



conviction was void because the charges were filed too late pursuant to principles of mandatory joinder and speedy trial. The court denied the petition, finding that it was not timely filed within two years of the judgment (see 735 ILCS 5/2-1401(c) (West 2010)) and had no basis in fact or law. The defendant appeals, arguing that (1) the limitations period was tolled because defense counsel's failure to explain to him the nature of his conflict of interest constituted fraudulent concealment of the defendant's claim and (2) his claim has merit. In addition, the defendant argues that he is entitled to a credit against his sentence for seven days he spent in custody in Missouri on these charges prior to trial. We affirm the order dismissing the defendant's petition, but amend the mittimus to reflect the sentencing credit.

¶ 3 The charges at issue in this appeal involve the shooting death of Dwight Riddlespriger in the parking lot of an Alton bar on December 15, 1996. Clifton Wheeler shot Riddlespriger 10 times with a gun handed to him by the defendant. On December 16, 1996, the State filed a one-count information charging the defendant with violating the FOID Act. On January 9, 1997, the defendant filed a speedy trial demand. On January 16, a grand jury indicted the defendant on that charge. The assistant State's Attorney who presented the matter to the grand jury was Jack Daugherty, who would subsequently represent the defendant.

¶ 4 A series of continuances followed. On January 21, 1999, a grand jury indicted the defendant on an amended indictment. The amended indictment charged the defendant with one count of first-degree murder (720 ILCS 5/9-1(a)(1) (West 1996)); one count of armed violence (720 ILCS 5/33A-2 (West 1996)); and one count of violating the FOID Act (430 ILCS 65/14(c)(1) (West 1996)). The State subsequently filed an amended information adding a charge of murder based on a felony-murder theory (720 ILCS 5/9-1(a)(3) (West 1996)).

¶ 5 On September 28, 1999, Daugherty entered his appearance as defense counsel. On

November 29, the defendant's trial in this matter commenced. Just prior to trial, Daugherty informed the court that he was the assistant State's Attorney who handled the initial indictment, charging the defendant with only the FOID charge. Daugherty then told the court, "I [have] informed Mr. Ewing of same, and he has indicated that he is willing to waive any potential conflicts that may or may not exist." The court asked the defendant whether he had a problem with the fact that Daugherty had previously acted as the prosecutor when the defendant was indicted. The court also asked the defendant if he needed more time to think about this decision. The defendant indicated that he did not object to Daugherty representing him after previously securing the indictment and did not need more time to think about it. The court then explained to the defendant that waiver meant that he could not raise the issue of a conflict of interest later. The court asked the defendant if he understood this, and the defendant said yes. As the defendant points out in this appeal, the court did not discuss the nature of the conflicts that might arise as a result of Daugherty's previous role in the case.

¶ 6 During the trial, the court granted the defendant's motion for a mistrial based on the introduction of evidence that the defendant was involved in uncharged crimes. A second trial commenced on December 6, 1999. Witnesses for the State testified that the events leading up to Dwight Riddlespriger's death began with a fistfight inside Pete's Lounge. As a result of the fight, the bar was cleared. In the parking lot, witnesses heard Riddlespriger tell the defendant and Clifton Wheeler that he would take either of them on in a fight. Another witness testified that Riddlespriger looked at the defendant and announced that he was tired of people owing him money. Witnesses testified that the defendant and Wheeler walked to the defendant's car. The defendant retrieved a handgun from under the seat and handed it to Wheeler. Wheeler then walked toward Riddlespriger and shot him 9 or 10 times.

¶ 7 Additional witnesses for the State testified that the defendant admitted to them that

he gave Wheeler the gun and told Wheeler to "handle [his] business." According to these witnesses, the defendant told Wheeler to wait and shoot Riddlespriger in a different location. Additional witnesses testified that prior to the shooting, Riddlespriger physically attacked and injured the defendant's father because he owed Riddlespriger money.

¶ 8 The defendant's father and brother both testified that Riddlespriger had never harmed the defendant's father. Other defense witnesses testified that the defendant was not with Wheeler when they left Pete's Lounge. The defense intended to call Clifton Wheeler to the stand. Wheeler had testified at the grand jury hearing that he shot Riddlespriger in self-defense. He testified that Riddlespriger threatened to kill him. As Wheeler backed away from Riddlespriger, he reached behind him hoping that someone in the crowd of onlookers would pass him a gun. The defendant handed Wheeler a gun, and Wheeler shot Riddlespriger in self-defense. However, Wheeler refused to testify at trial on the grounds that his testimony might incriminate him.

¶ 9 The jury found the defendant guilty of all charges. On November 20, 2000, the court sentenced the defendant to concurrent sentences of 45 years on the murder charge, 20 years for armed violence, and 3 years for the FOID Act violation. The defendant filed a motion to reconsider his sentence, which the court denied. The defendant then filed a direct appeal. This court affirmed his convictions and sentences for murder and violating the FOID Act, but vacated his conviction for armed violence. *People v. Ewing*, No. 5-01-0154 (Feb. 13, 2003) (unpublished order pursuant Supreme Court Rule 23).

¶ 10 On October 7, 2002, while his direct appeal was pending, the defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2002)). He alleged that (1) the State knowingly presented the perjured testimony of two witnesses, (2) he received ineffective assistance of counsel due to an "apparent" conflict of interest, and (3) appellate counsel provided ineffective assistance for failing to raise these

issues in the defendant's direct appeal. The matter was docketed for second-stage proceedings, and counsel was appointed to represent the defendant. However, the defendant fired at least three attorneys and filed numerous petitions for substitution of judges, all of which were denied.

¶ 11 The defendant also filed two *pro se* amended petitions for postconviction relief. The amended petitions alleged that (1) the defendant received ineffective assistance of counsel because defense counsel had a *per se* conflict of interest due to his prior role as the prosecutor at the defendant's first grand jury hearing, (2) the defendant's waiver of the conflict of interest was not knowing and voluntary because he did not understand the implications of the conflict, and (3) the trial judge was required to admonish the defendant about the significance of defense counsel's conflict of interest, but failed to do so.

¶ 12 On April 19, 2010, the defendant filed a *pro se* petition for relief from judgment. See 735 ILCS 5/2-1401 (West 2010). He alleged that the two-year time limit (see 735 ILCS 5-2-1401(c) (West 2010)) was inapplicable because his convictions were void (see 735 ILCS 5/2-1401(f) (West 2010)). He further alleged that (1) all charges were based on the defendant's act of handing a gun to Clifton Wheeler, which Wheeler then used to kill Dwight Riddlespriger, and (2) all relevant facts were known to the prosecution when the first charge was filed. He argued that, in light of these facts, the second indictment, charging him with murder, should have been dismissed pursuant to principles of mandatory joinder and speedy trial. The State filed a motion to strike the defendant's petition, arguing that it was not timely filed within two years of entry of the judgment of conviction.

¶ 13 The court held a hearing in the matter on March 30, 2011. The defendant appeared *pro se*. The court asked the defendant what factual matter he was asserting that could not have been presented to the trial court in his criminal trial. The defendant replied that, had the fact that "the compulsory joinder statute was applicable to [the defendant's] case" been

known at the time of his trial, it would have prevented his conviction. The court then asked the defendant to respond to the State's argument that his petition was untimely. The defendant responded, arguing that the time limit in section 2-1401 was inapplicable because the judgment of conviction was void. The State argued that the judgment was not void because the court had the power to render it. In addition, the State argued that proceedings on a postconviction petition were a more appropriate forum for addressing the underlying claim.

¶ 14 In ruling from the bench, the court found that the judgment of conviction was not void and the defendant's section 2-1401 petition was filed beyond the two-year limit. The court thus found the petition to be untimely. The court also found that there was no merit to the defendant's argument that mandatory joinder applied to the charges against him in his criminal trial. The court entered a written order to that effect the same day. This appeal followed.

¶ 15 We review *de novo* a court's decision to grant or deny a petition for relief from judgment based on the pleadings. *S.I. Securities v. Powless*, 403 Ill. App. 3d 426, 439, 934 N.E.2d 1, 11 (2010) (citing *People v. Vincent*, 226 Ill. 2d 1, 16, 871 N.E.2d 17, 27 (2007)). The defendant's contention that the court erred in denying his petition consists of a series of interconnected arguments. First, he argues that he was entitled to the dismissal of the charges in the amended indictment. He points out that our mandatory joinder statute requires that offenses based on the same acts must be brought at the same time if all offenses are known to the prosecution. 720 ILCS 5/3-3 (West 1996). He next notes that where mandatory joinder applies, the statutory speedy trial deadline for all such charges begins to run when the original charge is filed even if the additional charges are not joined at the outset. See *People v. Gooden*, 189 Ill. 2d 209, 217, 725 N.E.2d 1248, 1252 (2000). Continuances attributable to the defendant toll the speedy trial time limit for charges that are pending before the court;

however, continuances are not attributed to the defendant with respect to any additional charges that are not before the court when they occur. See *People v. Williams*, 94 Ill. App. 3d 241, 249, 418 N.E.2d 840, 846 (1981).

¶ 16 Applying these principles to the proceedings in the defendant's trial here, the defendant argues that the court would have been required to dismiss the murder charge had defense counsel requested this relief. He acknowledges that ordinarily a defendant waives the right to have charges dismissed on the basis of the speedy trial statute unless he asserts this right prior to conviction. See *People v. Pearson*, 88 Ill. 2d 210, 216, 430 N.E.2d 990, 992 (1981). However, he further contends that he received ineffective assistance of counsel due to defense counsel's *per se* conflict of interest. See *People v. Hernandez*, 231 Ill. 2d 134, 143-44, 896 N.E.2d 297, 303-04 (2008) (explaining that a *per se* conflict of interests arises when "defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant"). The defendant notes that defense counsel could not be expected to argue that he had personally secured an indictment against the defendant in violation of the defendant's speedy trial rights. He argues that a defendant is entitled to relief where the waiver of this right was the result of ineffective assistance of counsel. See *People v. Howard*, 130 Ill. App. 3d 967, 973, 474 N.E.2d 1345, 1349-50 (1985). The defendant acknowledges that he waived the right to object to the conflict of interests, but asserts that his waiver was not knowing and voluntary because he could not be expected to understand the implications of the conflict without explanation.

¶ 17 The defendant's argument that the two-year time limit was tolled is directly related to the nature of the underlying claim. He argues that the two-year time limit for filing a section 2-1401 petition was tolled because his attorney fraudulently concealed this claim from him. He notes that an attorney acts as a fiduciary for his client, and points out that, in a different context, an attorney's failure to disclose pertinent facts about his performance has

been found to constitute fraudulent concealment sufficient to toll an applicable limitations period. See *DeLuna v. Burciaga*, 223 Ill. 2d 49, 79-81, 857 N.E.2d 229, 247-48 (2006) (explaining that an attorney's failure to inform his clients of his actions while representing them constituted fraudulent concealment of the facts giving rise to their legal malpractice claim, thereby tolling the statute of repose on that claim).

¶ 18 We find these arguments unpersuasive. The primary problem for the defendant is that all of these arguments depend upon his claim of ineffective assistance of counsel. The defendant did not include that claim in his section 2-1401 petition and, as we will explain, a section 2-1401 petition is not an appropriate vehicle for such a claim.

¶ 19 A petitioner seeking relief from judgment under section 2-1401 must allege specific facts demonstrating (1) the existence of a meritorious defense or claim, (2) due diligence in attempting to present that defense or claim at trial, and (3) due diligence in filing the petition for relief from judgment. *People v. Pinkonsly*, 207 Ill. 2d 555, 565, 802 N.E.2d 236, 243 (2003). In addition, if the petition is filed more than two years after entry of the challenged judgment, the petitioner must allege facts showing that the basis for relief was fraudulently concealed and could not have been discovered through the exercise of due diligence. *S.I. Securities*, 403 Ill. App. 3d at 441, 934 N.E.2d at 13. Here, as previously noted, the defendant's arguments concerning all but the first of these elements depend upon his claim of ineffective assistance of counsel, a claim he did not raise in his petition.

¶ 20 Moreover, the purpose of a section 2-1401 petition is to bring to the court's attention *factual* matters that would have prevented entry of the judgment had they been known to the court at the time of trial. *Klose v. Mende*, 378 Ill. App. 3d 942, 947, 882 N.E.2d 703, 709 (2008). Thus, it is generally not available as a mechanism to obtain relief from errors of law. *Klose*, 378 Ill. App. 3d at 951, 882 N.E.2d at 712. For this reason, our supreme court has "long held that section 2-1401 proceedings are not an appropriate forum" for claims of

ineffective assistance of counsel. *Pinkonsly*, 207 Ill. 2d at 567, 802 N.E.2d at 244.

¶ 21 The supreme court has also recognized, however, that the statutory language of section 2-1401 does not expressly limit its application to errors of fact. *People v. Lawton*, 212 Ill. 2d 285, 297, 818 N.E.2d 326, 334 (2004). As such, the court has held that a section 2-1401 petition is a viable mechanism for bringing ineffective-assistance-of-counsel claims in situations where relief under the Post-Conviction Hearing Act is not available. See *Lawton*, 212 Ill. 2d at 295, 818 N.E.2d at 333-34 (explaining that section 2-1401 is an appropriate avenue to raise claims that a defendant received ineffective assistance of counsel in proceedings under the Sexually Dangerous Persons Act because relief under the Post-Conviction Hearing Act is not available to these defendants).

¶ 22 Here, the defendant not only could bring his claim of ineffective assistance of counsel in a postconviction petition, he in fact did so. Thus, his claim of ineffective assistance of counsel would not be cognizable under section 2-1401. We may affirm the trial court's ruling on this basis alone. See *People v. Dinelli*, 217 Ill. 2d 387, 403, 841 N.E.2d 968, 978 (2005) (noting that an appeals court may affirm a trial court's ruling on any basis appearing in the record). In addition, however, we reiterate that the defendant did not allege *in his petition* any facts demonstrating that he exercised due diligence in attempting to present the speedy trial issue at trial or in bringing his section 2-1401 petition as early as possible, and he did not allege *in his petition* any facts demonstrating that the salient facts were fraudulently concealed. We find no error in the trial court's ruling.

¶ 23 The defendant next contends that he is entitled to a credit of seven days against his sentence for time spent in custody in Missouri when he was first arrested on these charges. The defendant was arrested in Missouri on the FOID charge on January 2, 1997. He was booked into the Madison County jail on January 8 and released on bond the same day. The defendant was subsequently arrested in Illinois after being indicted for first-degree murder

in this case. The record reflects that the defendant received sentence credit for the time spent in custody from the time he was arrested for murder until he was sentenced, but he did not receive credit for the seven days spent in custody when he was first arrested in 1997. The State concedes that the defendant is entitled to a credit for those seven days, and we agree. See 730 ILCS 5/5-4.5-100(b) (West 2012); *People v. Williams*, 23 Ill. App. 3d 127, 130, 318 N.E.2d 692, 694 (1974). Accordingly, we amend the mittimus to reflect the seven-day credit.

¶ 24 For the reasons stated, we affirm the judgment denying the defendant's section 2-1401 petition.

¶ 25 Affirmed as amended.