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FIRST DIVISION  
May 31, 2016

No. 1-15-1228  
2016 IL App (1st) 151228-U

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
	)	Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	02 CR 2783701
	)	
PAUL KIORKIS,	)	
	)	Honorable Timothy Chambers,
Defendant-Appellant.	)	Judge Presiding.
	)	

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in granting the State's motion to dismiss defendant's untimely section 2-1401 petition brought on voidness grounds where defendant's petition did not argue voidness based on a lack of personal or subject matter jurisdiction and did not argue voidness based on a facially unconstitutional statute; affirmed.

¶ 2 Defendant, Paul Kiorkis, was born in Lebanon, but subsequently obtained permanent resident status in the United States. In 2002, defendant pled guilty to possession of a controlled substance and was sentenced to two years' probation. When defendant applied for naturalization in 2007, the Department of Homeland Security (DHS) became aware of his guilty plea, which

was essentially considered a conviction under federal law and grounds for deportation, and began proceedings for his removal from the United States. In 2014, defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), seeking to vacate his guilty plea. The State filed a motion to dismiss, arguing, *inter alia*, that defendant's petition was untimely. The trial court granted its motion and defendant now appeals. For the following reasons, we affirm the judgment of the trial court.

¶ 3

### BACKGROUND

¶ 4 In July 2002, defendant was arrested and charged with unlawful possession of a controlled substance (720 ILCS 570/402 (West 2000)), a Class 4 felony, for knowingly and unlawfully possessing a substance containing cocaine. On April 28, 2003, defendant's counsel, the State, and the court conducted a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). After the conference, the court stated to defendant in open court, "As a result of what I heard in the conference, significantly your lack of prior criminal history, I told the lawyers that if you were to plead guilty I would sentence you to a period of two years' probation under [s]ection 410 and require you to do 30 hours community service, have a drug and alcohol evaluation, follow all the treatment orders, and submit to random drug tests."

¶ 5 The State then gave a factual basis for the plea agreement, stating that the evidence would show that on July 20, 2002, at approximately 10:10 p.m., Officer Olson was on routine patrol. If called to testify, Officer Olson would state that he observed a car pass him at a high rate of speed and he pursued the speeding car, calling in its license plate. It was revealed that the plate on the car had been suspended for an insurance violation. The officer curbed the vehicle and observed defendant as the driver. While talking to defendant, Officer Olson observed a small knotted clear plastic bag containing a white powder substance lying on top of defendant's lap. The

officer then took defendant into custody. The State went on to explain that the white powder substance was inventoried and sent to the Illinois State Police lab for testing. If called to testify, Maureen Duffy of the Illinois State Police laboratory would state that she is an expert and would testify that the substance recovered from defendant's vehicle weighed 0.4 grams and that within a reasonable degree of scientific certainty, the substance contained cocaine.

¶ 6 The court, recognizing there was a basis for the plea, stated "[o]n the plea there will be a finding of guilty. However, pursuant to [s]ection 410 there will be no judgment on the finding at this time." The court then sentenced defendant to two years' probation, 30 hours of community service, and a drug and alcohol evaluation. The court gave defendant the following admonishment regarding his appellate rights:

"If you wish to appeal the [c]ourt's order, you must within [30] days in writing file a motion asking to withdraw your guilty plea. That motion has to state the legal grounds you're relying on. Any grounds not in the motion are given up for purposes of appeal. If you file that motion and I deny it, within [30] days of the denial you would have to file a notice of appeal or you could never appeal. If you wanted to take those steps, you would have the free services of a lawyer from the Public Defender's [o]ffice as well as a free transcript of the proceedings."

Defendant expressed that he understood his appellate rights.

¶ 7 In July 2003, defendant's probation was terminated unsatisfactorily because defendant failed to complete any of his 30 hours of community service and failed to pay any of his probation fees. A warrant was then issued for defendant's arrest. Defendant was arrested on October 2, 2003, and thereafter was recommitted to probation. In January 2004, defendant's probation was again terminated unsatisfactorily because he had only completed 8 of the 30

required community service hours. Additionally, defendant failed to report to the probation department from February to May 2004, he tested positive for "cocaine/marijuana" on January 28, 2004, and he failed to pay his probation fees. On July 1, 2004, defendant pled guilty to the violation of probation and the court sentenced him to 30 days in jail.

¶ 8 In 2007, defendant applied for naturalization. DHS reviewed defendant's application and became aware of his 2003 guilty plea for possession of cocaine, and according to defendant, used it as grounds for denying his application. Thereafter, DHS began removal proceedings pursuant to section 237(a)(2)(B)(i) of the Immigration and Nationality Act, which allows the removal of an alien who has been convicted of a violation of certain controlled substance laws. 8 U.S.C. § 237(a)(2)(B)(i) (2006). Defendant subsequently sought asylum in February 2009, but his request was denied by the immigration court. The Board of Immigration Appeals also denied defendant's asylum request, and the Seventh Circuit Court of Appeals affirmed the denial of asylum in *Kiorkis v. Holder*, 634 F.3d 924 (7th Cir. 2011).

¶ 9 On June 6, 2014, defendant, through private counsel, filed a petition pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)) to vacate the finding of guilty, the plea of guilty, and the orders entered on April 28, 2003. In his petition, defendant argued that his guilty plea was void because his right to due process was violated when he received ineffective assistance of counsel. Specifically, defendant argued that his counsel was ineffective for failing to inform him that entering a guilty plea would subject him to removal and deportation. Defendant cited the case of *Padilla v. Kentucky*, 557 U.S. 962 (2009), as support for his argument that his counsel should have advised him of the possible deportation consequences of entering a guilty plea. Defendant further asserted that he had presented meritorious defenses or claims, namely, that he did not have any knowledge of the cocaine that was recovered from his

vehicle. Defendant also argued that he could satisfy the diligence requirement of section 2-1401 of the Code because he did not become aware of the consequences of his guilty plea until 2007 or 2008, and he could not bring his section 2-1401 petition until the Third District issued its decision in *People v. Guzman*, 2014 IL App (3d) 090464, in December 2014 because that case supported vacation of his guilty plea. Finally, defendant argued that the equitable powers of the court prevented enforcement of the judgment.

¶ 10 On October 3, 2014, the State filed a motion to dismiss defendant's section 2-1401 petition, arguing that defendant's petition should be dismissed because it was filed over nine years after defendant pled guilty and was sentenced. Additionally, the State contended that defendant's conviction and sentence were not void where the court did not lack personal or subject matter jurisdiction. The State further argued that a section 2-1401 petition was not the proper vehicle through which defendant was required to seek relief because he did not raise any errors of fact that would have prevented entry of judgment.

¶ 11 Defendant responded to the motion to dismiss on December 5, 2014, and reasserted the arguments made in his section 2-1401 petition. Defendant also argued that he was not required to raise an error of fact in order to seek relief under section 2-1401 of the Code.

¶ 12 On March 6, 2015, the trial court held a hearing and orally delivered its ruling. The trial court granted the State's motion to dismiss defendant's petition. The court acknowledged that *Padilla* came after defendant entered his guilty plea. The court also stated that "the facts that [defendant] pled guilty to are clear and established guilt beyond a reasonable doubt." The court noted that defendant had an attorney and went on to state that "[t]he judgment in this case is valid. It is not void because it's valid. And there is no meritorious defense. It is clearly untimely, and the defendant's [section 2-]1401 petition is, respectfully, dismissed."

¶ 13 Defendant timely filed his notice of appeal on April 3, 2015.

¶ 14 ANALYSIS

¶ 15 On appeal, defendant contends that the trial court erred in granting the State's motion to dismiss his section 2-1401 petition where his plea was not voluntarily and knowingly entered, and therefore obtained in violation of due process and void. Specifically, defendant asserts that his plea was void because it was based on misleading advice from his counsel, an unfulfilled promise by the prosecutor, and a misunderstanding of the law. Defendant also argues that *Padilla* is retroactive, the doctrine of equitable tolling applies, and equity requires the judgment to be vacated.

¶ 16 "[A] section 2-1401 petition can present either a factual or legal challenge to a final judgment or order." *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 31. The nature of the challenge presented dictates the proper standard of review on appeal. *Id.* The parties in this case agree that defendant's petition was brought on purely legal grounds and the court's dismissal was on a legal basis. When a court in a section 2-1401 proceeding enters either a judgment on the pleadings or a dismissal, the court's order is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). Here, the order appealed from is the trial court's order dismissing defendant's section 2-1401 petition, thus our review is *de novo*.

¶ 17 Section 2-1401 of the Code encompasses the comprehensive statutory procedure that authorizes a trial court to vacate or modify a final order or judgment in either criminal or civil proceedings. *People v. Thompson*, 2015 IL 118151, ¶ 28. "Relief under section 2-1401 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 presenting the petition." *Vincent*, 226 Ill. 2d at 7-8 (citing *Smith v. Airoom*,

*Inc.*, 114 Ill. 2d 209 (1986)). Generally speaking, a petition brought pursuant to section 2-1401 of the Code "must be filed not later than 2 years after the entry of the order of judgment," but that time limitation is tolled if the "time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed." 735 ILCS 5/2-1401(c) (West 2012). However, section 2-1401(f) states that "[n]othing contained in this [s]ection affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief." 735 ILCS 5/2-1401(f) (West 2012). Therefore, the two-year time limit, due diligence requirement, and meritorious defense requirement do not apply to petitions that argue that a judgment is void. *People v. Brown*, 2016 IL App (2d) 140458, ¶ 6; *In re Haley D.*, 402 Ill. App. 3d 370, 373 (2010).

¶ 18 However, our supreme court has clarified that not every section 2-1401 petition based on alleged voidness allows a petitioner to circumvent the two-year filing deadline, due diligence and meritorious defense requirements. See *Thompson*, 2015 IL 118151, at ¶ 31. In *Thompson*, the defendant argued that his mandatory life sentence was void, specifically asserting that the sentencing statute violated the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). *Id.* ¶ 17. In rejecting the defendant's argument, the supreme court noted that it disagreed with the defendant's assertion that because he challenged his conviction and sentence as void, his claims were excused from section 2-1401's two-year limitations period and diligence and meritorious defense requirements. *Id.* ¶ 30. The court explained that "a voidness challenge to a final judgment under section 2-1401 that is exempt from the ordinary procedural bars" is available only for three types of claims: (1) challenges to personal or subject matter jurisdiction, (2) challenges to facially unconstitutional statutes that are void *ab initio*, and (3) challenges to

sentences that do not conform to the applicable sentencing statute. *Id.* ¶¶ 31-33. However, the court stated that the third type of voidness challenge was recently abrogated by its decision in *People v. Castleberry*, 2015 IL 116916, ¶ 19, and was therefore no longer available. *Id.* ¶ 33. The defendant did not allege that his mandatory life sentence was void due to lack of personal or subject matter jurisdiction, or due to a facially unconstitutional statute that was void *ab initio*, and therefore "defendant's claim [was] not a type recognized by any of our precedents as exempt from the typical procedural bars of section 2-1401." *Id.* ¶ 34.

¶ 19 On a related note, we find it pertinent that in *People v. Pikonsly*, 207 Ill. 2d 555 (2003), our supreme court previously addressed the issue of whether a constitutional argument based on ineffective assistance of counsel may be made in a section 2-1401 petition. *Pikonsly* found that such an argument could not be successful, recognizing "[w]e have long held that section 2-1401 proceedings are not an appropriate forum for ineffective-assistance claims because such claims do not challenge the factual basis for the judgment. [Citations.]" *Id.* at 567.

¶ 20 Here, defendant asserts that contrary to the supreme court's holding in *Pikonsly*, he was able to assert a voidness challenge based on ineffective assistance of counsel in his section 2-1401 petition due to the supreme court's more recent decision in *People v. Lawton*, 212 Ill. 2d 285, 298 (2004). The State responds that defendant's petition was time-barred because he did not allege any of the voidness grounds recognized by our supreme court in *Thompson*. We find defendant's argument unconvincing and agree with the State.

¶ 21 In *Lawton*, a defendant who was subject to civil commitment was able to assert claims in a section 2-1401 petition. *Lawton*, 212 Ill. 2d at 287. *Lawton* recognized that the case before it was distinguishable from, *inter alia*, *Pikonsly*, because unlike that case, *Lawton* did not involve a criminal defendant attempting to bring a collateral challenge to his criminal conviction who had



recourse under the Post-Conviction Hearing Act. *Id.* at 298. Similar to the defendant in *Pikonsly* and unlike the defendant in *Lawton*, defendant here seeks to collaterally attack his criminal conviction based on a constitutional violation, namely ineffective assistance of counsel. However, as our supreme court has recognized, the proper vehicle for defendants in such a situation is to bring a postconviction petition, rather than to seek relief under section 2-1401 of the Code. See *Pikonsly*, 207 Ill. 2d at 567.

¶ 22 Further, in defendant's section 2-1401 petition or in his brief on appeal, he did not assert a voidness challenge based on a lack of personal or subject matter jurisdiction. Defendant has also never claimed that any statute involved is facially unconstitutional and void *ab initio*. Thus, defendant has not asserted voidness based on any of the recognized grounds that would allow him to circumvent the two-year filing deadline. The judgment or final order that defendant seeks to declare void was the order entered on April 28, 2003, wherein defendant pled guilty and was sentenced to probation. Defendant filed his section 2-1401 petition on June 6, 2014. In order to have timely filed his petition, defendant would have had to file it by the end of April 2005. Instead, his petition was filed in 2014, nine years past the filing deadline. Due to his untimely filing and the fact that the voidness grounds alleged in his petition were not sufficient to remove the two-year time constraint, we find that the trial court properly dismissed defendant's section 2-1401 petition.

¶ 23 CONCLUSION

¶ 24 Based on the foregoing, we find the trial court did not err in dismissing defendant's section 2-1401 petition. Therefore, we affirm the judgment of the circuit court.

¶ 25 Affirmed.