *In re Marriage of Johnson*, 339 Ill. App. 3d 237, 239 (2003); *Zee Jay, Inc. v. Illinois Insurance Guaranty Fund*, 194 Ill. App. 3d 1098, 1101-02 (1990). Here, we have no section 2-1401 petition and we cannot, therefore, reach the question of whether the court properly “granted it.”

¶ 32 In sum, we will not work to cure jurisdictional issues by characterizing motions (or, here, responses to motions) as something they are not. In *Keener*, our supreme court criticized and reversed an appellate court for treating as a section 2-1401 petition a filing that was too late to be considered a posttrial motion, particularly where the late filing met none of the requisites for constituting a section 2-1401 petition. *Keener*, 235 Ill. 2d at 345-51. Recently, this court, following *Keener*, similarly declined to treat as a section 2-1401 petition a filing too late to be considered a

posttrial motion. See *Shatku v. Wal-Mart Stores, Inc.*, 2013 IL App (2d) 1204412, ¶¶ 14-17 (dismissing appeal for lack of jurisdiction after noting that *Keener* had cast doubt on the notion that a court must treat a filing that is too late to be a postjudgment motion as a section 2-1401 petition, and declining to do so where the appellant did not show its appropriateness nor request it).

¶ 33 Here, the Department did not file a timely objection to or appeal the court's expungement order. Its response to the contempt petition cannot be characterized as a section 2-1401 petition. As such, the trial court simply lacked jurisdiction to enter the order that is being appealed (again, the appeal does not concern whether the Department should be held in contempt), and we must dismiss the consolidated appeals for lack of jurisdiction.³ See *Keener*, 235 Ill. 2d at 350 ("because the circuit court had no jurisdiction to enter its order [], the appellate court had no jurisdiction to review that judgment"). Accordingly, the portion of the June 25, 2012, order that modified the August 2, 2011, expungement order (to require sealing instead of expungement) is vacated, and the October 5, 2012, supplemental memorandum of opinion is also vacated.

¶ 34 III. CONCLUSION

¶ 35 Accordingly, the judgment of the circuit court of Carroll County is vacated in part, and we dismiss the consolidated appeals for lack of jurisdiction.

¶ 36 Judgments vacated; cause dismissed.

³Of course, the trial court maintains jurisdiction to enforce its orders, such as through *mandamus* actions. See *e.g.*, *Holwell*, 334 Ill. App. 3d at 922 (even after the 30-day period, courts retain jurisdiction to enforce the terms of a judgment).