FIFTH DIVISION
SEPTEMBER 25, 2015

No. 1-13-2969

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 03 CR 13680
	)	04 CR 16117
	)	04 CR 25590
	)	
REGINALD SMITH,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court order dismissing defendant's petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), is affirmed. The court's July 2005 imposition of three $200 DNA assessments is vacated because defendant's DNA was already in the state police database due to a prior conviction.

¶ 2 Defendant Reginald Smith appeals from the dismissal of his petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). Defendant argues for the first time on appeal that the trial court improperly

imposed three $200 DNA assessments when he entered certain guilty pleas in 2005 because his DNA was already in the state police DNA database at that time. We affirm and vacate the DNA assessments.

¶ 3 In July 2005, defendant entered pleas of guilty to armed robbery in case 04 CR 25590, and to unlawful use of a weapon by a felon in case numbers 03 CR 13680 and 04 CR 16117. He was sentenced to 18 years in prison for armed robbery and to a consecutive term of 3 years in prison for unlawful use of a weapon by a felon in case number 03 CR 13680. He was also sentenced to a concurrent prison term of three years for his unlawful use of a weapon by a felon conviction in case number 04 CR 16117. Pursuant to each conviction, defendant was assessed certain fines and fees, including the $200 DNA assessment.[1]

¶ 4 In January 2013, defendant filed a petition for relief from judgment alleging that the trial court failed to properly admonish him at the plea hearing regarding the term of mandatory supervised release he must serve upon his release from prison. The State filed a motion to dismiss, which the trial court granted.

¶ 5 On appeal, defendant makes no argument regarding the merits of his section 2-1401 petition, and consequently, he has waived review of that issue. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Rather, defendant contends for the first time that he was improperly assessed the $200 DNA assessment in the three cases in which he entered guilty pleas because his DNA had been indexed pursuant to a prior felony conviction, and consequently the assessments are void. Defendant appended to his brief a fax from the Illinois State Police Division of Forensic Services

[1] Although the record on appeal does not contain the fines and fees order for case number 04 CR 16117, this court may take judicial notice of the circuit court's records. See *People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010).

that indicates defendant's DNA was collected and indexed in May 2003. We take judicial notice of this document. See *People v. Hill*, 2014 IL App (3d) 120472, ¶ 18.

¶ 6 The State makes no substantive response to defendant's argument on appeal; rather, the State argues that assessments are voidable, rather than void, and are therefore not subject to attack in either a section 2-1401 petition or for the first time on appeal from the denial of such a petition.

¶ 7 Section 2-1401 of the Code provides a statutory mechanism by which a final order or judgment may be vacated or modified more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2012). Section 2-1401 requires that the petition be filed within two years after the entry of the order or judgment, excluding the time during which a defendant is under a legal disability or duress, or the ground for relief is fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2012). However, the statutory limitations period does not apply to a petition challenging a judgment as void. *People v. Moran*, 2012 IL App (1st) 111165, ¶ 13; see also *People v. Raczkowski*, 359 Ill. App. 3d 494, 496-97 (2005) (if the circuit court lacked jurisdiction over the parties or the subject matter or exceeded its statutory power to act, the judgment is void and may be attacked at any time). This court reviews the dismissal of a section 2-1401 petition absent an evidentiary hearing *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 8 Here, defendant entered his guilty pleas in 2005, and filed his petition for postjudgment relief in 2013. However, defendant contends that he is not barred from seeking relief because he is attacking a void judgment, which may be attacked at any time. See *People v. Arna*, 168 Ill. 2d 107, 113 (1995) (a sentence which does not conform to statutory requirements is void). While it is certainly true that a defendant may attack a void judgment at any time (*Raczkowski*, 359 Ill.

App. 3d at 496-97), the judgment must actually be void in order to overcome the two-year time limit (*People v. Harvey*, 196 Ill. 2d 444, 447 (2001)). Thus, the question before us is whether the court's 2005 orders imposing the $200 DNA assessments were void.

¶ 9 In *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), our supreme court held that a trial court is authorized "to order the taking, analysis and indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database." In the case at bar, if defendant was previously ordered to submit a DNA sample and pay the corresponding fee, the trial court's 2005 orders imposing the $200 DNA assessments are void and must be vacated. See *Marshall*, 242 Ill. 2d at 303.

¶ 10 Here, the defendant's DNA was collected in 2003, and in July 2005 when he entered his guilty pleas, his DNA was already in the state police database. Therefore, the three DNA assessments imposed in 2005 were void and must be vacated. See *Marshall*, 242 Ill. 2d at 303 (a court's subsequent order for DNA samples and the concomitant analysis fee are void and must be vacated).

¶ 11 We reject the State's contention that the trial court's imposition of the DNA assessments was merely voidable, rather than void. In *Marshall*, our supreme court clearly stated that "[a] challenge to an alleged void order is not subject to forfeiture," and that a trial court is only authorized to order the indexing of a defendant's DNA and the payment of the analysis fee when that defendant is not registered in the DNA database. See *Marshall*, 242 Ill. 2d at 302-03. See also *Arna*, 168 Ill. 2d at 113 (a sentence which does not conform to a statutory requirement is void and a reviewing court has the authority to correct it at any time). We are unpersuaded by the cases cited by the State, as they either predate *Marshall* or involve civil matters, and are

therefore inapposite. Although the State notes that what constitutes a void, as opposed to a voidable, judgment is currently pending before our supreme court in *People v. Castleberry*, 2013 IL App (1st) 111791-U, *pet. for leave to appeal granted*, No. 116916 (Jan. 29, 2014), we are required to follow supreme court precedent on an issue "unless and until that conclusion is revisited by our supreme court or overruled by the United States Supreme Court." *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23. Until our supreme court instructs us otherwise, we must follow its holding in *Marshall*.

¶ 12 Here, the trial court lacked the power to impose the DNA assessments because defendant's DNA was already in the state police database in 2005; consequently, its orders were void. See *Marshall*, 242 Ill. 2d at 303. Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the fines and fees orders to reflect the vacation of the $200 DNA assessments. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 13 Affirmed; fines and fees orders corrected.