2016 IL App (1st) 130060-U

Nos. 1-13-0060, 1-13-2277 (cons.)

Fifth Division
April 29, 2016



IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>TERRANCE JOHNSON,<br><br>Defendant-Appellant. | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 01 CR 20437<br><br>The Honorable Michael Brown and Michael B. McHale, Judges Presiding. |

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

**ORDER**

¶ 1 *Held:* The trial court properly denied defendant leave to file a successive postconviction petition where defendant failed to demonstrate cause for his failure to bring the claim in his initial postconviction proceedings or prejudice resulting from that failure. Additionally, the trial court properly dismissed defendant's petition for relief from judgment under section 2-1401 of the Code of Civil Procedure because it was filed well outside the two-year statute of limitations for such petitions.

¶ 2 In 2005, defendant Terrance Johnson was found guilty by a jury of first-degree murder and aggravated battery with a firearm and was sentenced to a total of 51 years in the Illinois

Department of Corrections (IDOC). Defendant's conviction was affirmed on appeal, and a postconviction petition later filed by defendant was dismissed at the first stage. Defendant then filed the two petitions that are at issue in these consolidated appeals. Defendant first filed a motion for leave to file a successive postconviction petition, arguing that he was denied effective assistance of trial counsel when his trial counsel failed to withdraw from representation after knowing he would be called as a witness in defendant's case. Defendant then filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), in which he claimed that he had newly discovered evidence of his actual innocence in the form of letters and affidavits from an eyewitness to the crime who stated that defendant was not the shooter. Defendant's two petitions were considered by two different judges. One judge denied defendant leave to file his successive postconviction petition and a different judge denied defendant's 2-1401 petition. Defendant appeals both, and, for the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Defendant's Trial and Conviction

¶ 5 In this court's prior opinion affirming defendant's conviction (*People v. Johnson*, 385 Ill. App. 3d 585 (2008)), we described the evidence at trial in detail and our description of that evidence here comes from that prior opinion. We repeat here only those details necessary to understand the issues presently before us.

¶ 6 On the evening of July 18, 2001, Zhontele Payne and James Williams were shot in a drive-by shooting, near Maypole and Leclaire Streets in Chicago. Payne later died, and Williams sustained injuries. On August 27, 2001, a grand jury indicted defendant for Payne's murder and Williams' battery.

¶ 7 Before trial, defendant filed a motion to suppress his videotaped confession, based on his claim that he asserted his right to counsel in the presence of his attorney. Since his lawyer was a potential witness, the State filed a motion to disqualify his lawyer, which was granted, and defendant obtained new counsel. After a hearing, the trial court denied defendant's motion to suppress the confession.[1]

¶ 8 At trial, in its case in chief, the State called Payne's mother, who testified that she had identified her son's body; and Larry Porter, who testified that he observed a blue van pull up next to the victim's vehicle, a handgun protruded from the van's window and fired, and he identified the van. The State also called as a witness Williams, the aggravated battery victim. Although prior to trial, Williams had provided both a written statement and grand jury testimony, at trial he recanted his prior identification of defendant as the shooter. At trial, Williams identified the written statement and his signature on every page, and he testified that he recalled testifying in front of the grand jury. After Williams' testimony, the State called the assistant State's Attorney (ASA) who had presented Williams to the grand jury, who read Williams' grand jury testimony to the trial jury. The State also called the detective who had arrested defendant, a forensic investigator, a forensic scientist, and the ASA who had written the statement by hand signed by Williams and who had asked questions during defendant's videotaped confession. Williams' written statement was admitted into evidence and published to the jury, and the videotape of defendant's confession was played for the jury. The State also introduced a stipulation that if a forensic pathologist were to testify, he would testify that Payne died from gunshot wounds.

[1] We discuss the attorney's testimony during the suppression hearing later in this Background.

¶ 9 After the State rested, the defense called defendant's former girlfriend as a witness, who testified that defendant was with her during the night of the shooting until approximately 2:30 a.m. Defendant testified on his own behalf that he was with his then-girlfriend until approximately 2 a.m., that his videotaped confession was coerced, and that he was the owner of the blue van previously identified by State witness Porter.

¶ 10 In rebuttal, the State called a detective who testified that defendant's former girlfriend told him that defendant had left her house at 10 p.m. on the night of the shooting. The State also recalled the ASA who took defendant's videotaped confession, who testified that defendant did not ask for an attorney and did not complain of any mistreatment prior to his confession. The detective who arrested defendant also rebutted defendant's claims of coercion.

¶ 11 The jury found defendant guilty of the first-degree murder of Payne and the aggravated battery of Williams, but found defendant not guilty of the attempted murder of Williams. Defense counsel filed a posttrial motion for a new trial, and defendant filed a *pro se* motion claiming ineffective assistance of counsel. Both motions were denied. At sentencing, the trial court stated that it was sentencing defendant to the minimum sentence, which was 45 years in the IDOC for the first-degree murder charge, and a consecutive six-year sentence for the aggravated battery charge.

¶ 12 II. Direct Appeal

¶ 13 On direct appeal, defendant raised six claims: (1) the trial court erred in failing to suppress defendant's pretrial confession on right to counsel grounds; (2) the trial court erred by barring defendant's prior attorney from testifying at trial about defendant's claimed assertion of his right to counsel; (3) defense counsel was ineffective at trial; (4) the

prosecutor committed error in his rebuttal argument during closing; (5) the trial court erred by admitting into evidence both the written statement and the grand jury testimony of the aggravated battery victim, who recanted at trial; and (6) the mittimus must be corrected because it stated that defendant spent 1,657 days in custody, when he actually spent 1,687 days. *Johnson*, 385 Ill. App. 3d at 587. We affirmed defendant's conviction and sentence, but corrected the mittimus. *Johnson*, 385 Ill. App. 3d at 609.

¶ 14 III. Initial Postconviction Petition

¶ 15 On July 31, 2009, defendant, through counsel, filed a postconviction petition, alleging that his trial counsel was ineffective and that the admission of his coerced confession deprived him of a fair trial. Attached to his postconviction petition was a certification signed by defendant in which he certified, *inter alia*, that "I have reviewed the contents of the attached post-conviction petition," that "I believe that [the] issues [that] have been raised at this time are reviewable by this honorable court," and that "I am satisfied, thus far, with my attorney's representation of my case."

¶ 16 On September 25, 2009, the trial court dismissed defendant's postconviction petition at the first stage. In its written order, the court noted that in his postconviction petition, defendant claimed: (1) the trial court erred in failing to suppress defendant's confession and (2) defendant received ineffective assistance of trial counsel. Specifically, defendant claimed that the trial court erred by allowing his videotaped confession at trial because the police obtained his confession in violation of his invoked right to counsel and further claimed that trial counsel was ineffective because counsel failed to investigate and call witnesses to support a mental illness claim. However, the trial court found that defendant had already raised these issues on direct appeal and, therefore, they were barred by the doctrine of *res*

*judicata*. Accordingly, the trial court dismissed defendant's postconviction petition at the first stage, which was not appealed.

¶ 17 IV. Successive Postconviction Petition

¶ 18 On June 29, 2012, defendant filed a motion for leave to file a successive postconviction petition. Defendant claimed that he could demonstrate cause for his failure to bring the claim in his initial postconviction petition, as well as demonstrating that prejudice resulted from that failure. However, defendant did not specify either the facts for the cause or the prejudice. Defendant simply asked for an evidentiary hearing on his request for leave to file the successive postconviction petition.

¶ 19 Attached to the motion, and incorporated in the motion, was defendant's proposed successive postconviction petition. In the petition, defendant claimed that his initial postconviction counsel did not provide reasonable assistance, because in defendant's initial postconviction petition, counsel simply repeated two of the claims defendant had made on appeal, which was "doomed to immediate failure" on *res judicata* grounds, and also did not timely file a notice of appeal of the denial of defendant's initial postconviction petition.

¶ 20 Defendant claimed that there was a meritorious postconviction issue in his case that was "effectively outside the record and thus could not have been raised on direct appeal," namely, that "[d]efendant's original trial counsel had no business representing defendant in the substantive case, after the events which occurred at the police station." Defendant claimed that his original trial counsel violated the Rules of Professional Conduct because he "had to have known" that he would be a witness on defendant's behalf, and this violation prejudiced defendant "because counsel diluted and destroyed his usefulness and effectiveness as a later

witness." Defendant further claimed that "[h]ow and why this occurred is outside the record, and must be resolved in a post-conviction proceeding."

¶ 21 Attached to defendant's proposed successive postconviction petition were a number of documents, including our opinion concerning defendant's direct appeal, defendant's original postconviction petition, and the order denying it.[2] Additionally, defendant included the transcripts of the hearing on his motion to suppress his videotaped confession, at which his then-counsel, Lawrence Jackowiak, testified. During the hearing, Jackowiak testified that he had visited the Area 5 police station on July 19, 2001, where defendant was being held, and had spoken to defendant and had advised him not to say anything to the police unless Jackowiak was present. Jackowiak further testified that he informed the detective who had taken him to defendant that defendant was represented by an attorney and that defendant was asserting his right to remain silent and his right to counsel. Jackowiak testified that he told defendant, " 'Isn't that right, Terrance?' " and defendant responded " 'Yes.' " Jackowiak testified that he did not sign in at the front desk but proceeded upstairs to the front desk at Area 5, where a detective took his ARDC card and his Cook County sheriff's identification card before taking him to visit defendant. Jackowiak was unable to provide the names or star numbers of any of the police officers he encountered during the visit, nor was he able to provide more than general descriptions of the officers. At the time, Jackowiak had no records corroborating his testimony, but was later recalled to testify when the defense discovered some files and phone records that were relevant.

¶ 22 On November 29, 2012, the trial court denied defendant leave to file a successive postconviction petition. The court first stated that "[f]or the sake of this petition," it was

[2] We note that defendant did not make an actual innocence claim in the proposed successive postconviction petition, nor did he attach any documentation supporting such a claim. Defendant on appeal also does not argue that his successive postconviction petition set forth an actual innocence claim.

accepting petitioner's allegations concerning postconviction counsel as true and finding that defendant had demonstrated cause. Nevertheless, the court found that even if cause had been established, defendant was unable to demonstrate that he was prejudiced. The court noted that defendant's argument was that trial counsel's failure to preserve himself as a witness was prejudicial to his defense, but trial counsel was permitted to testify as a witness during defendant's suppression hearing and, "[p]resumably, if counsel were telling the truth on the witness stand during the hearing he would have testified to the exact same facts even if he had withdrawn his representation prior to the hearing. The testimony would have been identical in either scenario." The court also noted that trial counsel did not represent defendant during the suppression hearing and therefore was able to testify as a witness on defendant's behalf, so defendant was not prejudiced by any "professional oversight." Accordingly, the trial court denied defendant leave to file his successive postconviction petition.

¶ 23 Defendant filed a notice of appeal in case no. 1-13-0060 on December 5, 2012.

¶ 24 V. Section 2-1401 Petition

¶ 25 Defendant, through counsel, filed a petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)) on November 8, 2012, requesting a new trial based on newly discovered evidence. The petition claimed that in June 2012, defendant's counsel became aware of a prison inmate named Kendrick Butler who had information about defendant's case. On June 16, 2012, defendant's counsel sent a written memo to Butler in prison to discover more information. On June 26, 2012, Butler sent a letter to defendant's counsel in which he identified himself as an eyewitness to the murder for which defendant had been convicted and stated that an individual named "J.R.," and not

defendant, committed the murder. The petition claimed that this information constituted proof of defendant's actual innocence and requested an evidentiary hearing on the issue.[3]

¶ 26 Defendant supplemented his 2-1401 petition on March 22, 2013,[4] with a letter from Kendrick Butler, as well as Butler's affidavit attesting to the accuracy of facts stated in the letter. Butler's letter was dated June 26, 2012, and stated that he was present at the time of the July 18, 2001, shootings and had been friends with the victims. Butler stated that he observed a light-skinned man with long hair, whom Butler knew from the neighborhood as "J.R.," drive by and shoot the victims. Butler stated that he was "110% sure it wasn't Terrance Johnson who murdered my friend." Butler explained that he "recently gave my life to Allah/God/Budda/Messia [*sic*] so I feel I should do the right thing because my conscious [*sic*] is killing me." Subsequent additions to the letter indicated that Butler was delayed in sending it due to problems obtaining notarization of the accompanying affidavit. The envelope in which the letter and affidavit were sent, also attached to the supplement to the 2-1401 petition, indicates that it was mailed on February 8, 2013.

¶ 27 Defendant again supplemented his 2-1401 petition on March 22, 2013, with another letter and affidavit from Butler, with an envelope indicating that the two items were mailed on February 27, 2013. The contents of the affidavit and letter were consistent with the first affidavit and letter.

[3] We note that this information is not included in defendant's proposed successive postconviction petition, even though counsel became aware of its existence by June 16, 2012, and defendant's motion for leave to file his successive postconviction petition was not filed until June 29, 2012. As noted, defendant's postconviction petition does not contain an actual innocence claim, but only claims that trial counsel was ineffective for failing to withdraw from defendant's case.

[4] The same document appears twice in the record on appeal, with a "received" date of March 1, 2013, and a "filed" date of March 22, 2013.

¶ 28 On July 2, 2013, the trial court[5] denied defendant's 2-1401 petition, finding that it had been filed beyond the two-year statute of limitations for such petitions. Defendant filed his notice of appeal in case no. 1-13-2277 on July 22, 2013.

¶ 29 On October 30, 2013, we granted defendant's motion to consolidate the two appeals.

¶ 30 ANALYSIS

¶ 31 On appeal, defendant argues that (1) the trial court erred in denying him leave to file a successive postconviction petition and (2) the trial court erred in denying defendant's 2-1401 petition. We consider each argument in turn.

¶ 32 I. Successive Postconviction Petition

¶ 33 Defendant first argues that the trial court erred in denying him leave to file a successive postconviction petition. The Post-Conviction Hearing Act (Act) provides that "[o]nly one petition may be filed by a petitioner under this Article without leave of the court." 725 ILCS 5/122-1(f) (West 2012). However, a petitioner may be granted leave to file another postconviction petition if the petition (1) states a colorable claim of actual innocence (*People v. Edwards*, 2012 IL 111711, ¶ 28) or (2) establishes cause and prejudice (*People v. Smith*, 2014 IL 115946, ¶ 34). In the case at bar, as noted, defendant's proposed successive postconviction petition does not purport to state a claim of actual innocence, nor does defendant claim that it should be read that way on appeal. Thus, defendant could only be granted leave to file the successive postconviction petition if his petition established cause and prejudice.

¶ 34 Under the Act, petitioner may be granted leave to file a successive postconviction petition "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her

[5] Again, we note that the judge who denied defendant's 2-1401 petition was a different judge than the judge who denied defendant's motion for leave to file his successive postconviction petition.

initial postconviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2012). "To establish 'cause,' the defendant must show some objective factor external to the defense impeded his ability to raise the claim in the initial post-conviction proceeding." *People v. Coleman*, 2013 IL 113307, ¶ 82 (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002)). "To establish 'prejudice,' the defendant must show the claimed constitutional error so infected his trial that the resulting conviction violated due process." *Coleman*, 2013 IL 113307, ¶ 82 (citing *Pitsonbarger*, 205 Ill. 2d at 464). Our supreme court has explained that the standard for demonstrating cause and prejudice is higher than that applicable to the first stage of an initial postconviction petition. *People v. Smith*, 2014 IL 115946, ¶ 34 ("the cause-and-prejudice test for a successive petition involves a higher standard than the first-stage frivolous or patently without merit standard that is set forth in section 122-2.1(a)(2) of the Act").

¶ 35 While our supreme court has not expressly set forth the standard of review for a trial court's grant or denial of leave to file a successive petition, because cause-and-prejudice claims may fail either as a matter of law or due to an insufficiency of the petition and supporting documents, we conclude, as have other appellate courts, that a *de novo* standard of review also applies. *People v. Diggins*, 2015 IL App (3d) 130315, ¶ 7 (applying a *de novo* standard of review to the trial court's denial of the defendant's motion to file a successive petition alleging cause and prejudice, because this issue is "resolved on the pleadings" alone); *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 38 (applying a *de novo* standard of review to the trial court's denial of the defendant's motion to file a successive petition alleging cause and prejudice). See also *People v. Wrice*, 2012 IL 111860, ¶ 50 (applying a *de novo* standard of review to the State's arguments concerning lack of prejudice to the

defendant, since these "arguments raise purely legal issues"). *De novo* consideration means that we perform the same analysis that a trial judge would perform. *In re N.H.*, 2016 IL App (1st) 1552504, ¶ 50 (citing *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011)).

¶ 36 In the case at bar, defendant claims that the "cause" for his failure to bring his claims in his initial postconviction petition was "ineffective assistance" of postconviction counsel and that this error prejudiced him because "this constitutional error has completely disabled defendant from presenting his meritorious post-conviction claim." We do not find these arguments persuasive and, accordingly, affirm the trial court's denial of leave to file defendant's successive postconviction petition. We note that, while defendant asks for an evidentiary hearing on the issue of whether he has satisfied the cause-and-prejudice test, our supreme court has observed that "[s]ection 122-1(f) does not provide for an evidentiary hearing on the cause-and-prejudice issues and, therefore, it is clear that the legislature intended that the cause-and-prejudice determination be made on the pleadings prior to the first stage of postconviction proceedings." *Smith*, 2014 IL 115946, ¶ 33. Accordingly, we must examine defendant's pleadings to determine whether the cause-and-prejudice test is satisfied.

¶ 37 As an initial matter, we must clarify that there is no constitutional right to the assistance of counsel in postconviction proceedings; the right to counsel in postconviction proceedings is statutory (725 ILCS 5/122-4 (West 2012)), and defendants are only entitled to the level of assistance provided for by the Act. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). Thus, to the extent that defendant references the "ineffective assistance" of postconviction counsel or characterizes his performance as a "constitutional error," defendant misstates the standard to which his postconviction attorney was held. Our supreme court has explained that "[i]t is

well settled that the Act requires counsel to provide a 'reasonable level of assistance' to petitioner[s] in post-conviction proceedings." *Turner*, 187 Ill. 2d at 410 (quoting *People v. Owens*, 139 Ill. 2d 351, 364 (1990)). Accordingly, we must consider whether defendant's claim that postconviction counsel's assistance was inadequate suffices to establish "cause" for purposes of the cause-and-prejudice analysis. We note that the trial court assumed *arguendo* that defendant had established cause and found that defendant had failed to demonstrate prejudice. However, we may affirm the trial court on any basis supported by the record on appeal. *People v. Dinelli*, 217 Ill. 2d 387, 403 (2005) ("we may affirm the circuit court on any basis supported by the record").

¶ 38 In the case at bar, we cannot find that postconviction counsel's representation of defendant constitutes cause for purposes of the cause-and-prejudice test. We first note that postconviction counsel was retained by defendant and was not appointed by the court. Accordingly, the requirements of Illinois Supreme Court Rule 651(c) (eff. Apr. 26, 2012), do not apply. See *People v. Richmond*, 188 Ill. 2d 376, 382-83 (1999) (noting that "[b]y its own terms, *** the requirements of Rule 651(c) would not have been applicable" in cases where an initial postconviction petition had been prepared and filed by counsel as opposed to *pro se*). Furthermore, in the instant case, attached to the initial postconviction petition was a certification of defendant, in which he stated that "I have reviewed the contents of the attached post-conviction petition with my attorney"; that "I believe that issues have been raised at this time [that] are reviewable by this honorable court"; and that "I am satisfied, thus far, with my attorney's representation of my case." Defendant does not claim on appeal that this certification was drafted by postconviction counsel or that it is in any way inaccurate. Given this certification, we cannot find that defendant has demonstrated that

"some objective factor external to the defense impeded his ability to raise the claim in the initial post-conviction proceeding." *Coleman*, 2013 IL 113307, ¶ 82. Instead, according to his certification, defendant reviewed the contents of the petition and was satisfied with postconviction counsel's performance.

¶ 39 In addition, we cannot find that defendant has demonstrated prejudice. Defendant claims that he was prejudiced because he is now "completely disabled *** from presenting his meritorious post-conviction claim." We do not find this argument persuasive. In his reply brief on appeal, defendant indicates that the issue raised in his successive postconviction petition was that "[t]rial counsel rendered ineffective assistance of counsel by failing to immediately withdraw, when it was clear from day one[] that counsel had to be a witness for defendant." In his opening brief on appeal, defendant also claims that "[c]ounsel failed to preserve *himself* as a witness for defendant." (Emphasis in original.) However, we agree with the State that these claims are claims that could have been raised on direct appeal, as they are not based on matters outside the record on appeal. "Issues that could have been presented on direct appeal, but were not, are waived." *People v. Harris*, 206 Ill. 2d 1, 13 (2002). Where the facts relating to the claim do not appear on the face of the original appellate record, the doctrines of *res judicata* and waiver are relaxed. *Harris*, 206 Ill. 2d at 13. Thus, a claim of ineffectiveness of trial counsel may be appropriately brought in a postconviction proceeding where the evidentiary basis for the claim lies outside the record. See, *e.g.*, *People v. Jones*, 364 Ill. App. 3d 1, 4-5 (2005) (finding that the defendant's claim of ineffective assistance of counsel was not barred by waiver because the claim was based on matters outside the record).

¶ 40 In the case at bar, however, defendant points to nothing outside the original appellate record in support of his claim. While defendant claims that his ineffective assistance of trial counsel claim is based on matters outside the original appellate record, all of his citations are to his counsel's testimony during defendant's suppression hearing. Accordingly, this issue could have been raised on direct appeal and is therefore waived. See *People v. Enis*, 194 Ill. 2d 361, 378 (2000) ("Defendant *** cites to nothing outside the trial court record in support of [his claim that trial counsel was ineffective due to promises made in his opening statement]. Accordingly, this issue could have been raised on direct review. The issue is therefore waived."). Since the issue would have been waived even had it been contained in defendant's initial postconviction petition, we agree with the State that defendant was not prejudiced by not being able to raise it there. Consequently, since defendant is unable to establish either cause or prejudice, we cannot find that the trial court erred in denying defendant leave to file a successive postconviction petition.

¶ 41 II. Section 2-1401 Petition

¶ 42 Defendant also argues that the trial court erred in denying his 2-1401 petition and claims that he is entitled to an evidentiary hearing on the newly discovered evidence establishing his actual innocence. In the case at bar, defendant submitted the letters and affidavits of Kendrick Butler, who stated that he had observed the crime and that defendant was not the shooter. However, we agree with the trial court that defendant's petition was filed more than two years after his conviction and therefore was not timely.

¶ 43 Section 2-1401 permits relief from final judgments that are older than 30 days but were entered less than two years ago. 735 ILCS 5/2-1401(a), (c) (West 2012); *People v. Laugharn*, 233 Ill. 2d 318, 322 (2009). "To obtain relief under section 2-1401, the defendant 'must

affirmatively set forth specific factual allegations supporting each of the following 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 for relief.' " *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003) (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). "[A]n action brought under section 2-1401 is a civil proceeding and, according to this court's long-standing precedent, is subject to the usual rules of civil practice, even when it is used to challenge a criminal conviction or sentence." *People v. Vincent*, 226 Ill. 2d 1, 6 (2007).

¶ 44 In the case at bar, the trial court dismissed defendant's 2-1401 petition because it was not timely filed. Under section 2-1401 of the Code, a petition for relief from judgment under this section "must be filed not later than 2 years after the entry of the order or judgment." 735 ILCS 5/2-1401(c) (West 2012). "A section 2-1401 petition filed more than two years after the challenged judgment cannot be considered absent a clear showing that the person seeking relief was under a legal disability or duress or the grounds for relief were fraudulently concealed." *Pinkonsly*, 207 Ill. 2d at 562. In the case at bar, defendant was convicted in 2005 and sentenced in 2006, but did not file his 2-1401 petition until 2012. Accordingly, defendant's petition was filed well outside the limitations period provided by section 2-1401. Although defendant argued before the trial court that the fraudulent concealment exception should apply, he does not make that argument on appeal. Instead, his argument is based on his claim that he is entitled to assert a freestanding claim of actual innocence under our supreme court's decision in *People v. Ortiz*, 235 Ill. 2d 319 (2009). We do not find this argument persuasive.

¶ 45 In *Ortiz*, our supreme court held that "in a nondeath case, where a defendant sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing cause and prejudice." *Ortiz*, 235 Ill. 2d at 330. The supreme court explained that "[t]his court has held that the due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *Ortiz*, 235 Ill. 2d at 331 (citing *People v. Morgan*, 212 Ill. 2d 148, 154 (2004)). The supreme court noted that accepting a different interpretation of the Act could theoretically bar a petitioner from filing a freestanding claim of actual innocence, which the supreme court stated that it "[could not] allow as a matter of substantive and procedural due process under the Illinois Constitution." *Ortiz*, 235 Ill. 2d at 332 (citing *People v. Washington*, 171 Ill. 2d 475, 487-88 (1996)).

¶ 46 The main problem with defendant's argument is that he did not choose to assert his claim of actual innocence under the Act in a postconviction petition, but instead chose to file a petition for relief from judgment under section 2-1401 of the Code. Thus, the *Ortiz* court's findings concerning the interpretation of the Act are not applicable in the instant case. There is nothing in the Code which provides an exception for a case such as defendant's, nor does defendant provide any authority for reading section 2-1401 in this manner, and we cannot read a case concerning a wholly separate statute as providing such an exception. While an actual innocence claim raised in a postconviction petition is not subject to such a time limitation, our supreme court has made clear that "an action brought under section 2-1401 is a civil proceeding and, according to this court's long-standing precedent, is subject to the usual rules of civil practice, even when it is used to challenge a criminal conviction or sentence." *Vincent*, 226 Ill. 2d at 6. As noted, "[a] section 2-1401 petition filed more than

two years after the challenged judgment cannot be considered absent a clear showing that the person seeking relief was under a legal disability or duress or the grounds for relief were fraudulently concealed." *Pinkonsly*, 207 Ill. 2d at 562. Here, no such exception applies and, accordingly, the trial court properly denied defendant's 2-1401 petition because it was filed well after the two-year statute of limitations.[6]

¶ 47 CONCLUSION

¶ 48 The trial court properly denied defendant leave to file a successive postconviction petition where defendant failed to demonstrate cause for his failure to bring the claim in his initial postconviction proceedings or prejudice resulting from that failure, as required by the Act. Additionally, the trial court properly dismissed defendant's section 2-1401 petition because it was filed well outside the two-year statute of limitations for such petitions.

¶ 49 Affirmed.

[6] We note that defendant does not argue that the trial court should have treated his 2-1401 petition as a postconviction petition. However, even if he had, it is unlikely such a claim would have merit, as the 2-1401 petition was drafted by counsel. See *Pinkonsly*, 207 Ill. 2d at 566 (noting that an argument that the trial court should have considered a 2-1401 petition as a postconviction petition "would fail because *** [the defendant's] amended petition, which is the subject of this appeal, was prepared by an attorney and clearly brought under section 2-1401").