

**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).

2014 IL App (4th) 130479-U

NO. 4-13-0479

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**  
July 28, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

JEFFREY A. EWING,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
HONORABLE ANN CALLIS, HONORABLE JAMES	)	No. 09MR749
HACKETT, HONORABLE RICHARD TOGNARELLI,	)	
and THE CIRCUIT COURT OF MADISON COUNTY,	)	Honorable
ILLINOIS,	)	John W. Belz,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.  
Justices Turner and Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court committed no error in denying plaintiff's (1) motion for an order *nunc pro tunc*, requesting that the court correct a previously filed notice of appeal to reflect that it was timely filed, and (2) petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), challenging the court's decision to dismiss his requests for *habeas corpus* relief and this court's dismissal of his appeal of that decision.

¶ 2 In August 2009, plaintiff, Jeffrey A. Ewing, an inmate in the Illinois Department of Corrections (DOC), filed a *pro se* petition for *habeas corpus* relief (735 ILCS 5/10-101 to 10-137 (West 2008)), naming as defendants the Honorable Ann Callis; the Honorable James Hackett; the Honorable Richard Tognarelli; and the circuit court of Madison County, Illinois. On defendants' motion, the trial court dismissed plaintiff's petition. Plaintiff appealed, but this court dismissed his appeal for being untimely filed. See *Ewing v. Callis*, No. 4-11-0528 (Feb. 8,

2012) (appeal dismissed).

¶ 3 Plaintiff returned to the trial court and filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), challenging both the trial court's dismissal of his *habeas corpus* petition and this court's dismissal of his appeal. He also filed a motion asking the trial court to either enter an order *nunc pro tunc*, which corrected his previously filed notice of appeal to reflect that it was timely filed, or reinstate his *habeas corpus* petition. After reviewing plaintiff's filings, the trial court denied his requests for relief. He appeals, arguing his section 2-1401 petition and motion for order *nunc pro tunc* were "erroneously dismissed." Plaintiff maintains the case should be remanded for a hearing to determine whether his first appeal in the matter was timely filed. We affirm.

¶ 4

#### I. BACKGROUND

¶ 5 Plaintiff is a DOC inmate, serving a 45-year sentence for first-degree murder and a 3-year sentence for violating the Firearm Owners Identification Card Act in connection with Madison County case No. 96-CF-2295. In 1999, he was additionally indicted in Madison County case No. 99-CF-2709 on multiple counts of first-degree murder and one count of aggravated battery with a firearm. On August 10, 2009, plaintiff filed a *pro se* petition for *habeas corpus* relief in the circuit court of Sangamon County, arguing he was being confined and restrained by unconstitutional and unlawful means in connection with case No. 99-CF-2709, which had remained pending. (In his brief, plaintiff asserts the trial court issued an order granting his complaint for *habeas corpus* relief in November 2009; however, the record does not support his assertion and reflects, at that time, the court actually allowed plaintiff's motion for leave to proceed *in forma pauperis*.) On December 13, 2010, plaintiff filed a *pro se*

supplemental complaint for *habeas corpus* relief and, again, raised claims related to case No. 99-CF-2709.

¶ 6 On February 24, 2011, defendants filed a motion to dismiss plaintiff's claims for *habeas corpus* relief. On May 10, 2011, the trial court granted defendants' motion. In a docket entry, the court noted it conducted a phone conference with the parties on April 28, 2011, during which they presented argument on the motion to dismiss. It further stated as follows:

"After taking the matter under advisement to review all submitted documents and review all applicable case law, the Court grants the Defendants' Motion to Dismiss \*\*\*. After having granted numerous motions to supplement complaint, the Court finds [plaintiff] has still failed to file a valid course [*sic*] of action pursuant to the *habeas corpus* statute. The allegations do not implicate the jurisdiction of the Circuit Court over the criminal case or qualify as post-conviction events justifying the immediate release from custody of [plaintiff]. Additionally, the complaint is dismissed \*\*\* because [plaintiff] is in custody pursuant to a valid, unchallenged Judgment. The valid Judgment entered on [plaintiff's] 1996 convictions preclude relief on [plaintiff's] complaint. [Plaintiff's] *Habeas Corpus* Complaint is dismissed with prejudice. This is a final appealable Order."

The court directed the circuit court clerk to send a copy of its docket entry to all parties of record.

¶ 7 On June 8, 2011, correspondence from defendant was filed, "requesting the Order

that was suppose [sic] to be entered by th[e] Court in May 2011." The same date, the trial court made the following docket entry:

"The Court reviews correspondence from [plaintiff] \*\*\*. The clerk is again ordered to send a copy of the 5/10/11 docket sheet immediately to [plaintiff] \*\*\*. The Court in its 5/10/11 ruling dismissed this case with prejudice so nothing further may be set with this Court. [Plaintiff] can appeal to a higher Court."

The court also directed the clerk to send a copy of its docket entry to all parties.

¶ 8 On June 20, 2011, plaintiff filed a notice of appeal (signed by him on June 15, 2011, and mailed from Menard Correctional Center on June 16, 2011), seeking review of the judgment "which denied his *Habeas Corpus* Complaint." Before this court, defendants filed a motion to dismiss plaintiff's appeal on the basis that his notice of appeal was untimely filed. Plaintiff filed a response, asserting he did not receive notice of the trial court's May 2011 order and had no knowledge that an order had been entered until on or about June 15, 2011, after the trial court responded to his inquiry regarding the status of the case. On February 8, 2012, this court allowed defendants' motion and dismissed plaintiff's appeal. *Ewing*, No. 4-11-0528 (Feb. 8, 2012). On March 14, 2012, we denied plaintiff's petition for rehearing, in which he again asserted he had no knowledge of the trial court's May 2011 order until after June 8, 2011, when copies of the court's judgment were mailed to the parties and its order "made public."

¶ 9 On March 12, 2012, plaintiff filed a *pro se* petition for relief from judgment with the trial court pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). He challenged the court's dismissal of his *habeas corpus* petition, asserting it did not have statutory

authority to deny his requests for relief and he was denied his right to procedural due process when his petition was dismissed without adequate notice and an opportunity to be heard. Plaintiff also reiterated arguments made in connection with his requests for *habeas corpus* relief. Further, he argued the "cause must be vacated for further proceedings" because he was not promptly notified of the trial court's May 2011 dismissal order and, as a result, was deprived of his right to appeal.

¶ 10 On April 10, 2013, plaintiff filed a *pro se* "Motion For Order *Nunc Pro Tunc* Correcting Omissions In Previous Order." Again, he asserted he had no knowledge of the trial court's May 2011 order dismissing his *habeas corpus* petition until after June 8, 2011, when the court clerk sent all parties copies of the court's May 2011 docket entry. Plaintiff maintained his notice of appeal was timely filed within 30 days of his receipt of the court's decision and his appeal was erroneously dismissed for being untimely. He asked the trial court to "issue and enter an order *Nunc Pro Tunc*, correcting [his] previously filed Notice of Appeal to reflects [*sic*] that it was Timely filed." In the alternative, plaintiff requested the court reinstate his *habeas corpus* complaint.

¶ 11 On May 7, 2013, the trial court made a docket entry, denying plaintiff his requested relief. The court stated it had reviewed "all documents filed in th[e] matter." It determined this appellate court had "rendered a final opinion in the case" and, as a result, the "matter [was] closed" and "all matters [were] moot."

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Plaintiff appeals *pro se*, arguing the trial court erred in denying both his section 2-

1401 petition and his motion for an order *nunc pro tunc*. He contends this court's dismissal of his first appeal was not an adjudication on the merits and, thus, did not foreclose consideration by the trial court of claims raised in his section 2-1401 petition and motion for a *nunc pro tunc* order. Plaintiff continues to challenge the propriety of this court's dismissal of his initial appeal, arguing his notice of appeal was timely filed. He asks that we vacate that dismissal and reinstate his appeal.

¶ 15 Defendants argue *res judicata* and the law-of-the-case doctrine bar relitigation of the timeliness of plaintiff's June 2011 notice of appeal, which sought review of the trial court's dismissal of plaintiff's requests for *habeas corpus* relief. Additionally, they maintain that neither a motion for an order *nunc pro tunc* nor a section 2-1401 petition for relief from judgment was a proper vehicle for challenging the dismissal of plaintiff's first appeal.

¶ 16 We agree with defendants' contention that the law-of-the-case doctrine bars relitigation of the timeliness of plaintiff's first appeal. That doctrine "generally bars relitigation of an issue previously decided in the same case." *People v. Sutton*, 233 Ill. 2d 89, 100, 908 N.E.2d 50, 58 (2009). "Thus, the determination of a question of law by an appellate court in the first appeal may be binding on the court in a second appeal." *Sutton*, 233 Ill. 2d at 100, 908 N.E.2d at 58.

¶ 17 This court dismissed plaintiff's first appeal on the basis that his notice of appeal was untimely filed. As a result, issues related to the timeliness of that appeal have been resolved and are not subject to relitigation in this appeal. Those issues were also not subject to relitigation in the trial court. Both plaintiff's motion for order *nunc pro tunc* and his section 2-1401 petition for relief from judgment improperly challenged this court's dismissal of his first appeal. The trial

court correctly denied requests for relief that were based upon such challenges.

¶ 18 We note plaintiff's section 2-1401 petition also raised claims challenging the trial court's dismissal of his requests for *habeas corpus* relief. Although those claims were not foreclosed by the dismissal of plaintiff's first appeal, we find the court's denial of his request for section 2-1401 relief based upon those claims was also appropriate.

¶ 19 "Section 2-1401 provides a statutory procedure permitting vacatur of final judgments and orders after 30 days from their entry." *People v. Coleman*, 206 Ill. 2d 261, 288, 794 N.E.2d 275, 292 (2002). "The purpose of a petition under section 2-1401 is to bring before the trial court facts not appearing in the record which, if known to the court and petitioner when judgment was entered, would have prevented its entry." *People v. Lawton*, 335 Ill. App. 3d 1085, 1087, 781 N.E.2d 1122, 1124 (2002). A section 2-1401 petition is not a substitute for direct appeal and "[p]oints previously raised at trial and other collateral proceedings cannot form the basis of a section 2-1401 petition for relief." *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000).

¶ 20 Here, plaintiff's section 2-1401 petition failed to set forth any unknown facts which would have prevented the trial court's dismissal of his requests for *habeas corpus* relief. Instead, aside from his improper challenge to this court's dismissal of his first appeal, plaintiff raised legal challenges to the trial court's dismissal and reiterated claims he made in connection with his requests for *habeas corpus* relief. None of plaintiff's claims constituted an appropriate basis for relief under section 2-1401 and the trial court committed no error in denying plaintiff relief under that section. See *People v. Harvey*, 379 Ill. App. 3d 518, 521, 884 N.E.2d 724, 728 (2008) ("We may affirm the trial court's judgment on any basis supported by the record,

regardless of the actual reasoning or grounds relied upon by the circuit court.").

¶ 21

### III. CONCLUSION

¶ 22

For the reasons stated, we affirm the trial court's judgment.

¶ 23

Affirmed.