

2015 IL App (2d) 140732-U  
No. 2-14-0732  
Order filed March 13, 2015

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE	)	Appeal from the Circuit Court
STATE OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 99-CF-1675
	)	
DEWAYNE WESTER,	)	Honorable
	)	George Bridges,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Burke and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in denying defendant's section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)). Affirmed.

¶ 2 The trial court denied as untimely and as unmeritorious defendant DeWayne Wester's *pro se* section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)) pursuant to the Illinois Code of Civil Procedure. Wester appeals, arguing that: (1) he was entitled to an evidentiary hearing because the State did not timely answer his petition; and (2) the judgment against him was void, and, so, the two-year limitations period did not apply to his challenge against it. For the reasons that follow, we disagree and affirm.

¶ 3

## I. BACKGROUND

¶ 4

### A. The Trial

¶ 5 In 1999, the State charged Wester with the first-degree murder of Brian Blanchard. During the State's case in chief, witnesses testified that Wester went to Blanchard's neighborhood in search of him. Witnesses saw Wester and the unarmed Blanchard engage in a physical struggle outside, and Wester pulled out a gun and shot at Blanchard at least four times. Two witnesses testified that Wester fired the third and fourth shots when Blanchard was already across the street from him. As Wester fired his fourth shot, one of the witnesses ran to collect her son, whom she had been watching play outside.

¶ 6 Wester then raised a self-defense theory. He claimed to be playing dice when Blanchard swiped \$50 of his winnings. Wester demanded his money, Blanchard punched him in the face, and a physical altercation ensued. Wester fell to the ground and Blanchard continued to move toward him. Wester knew Blanchard to carry a gun on his person, and, so, Wester pulled his own gun and shot at the ground to get Blanchard to move back. Blanchard kept approaching, and several other people "tried to come at him," so Wester fired several more shots and ran away.

¶ 7 The State then called several rebuttal witnesses to refute Wester's claim that the altercation ensued when Blanchard stole money during a dice game. Among these witnesses was the victim's sister, Sherene Blanchard. She testified that, the morning of the murder, Blanchard asked her for \$50 to pay a drug debt (presumably to Wester). Trial counsel timely objected to Sherene's testimony. During a sidebar, counsel argued, among other reasons, that it would be unfair for Sherene to testify on this subject, because the State did not disclose Blanchard's statement concerning the \$50 drug debt during pretrial discovery. The trial court overruled the

objection.

¶ 8 The jury received instructions for first-degree murder and for the lesser-included offense of involuntary manslaughter. While discussing which jury instructions should be given, defense counsel stated:

“ ‘While we are discussing that issue, we [Wester and I] did discuss the issue of a second[-]degree instruction as well as Mr. Wester’s decision to go with the involuntary as opposed to the second[-]degree.’ ” *People v. Wester*, No. 2-01-0204, slip order at 19 (2002) (unpublished order under Supreme Court Rule 23).

¶ 9 Following deliberations, the jury found Wester guilty of first-degree murder. The trial court sentenced him to 45 years’ imprisonment.

¶ 10 **B. Direct Appeal**

¶ 11 On direct appeal to this court, Wester argued, among other claims, that trial counsel was ineffective for failing to tender a second-degree murder instruction. *Wester*, No. 2-01-0204, slip order at 17. The second-degree instruction would have stated that, at the time of the killing, Wester believed that he was justified to use self-defense, but his belief was unreasonable. *Id.* at 18. We rejected Wester’s argument, noting that it was “clear” from the record that “defendant and his counsel discussed the matter of a second[-]degree murder instruction as opposed to an involuntary manslaughter instruction and that defendant chose not to have the jury receive the former instruction.” *Id.* at 19.

¶ 12 **C. Postconviction Proceedings**

¶ 13 Wester later filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2002) (allowing for collateral attacks to the conviction or sentence based on a violation of constitutional rights)). Wester argued, among other claims, that

he was prejudiced by Sherene's testimony, because the State had not provided trial counsel with the discovery needed to prepare for her testimony. Specifically, Wester would have liked the State's information as to whether he or Blanchard sold drugs. *People v. Wester*, 2013 IL App (2d) 111085-U, ¶ 15. For reasons unrelated to this claim, and following the remand of a summary dismissal *and* the remand of a second-stage dismissal (wherein counsel misstated the evidence), the court ultimately appointed a second postconviction counsel. *Id.* at ¶ 16. Postconviction counsel again argued, in part, that the trial court erred in allowing Sherene to testify because her testimony was a surprise. *Id.* Following an evidentiary hearing, the trial court denied the petition. *Id.* at ¶ 26.

¶ 14 On appeal, Wester did not challenge the trial court's determination that the claim of surprise did not warrant a new trial. *Id.* Instead, he argued that his final postconviction counsel should have amended the petition to allege that Sherene's testimony was hearsay and all previous counsel were ineffective for failing to so object. *Id.* at ¶ 28. This court rejected Wester's argument, finding no merit in it. *Id.* at 28-30. Moreover, this court stated that Wester could not establish prejudice even if it had been improper to allow Sherene's testimony: "in light of the entirety of the trial evidence, \*\*\* Sherene's rebuttal testimony simply was not essential to defendant's conviction." *Id.* at ¶ 32.

¶ 15 D. Section 2-1401 Proceedings

¶ 16 Next, on January 10, 2014, nearly 12 years after his failed direct appeal, Wester filed the *pro se* section 2-1401 petition at issue here. 735 ILCS 5/2-1401 (West 2014); *People v. Vincent*, 226 Ill. 2d 1, 7-8 (relief from judgment is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and in presenting the petition).

Wester argued that his conviction was “void,” because the trial court lacked the power to convict him where: (1) the State fraudulently concealed evidence during his trial; and (2) the court allowed the jury to receive fraudulent instructions.

¶ 17 As to “fraudulent concealment” of evidence, Wester complained, as he did unsuccessfully at trial and in his postconviction petition, that the State did not disclose during discovery the nature of Sherene’s testimony. Wester contended that, if he had known in advance about evidence of a drug debt, he would have prepared differently for trial.

¶ 18 As to “fraudulent” jury instructions, Wester complained that: (1) the trial court should have defined, per the jurors’ request, the terms “strong probability” and “likely,” which were contained in the instructions for first-degree murder and involuntary manslaughter, respectively; and (2) the Illinois Pattern Jury Instructions for first-degree murder, which were given to the jury, were unconstitutional.

¶ 19 The State did not file a response within 30 days, and, on March 6, 2014, and again on March 25, 2014, Wester moved for judgment (“Request for ‘Judgment’ and ‘Judgment by Default’ ”). In the motions, Wester asked the court to consider his section 2-1401 petition and vacate his conviction.

¶ 20 On April 1, 2014, the State filed a motion to dismiss the petition. In it, the State argued that there was no merit to either of Wester’s claims. It noted that stating that something was fraudulent did not make it so. It further noted that each of Wester’s claims were, or could have been, litigated in previous proceedings.

¶ 21 On April 23, 2014, without acknowledging the State’s motion or the arguments raised therein, the trial court issued an order denying Wester’s section 2-1401 petition. The court stated that it reviewed Wester’s petition and the appellate court’s Rule 23 Orders. The court noted that

Wester filed his section 2-1401 petition well beyond the two-year limitations period. Wester did not establish as a matter of law any exception to the timeliness limitations. The court denied the petition on the basis of timeliness alone. The court further explained that the petition's absolute lack of merit provided further basis to deny it. Wester could not establish the required due diligence in presenting his claim(s) to the circuit court in the original action and/or in the section 2-1401 petition. "The record indicates that most of defendant's claims are merely attempts to reassert matters that were already fully considered and decided, or which could have been raised, either in the trial court [or] in the context of defendant's multiple appeals." Moreover, the court noted that Wester's claims were constitutional and were, therefore, better suited for a postconviction petition (which he had already pursued and lost).

¶ 22 On April 24, 2014, Wester moved to amend his section 2-1401 petition. In it, Wester stated that the State never filed a response to his petition (which we take to mean that he had not yet received in prison either the State's motion or the trial court's ruling). On April 30, 2014, the trial court summarily denied Wester's motion to amend. On May 22, 2014, Wester, who had by this time received the State's motion and the court's judgment, moved for reconsideration, arguing that the trial court could not *sua sponte* dismiss his petition for falling outside the statute of limitations. On June 20, 2014, the court denied the motion to reconsider. This appeal timely followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, Wester argues that: (1) he was entitled to an evidentiary hearing because the State did not timely answer his petition; and (2) the judgment against him was void, and, so, the two-year limitations period did not apply to his challenge against it. For the reasons that follow, we reject these arguments.

¶ 25

A. Procedure

¶ 26 Wester first argues that, because the State did not timely answer his petition, it admitted that Wester pleaded an adequate cause of action, and, therefore, Wester's petition must proceed to an evidentiary hearing. We reject this argument. Wester asked the court to consider his petition, even absent a response, in his motion for default judgment. And, *Vincent*, the very case Wester cites for the opposite proposition, expressly allows for a trial court to deny a petition as a matter of law even in the absence of a response by the State. *Vincent*, 226 Ill. 2d at 9-10 (the trial court was not precluded from ruling on the defendant's petition for relief from judgment due to the State's failure to file a response as the court was free to decide the issue of whether the defendant was entitled to relief as a matter of law). Perhaps Wester is making much of the trial court's use of the word "dismiss" rather than "deny." In any case, it is clear that a trial court may consider a section 2-1401 petition on the pleadings, even absent the State's response.

¶ 27

B. Limitations Period

¶ 28 Next, Wester argues that the trial court erred in finding that no exception to section 2-1401's two-year limitations period applied. The supreme court has stated:

"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. A section 2-1401 petition filed beyond the two-year period will not normally be considered. 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. A person may also seek relief beyond section 2-1401's two-year limitations period where the judgment being challenged is void." (Citations omitted.) *People v. Harvey*, 196 Ill. 2d 444, 447 (2001).

A judgment is void only where the court did not have jurisdiction over the parties or the subject matter, or where the court lacked power to render the particular judgment or sentence. *People v. Mescall*, 379 Ill. App. 3d 670, 673 (2008). Whether a judgment is void is a question of law that is reviewed *de novo*. *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 14.

¶ 29 Primarily, Wester argues that the judgment against him was void, because the court lacked power to render the judgment where: (1) the State fraudulently concealed evidence during his trial; and (2) the court allowed the jury to receive fraudulent instructions. These allegations, even if true, do not mean that the trial court lacked the power to convict Wester and sentence him to his prison term. Therefore, Wester's petition did not raise an arguable question of fact that his conviction was void. Here, as a matter of law, voidness cannot provide the basis for any timeliness exception.

¶ 30 To the extent that Wester conflated his argument that the judgment was void with a different exception to the two-year limitations period, *i.e.*, fraud, we address that exception as well. There is an exception to the two-year limitations period where the person seeking relief makes a clear showing that "the grounds for relief are fraudulently concealed." *Harvey*, 196 Ill. 2d at 447. Here, Wester does not allege that the *grounds* for relief were fraudulently concealed. Rather, he alleges that each ground for relief is, itself, fraud. Therefore, Wester has not established an exception to the timeliness requirement.

¶ 31 C. Merits

¶ 32 To whatever extent Wester argues that the trial court erred in determining, as an alternative basis for denial, that the merits of his claims fail as a matter of law, we address that argument as well. To receive relief under section 2-1401, a petitioner must establish three elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this



defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition. *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003). As to the first element, this court has already held that Sherene's testimony did not prejudice Wester. *Wester*, 2013 IL App (2d) 111085-U, ¶ 32. Moreover, as stated by the trial court, the merits of Wester's arguments are constitutional in nature and, therefore, better suited for a postconviction proceeding (which Wester has already had and lost). As to the latter two elements, the record absolutely refutes any assertion of diligence. Wester was aware of Sherene's testimony during the trial. Wester also was aware of the language of his jury instructions, and the trial court's decision not to define certain terms. Even if these claims were appropriate and had not been raised already, Wester cannot, as a matter of law, establish his diligence in raising them now.

¶ 33

### III. CONCLUSION

¶ 34 For the aforementioned reasons, we affirm the denial of Wester's section 2-1401 petition.

¶ 35 Affirmed.