

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).

2013 IL App (4th) 120002-U
NO. 4-12-0002
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
July 22, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
JEFFREY L. MARCRUM,)	No. 10CF47
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because the record contradicts the allegations in defendant's petition for relief from judgment (735 ILCS 5/2-1401 (West 2010)), the trial court was correct to grant the State's motion to dismiss the petition.
- ¶ 2 Defendant, Jeffrey L. Marcrum, appeals from the denial of his *pro se* petition for relief from judgment. The office of the State Appellate Defender (OSAD) moves to withdraw from representing defendant because OSAD does not believe that any reasonable argument could be made in support of this appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). We notified defendant of his right to respond, by a certain date, with additional points and authorities, and he did so, reiterating his claims stated in his petition. The State filed a brief, supporting OSAD's motion to withdraw.
- ¶ 3 In our *de novo* review, we agree with OSAD that an appeal in this case would be

frivolous. Therefore, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment.

¶ 4

I. BACKGROUND

¶ 5 In February 2010, defendant and the State entered into a fully negotiated plea agreement in which defendant pleaded guilty to burglary, a Class 2 felony, and agreed to be sentenced as a Class X offender pursuant to section 5-5-3(c)(8) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3(c)(8) (West 2008) (text of section eff. until July 1, 2009)) in exchange for the State's recommendation of a seven-year prison sentence. Additionally, the State agreed to dismiss defendant's pending theft and obstruction-of-justice charges.

¶ 6 In March 2010, defendant filed a *pro se* motion to withdraw his plea, alleging he was "pressured" into entering the plea and "confused" about the "stage and nature of the proceedings" at the time the plea was introduced to the trial court. He claimed he was under "extreme duress" and was suffering from serious medical conditions on the date the plea was entered. He also filed a *pro se* motion to reconsider his sentence. However, at a May 2010 hearing on defendant's motions, defendant's counsel advised defendant wished to withdraw his *pro se* motions.

¶ 7 In April 2011, defendant filed a *pro se* postconviction petition, alleging (1) the State violated his due-process rights by failing to produce exculpatory evidence, and (2) his trial counsel was ineffective for, *inter alia*, filing an inaccurate certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), and advising defendant he would only be required to serve three years of his seven-year sentence upon pleading guilty.

¶ 8 In May 2011, the circuit court entered a written order of dismissal, finding defendant's petition frivolous and patently without merit. Defendant filed a motion to reconsider, which the court denied. Defendant appealed and this court affirmed the first-stage dismissal. *People v.*

Marcrum, 2013 IL App (4th) 110514-U.

¶ 9 In September 2011, defendant filed a *pro se* petition for relief from judgment pursuant to 735 ILCS 5/2-1401 (West 2010), alleging he should not have been sentenced as a Class X offender because two of the convictions used to elevate him to Class X status were void. He claims the sentences for those two convictions should have been ordered to run consecutively instead of concurrently and therefore, those convictions are void. He also alleged his attorney failed to advise him and the trial court failed to admonish him that he could appeal after his motion to withdraw his guilty plea was withdrawn. The State filed a motion to dismiss defendant's petition.

¶ 10 In November 2011, the trial court granted the State's motion and dismissed defendant's petition for relief from judgment, finding defendant's petition failed to state a cause of action. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 A trial court should grant a section 2-1401 petition if the petitioner has pleaded and established a meritorious defense to the action, as well as due diligence in presenting the defense and filing the petition. *Engel v. Loyfman*, 383 Ill. App. 3d 191, 198 (2008). "A section 2-1401 petition is directed to the circuit court's sound exercise of discretion, and the resulting decision will not be disturbed on review unless the court has abused its discretion." *Engel*, 383 Ill. App. 3d at 194.

¶ 13 The trial court did not abuse its discretion by dismissing defendant's section 2-1401 petition because the petition fails to establish a meritorious defense to the judgment against defendant in this criminal case. In his petition, defendant asserts that the current judgment of conviction (Champaign County case No. 10-CF-47) should be vacated because he was sentenced in that case as a Class X offender due to his two prior convictions of a Class 2 offense or greater. See

730 ILCS 5/5-5-3(c)(8) (West 2008) (text of section eff. until July 1, 2009). However, he claims those two prior convictions should be vacated as void because the court ordered the sentences on those prior convictions to run concurrently when they should have been ordered to run consecutively as defendant was on pretrial release from the first offense when he committed the second. See 730 ILCS 5/5-8-4(h) (West 2008) (text of section eff. until July 1, 2009) (if a defendant charged with a felony commits a separate felony while on pre-trial release, the sentences must be served consecutively).

¶ 14 Defendant's argument fails, even if he was correct on his claim of error regarding sentencing, because he not only had two prior Class 2 felonies or greater, he had five. Thus, even if two were vacated as void, he still had three prior qualifying convictions, which elevated him to a Class X offender status for sentencing purposes. Defendant's criminal history consisted of the following: (1) Coles County case No. 93-CF-209, manufacturing/delivery of cannabis, a Class 2 felony; (2) Edgar County case No. 96-103, two burglary convictions, both Class 2 felonies; (3) Champaign County case No. 96-CF-722, unauthorized possession of a controlled substance, a Class 4 felony; (4) Edgar County case No. 02-CF-21, robbery, a Class 2 felony; and (5) Edgar County case No. 02-CF-76, burglary, a Class 2 felony. Even if two of the Class 2 felonies in Edgar County case No. 96-CF-103 were disregarded, as argued by defendant, there remained three Class 2 felonies or greater to elevate defendant to Class-X-offender status for purposes of sentencing. Further, even if the concurrent sentences imposed are void, the underlying convictions are not void. *People v. Hudson*, 2012 IL App (2d) 100484, ¶ 16. Therefore, defendant's first argument set forth in his section 2-1401 petition is without merit.

¶ 15 Defendant also raised a claim that his trial counsel erred by not advising him that he

could appeal after the proceeding on his motion to withdraw his guilty plea. However, at the hearing on his motion to withdraw, his counsel informed the court that defendant wished to withdraw his motion to withdraw his guilty plea. Because he withdrew his motion, there was no judgment from which he could appeal.

¶ 16 Finally, defendant claimed the trial court erred by failing to provide "any appeal-rights admonishments in this cause." Our review of the record indicates the contrary. The court fully and adequately admonished defendant.

¶ 17 Because there are no meritorious claims that can be raised in this appeal, we agree with OSAD's assessment of this case.

¶ 18 III. CONCLUSION

¶ 19 For the foregoing reasons, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 20 Affirmed.