NOTICE
Decision filed 06/07/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 110458-U

NO. 5-11-0458

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Marion County. |
| | ) | |
| v. | ) | No. 03-CF-217 |
| | ) | |
| NATHAN RUSSELL, | ) | Honorable |
| | ) | Wm. Robin Todd, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

## ORDER

¶ 1 *Held*: The motion of the State Appellate Defender to withdraw was granted and the dismissal of the defendant's filing affirmed where there were no meritorious, nonfrivolous arguments to be made on the defendant's behalf regarding his denial of good-conduct credits.

¶ 2 The defendant Nathan Russell appeals the circuit court's dismissal of his "motion for specific performance of plea agreement" which was presented by the defendant under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The State Appellate Defender has been appointed to represent him. The State Appellate Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and an extension of time to file briefs, memoranda, or other documents demonstrating why the dismissal should not be affirmed and why counsel should not be permitted to withdraw. The defendant has not done so. Upon

examination of the entire record and brief of the State Appellate Defender, we find no error or potential grounds for appeal. Therefore, we now grant the motion of the State Appellate Defender to withdraw as counsel and affirm the judgment of the circuit court of Marion County based upon the following.

¶ 3 We will present only the facts and procedure relevant to a determination of the present appeal. On August 13, 2003, the defendant was charged with unlawful possession with intent to deliver a controlled substance, pursuant to section 401(a)(2)(B) of the Illinois Controlled Substances Act (720 ILCS 570/401(a)(2)(B) (West 2002)), and armed violence, pursuant to section 33A-2(a) of the Criminal Code of 1961 (720 ILCS 5/33A-2(a) (West 2002)). On November 7, 2003, the defendant pled guilty to armed violence in exchange for a sentence of 20 years and the State's willingness to dismiss the charge of unlawful possession with intent to deliver. In February of 2006, the defendant filed a postconviction petition, which was denied by the circuit court. This court affirmed the judgment of the circuit court. *People v. Russell*, No. 5-09-0419 (June 16, 2010) (unpublished order under Supreme Court Rule 23).

¶ 4 On May 23, 2011, the defendant filed his "motion for specific performance of plea agreement", which was denied by the circuit court. In his motion, the defendant alleged that he had not received the specific performance of his negotiated plea agreement, and that, as a result, his "rights under the U.S. Constitution and Illinois Constitution were substantially denied." He specifically alleged that his due process and fundamental fairness rights were violated because his plea agreement "has been modified by *** not allowing me to get my 6 months meritorious and supplemental Good Time to my sentence which I have found out since arriving in the Illinois Department of Corrections, and thus, I have added the time that I'm supposed to do and it totals 10 years, not 9½ years."[1] The defendant stated in his motion

[1]As counsel points out in his brief, Public Act 97-697 (eff. June 22, 2012) (amending

that his lawyer "told me I would get 6 months." He also states in underlined form that he does not wish to vacate the plea or the conviction.

¶ 5 ANALYSIS

¶ 6 The purpose of a petition for relief from judgment under section 2-1401 (735 ILCS 5/2-1401 (West 2010)) is "to bring before the trial court facts not appearing in the record which, if known to the trial court at the time judgment was entered, would have prevented the judgment." *Physicians Insurance Exchange v. Jennings*, 316 Ill. App. 3d 443, 457 (2000) (citing *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273 (1982); *In re Charles S.*, 83 Ill. App. 3d 515 (1980); *Klein v. Steel City National Bank*, 212 Ill. App. 3d 629 (1991)). "[W]here a section 2-1401 petition is filed beyond two years after the judgment was entered, it [generally] cannot be considered." *People v. Caballero*, 179 Ill. 2d 205, 210 (1997) (citing 735 ILCS 5/2-1401(c) (West 1992); *People v. Logan*, 49 Ill. App. 3d 787, 790 (1977)). "[T]he two-year limitation *** must be adhered to in the absence of a clear showing that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed." *Id.* at 211 (citing *Crowell v. Bilandic*, 81 Ill. 2d 422, 427 (1980); *People v. Berland*, 74 Ill. 2d 286 (1978)).

¶ 7 With regard to the dismissal of a section 2-1401 petition, our supreme court has held that "responsive pleadings are no more required in section 2-1401 proceedings than they are in any other civil action." (*People v. Vincent*, 226 Ill. 2d 1, 9 (2007)) and that "a trial court may, on its own motion, dispose of a matter when it is clear on its face that the requesting party is not entitled to relief as a matter of law." *Id.* at 12 (citing *Mitchell v. Normal James Construction Co.*, 291 Ill. App. 3d 927 (1997); *Rhodes v. Mill Race Inn, Inc.*, 126 Ill. App.

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730 ILCS 5/3-6-3 (West 2010)) applied new terminology to the term "good[-]conduct credits," found in section 3-6-3 of the Unified Code of Corrections, which is now labeled "sentence credits."

3d 1024 (1984)).

¶ 8 As a preliminary matter, we note, as has the State Appellate Defender, that the defendant's petition was well outside the two-year time frame allowed by statute. 735 ILCS 5/2-1401(c) (West 2010). However, the State waives any argument that the defendant's filing was untimely if it fails to raise the issue in the trial court. *People v. Pinkonsly*, 207 Ill. 2d 555, 564 (2003). Here, the State did not challenge the timeliness of the defendant's petition in the trial court, and therefore, we move on to the merits of the petition. In reviewing the merits, we consider all well-pleaded facts admitted as the State did not file an answer to the defendant's petition. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009) (citing *People v. Vincent*, 226 Ill. 2d 1, 10 (2007)).

¶ 9 In this case, we agree with the State Appellate Defender that there are no nonfrivolous arguments to be made on behalf of the defendant viewing the defendant's filing as a petition for relief from judgment. The sole basis for the defendant's filing was that he did not receive six months of good-conduct credit; however, the award of such credit is left to the discretion of the Director of the Department of Corrections. 730 ILCS 5/3-6-3(a) (West 2010). The defendant has not attached any affidavit or other appropriate showing, to his petition, as to matters not of record, as is required by the statute. 735 ILCS 5/2-1401(b) (West 2010). While the defendant did write, in the blank where attachments are to be listed, that his lawyer told him he would get six months, there is no indication in the record that either defense counsel, the prosecutor, or the judge advised the defendant that such was the case. In his petition, the defendant states, "<u>I wish Not to vacate the plea or the conviction</u>." The defendant cannot seek relief from judgment under section 2-1401 and simultaneously seek enforcement of the judgment.

¶ 10 The State Appellate Defender next argues that the defendant would not be aided if his filing were recharacterized as a petition for postconviction relief. " '[W]hile a trial court *may*

treat a *pro se* pleading as a postconviction petition, there is no *requirement* that the court do so.' " (Emphasis in original.) *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010) (quoting *People v. Shellstrom*, 216 Ill. 2d 45, 53 n.1 (2005)). "It cannot be error for a trial court to fail to do something it is not required to do." *Id.* Therefore, "a trial court's decision not to recharacterize a defendant's *pro se* pleading as a postconviction petition may not be reviewed for error." (Emphasis omitted.) *Id.*

¶ 11 In this case, there is no indication in the circuit court's order that the judge intended to recharacterize the defendant's "motion" presented under section 2-1401 as a petition for postconviction relief, and therefore, we need not review it as such. Even if it were recharacterized as such, the defendant has previously filed a petition for postconviction relief and would therefore need to seek leave of court to file a successive petition, something which he failed to do in the "motion" which is the subject of this appeal.

¶ 12 We also agree with the State Appellate Defender that the circuit court did not err in failing to treat the defendant's action as a complaint for *mandamus* relief. The defendant did not present his "motion" as a *mandamus* action, nor is there any indication in the order that the circuit court intended to recharacterize it as such. In any event, in order to succeed on a *mandamus* claim, "the defendant must have a clear duty to act and the plaintiff must show a clear right to the requested relief." *Guzzo v. Snyder*, 326 Ill. App. 3d 1058, 1063 (2001) (citing *Freeman v. Lane*, 129 Ill. App. 3d 1061 (1985)). With regard to discretionary power, *mandamus* is generally only applicable "to prevent a clear abuse of discretion or to control the exercise of discretion so that it is exercised consistent with the applicable law." *Id.* (citing *People ex rel. Collins v. Young*, 83 Ill. App. 2d 312, 318 (1967)).

¶ 13 The defendant has failed to demonstrate a clear duty to act on the part of the Director, and he has failed to demonstrate a clear right to something that is discretionarily awarded. We therefore agree with the State Appellate Defender that any argument to the contrary

would be frivolous and without merit.

¶ 14 CONCLUSION

¶ 15 The motion of the State Appellate Defender is granted, and the judgment of the circuit court is affirmed.

¶ 16 Motion granted; judgment affirmed.