

property, a Class 3 felony, for damaging a wall, a sink, and a toilet while incarcerated at Pontiac Correctional Center. 720 ILCS 5/21-4(a) (West 1996) (when damage is greater than \$500 but less than \$10,000, the offense is punishable as a Class 3 felony). The trial court appointed counsel to represent defendant five days after the grand jury returned the indictment. In June 1997, defendant pleaded guilty to the offense as charged and the court sentenced him to three years in prison, the term to run consecutive to his sentence he was then serving.

¶ 5 In December 2011, defendant filed a *pro se* motion for grand jury transcripts and a motion to proceed *in forma pauperis*. Defendant's motion was denied because "no post-conviction and/or appeals [were] pending."

¶ 6 In January 2012, defendant filed a *pro se* motion to vacate a void judgment, claiming the grand jury that issued the original indictment in 1997 was never impaneled or sworn as required by section 112-2(b) of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/112-2(b) (West 1996)). Defendant again requested copies of the grand jury proceedings. He claimed the transcript would support his argument that the indictment, his guilty plea, and the resulting judgment of conviction were void because the grand jury was never sworn. Defendant attached a copy of the indictment, which had been signed by the foreman of the grand jury and filed on April 3, 1997.

¶ 7 On April 13, 2012, the circuit court made the following docket entry:

"This cause comes before the court on defendant's motion which he titles 'motion to vacate void judgment' entered [June 18, 1997]—over 14 years ago. Defendant contends the judgment is void because the grand jury was not sworn. Def[endant] purports to bring

this before the court under section 2-1401 of the Code of Civil Procedure [(735 ILCS 5/2-1401 (West 2010))]. However, this petition has not been timely filed and no proper explanation has been provided for why the delay should be excused. The matter about which defendant complains is a question of law which was known or should have been known at the time the judgment was entered. Moreover, whether the grand jury was or was not sworn does not make the judgment void, and defendant has failed to provide any legal basis for that argument. Moreover, def[endant] has failed to set forth the elements necessary to proceed with a 2-1401 petition. For these reasons, defendant's petition is dismissed."

This appeal followed.

¶ 8

II. ANALYSIS

¶ 9

Defendant contends his conviction is void because the record does not demonstrate the grand jury was properly impaneled and sworn. Alternatively, defendant requests this court reverse the circuit court's dismissal and remand to allow him the opportunity to obtain transcripts of the grand jury proceedings so that he may determine whether the grand jury was sworn. Specifically, defendant argues that, without a certificate from the clerk showing the impaneling of the grand jury, as required by Illinois Supreme Court Rule 608(a)(2) (eff. Dec. 13, 2005), we must presume the grand jury was not impaneled, and thus could not have been sworn. He contends the trial court lacked subject matter jurisdiction where his indictment was void. As a result of his void indictment and subsequent conviction, he claims the court erred in dismissing his section 2-1401

petition. See 725 ILCS 5/2-1401 (West 2010).

"As a general rule, a petition for relief from judgment under section 2-1401 must be filed within two years after entry of the judgment being challenged. 735 ILCS 5/2-1401(c) (West 1998). A section 2-1401 petition filed beyond the two-year period will not normally be considered. [Citation.] An exception to the two-year period has been recognized where a clear showing has been made that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed. [Citation.] A person may also seek relief beyond section 2-1401's two-year limitations period where the judgment being challenged is void. [Citations.]" *People v. Harvey*, 196 Ill. 2d 444, 447 (2001).

¶ 10 Because defendant raises this issue for the first time more than 14 years after the date of the judgment of conviction, we must first determine whether that judgment could be declared void. Only if the judgment is void can defendant seek the relief he requests beyond the two-year limitation period. He cannot, under the facts of this record, make a clear showing he was under a legal disability or duress or that the grounds for relief were fraudulently concealed in order to excuse his late filing. Rather, he must demonstrate the judgment is void and can therefore be challenged at any time. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002).

¶ 11 An indictment returned by a grand jury that was not sworn does not result in a void judgment of conviction. See *People v. Hughes*, 2012 IL 112817, ¶ 29. "[A] defendant has a right to challenge the sufficiency of a charging instrument for failing to state an offense based on statutory

and due process grounds. However, a successful challenge would render the conviction voidable not void for lack of jurisdiction." *Hughes*, 2012 IL 112817 at ¶ 29.

¶ 12 In support of his argument, defendant relies on *People v. Gray*, 261 Ill. 140 (1913), where the record of the grand jury proceedings did not demonstrate the grand jury was sworn as required by law. The court reversed the defendant's conviction, finding that a grand jury that was not sworn was without jurisdiction to act. *Gray*, 261 Ill. at 142.

¶ 13 Defendant's reliance on *Gray* is misplaced for two reasons. First, *Gray* was decided prior to the effective date of our current constitution. A trial court's subject matter jurisdiction is derived from the state constitution. Ill. Const.1970, art. VI, § 9; *Hughes*, 2012 IL 112817 at ¶ 20. The constitution provides that the circuit court has the power to determine all justiciable matters, which includes "'a controversy appropriate for review by the court ***.'" *Hughes*, 2012 IL 112817 at ¶ 20 (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002)).

¶ 14 Here, defendant was charged under the Criminal Code of 1961 with criminal damage to government supported property (720 ILCS 5/21-4(a) (West 1996)), a controversy appropriate for review by the circuit court. Thus, the court had subject matter jurisdiction. See *People v. Benitez*, 169 Ill. 2d 245, 256 (1996) (an invalid indictment does not deprive the circuit court of jurisdiction). Whether the grand jury was sworn has no effect on the circuit court's power to consider defendant's criminal charge and therefore, any defect in the grand jury proceedings would not result in a void judgment. Without a void judgment, defendant cannot overcome the two-year limitation period required by section 2-1401. 735 ILCS 5/2-1401 (West 2010).

¶ 15 Second, in contrast to *Gray*, defendant asks us to either presume the grand jury was

not sworn or to reverse and remand the case to the circuit court to afford defendant the opportunity to secure the transcripts from the grand jury proceedings. We note an indictment is presumed valid, in the absence of evidence to the contrary, when returned by a legally constituted jury. *People v. Whitlow*, 89 Ill. 2d 322, 330 (1982). The indictment in the record appears valid, as it was signed by the foreman of the grand jury as a true bill. See 720 ILCS 5/11-3(b) (West 1996).

¶ 16 Section 112-2 of the Code of Criminal Procedure (725 ILCS 5/112-2(b) (West 1996)) requires the grand jury be impaneled and sworn by the circuit court. However, the indictment is not required to show on its face compliance with this statutory procedure. The indictment filed in the record before us appears valid. Without a transcript of the grand jury proceedings demonstrating the grand jury was not sworn, defendant cannot demonstrate error and we will not presume error.

¶ 17 Alternatively, defendant contends if he could obtain the transcripts of the proceedings, he could demonstrate error. However, it is defendant's burden as the appellant to provide this court with a complete record sufficient to support his claims of error. Any doubts that arise from the incompleteness of the record will be resolved against him. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). If defendant discovered no transcripts were available, he could have submitted a bystander's report or an agreed statement of facts in accordance with Illinois Supreme Court Rule 323(c), (d) (eff. Dec. 13, 2005). See *People v. Bragg*, 126 Ill. App. 3d 826, 832 (1984) (any doubt arising from the validity of grand jury proceeding should be resolved against the defendant when he failed to provide a transcript of the grand jury proceedings). The record on appeal demonstrates that on May 1, 1997, as part of the State's disclosure to the accused, it forwarded to defendant the grand jury "minutes" consisting of 26 pages. It is apparent defendant had, at that time, access to the transcript from the grand jury proceedings.

¶ 18 In the absence of a record supporting his claim, we will not presume that section 112-2 of the Code of Criminal Procedure (725 ILCS 5/112-2 (West 1996)) was not complied with. See *People v. Bell*, 2013 IL App (3d) 120328, ¶ 9 (defendant alleged the grand jury was not sworn but he failed to produce a sufficient record to support his claim). Accordingly, we will not presume the grand jury was not sworn before it returned defendant's indictment. *Bell*, 2013 IL App (3d) 120328 at ¶ 10 (the lack of the clerk's certificate showing the impaneling of the grand jury as required by Rule 608(a)(2) does not demonstrate error in the absence of a complete record). Nor, will we, for the reasons stated in this decision, reverse and remand this case to afford defendant the opportunity to secure a transcript of the grand jury proceedings to determine whether the grand jury was sworn when it returned defendant's indictment. We conclude the trial court did not err in dismissing defendant's section 2-1401 petition.

¶ 19

III. CONCLUSION

¶ 20 For the foregoing reasons, 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.

¶ 21 Affirmed.