

2016 IL App (2d) 140421-U
No. 2-14-0421
Order entered October 26, 2016

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 99-CF-64
)	
TERRY R. WAGNER,)	Honorable
)	James C. Hallock,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's section 2-1401 petition as untimely where the State sought dismissal based on untimeliness, defendant filed his petition more than 11 years after entry of the final judgment, and none of the exceptions to the limitations period applied; defendant's sentence was not void where part of the truth-in-sentencing statute was held unconstitutional because the legislature enacted Public Act 90-592, which was in effect on the date of defendant's offense and sentencing, and defendant's sentence was therefore proper; trial court is affirmed.

¶ 2 Defendant, Terry Wagner, appeals *pro se* from the trial court's order dismissing his petition for relief from judgment that was brought pursuant to section 2-1401 of the Code of Civil

Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). Defendant argues on appeal that (1) the trial court abused its discretion by dismissing his petition as untimely, (2) the trial court's order dismissing his motion is void because his petition was not assigned to Judge Hallock but to Judge Barsanti, (3) his sentence for first degree murder is void because the truth-in-sentencing statute as applied to his case is unconstitutional, and (4) his sentence for first degree murder is void because the truth-in-sentencing statute is unconstitutional as a violation of the separation of powers doctrine. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Defendant, Terry Wagner, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) and unlawful concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 1998)) after a bench trial for offenses he committed in December 1998. Defendant was sentenced to 30 years' imprisonment for the first degree murder conviction and 5 years' imprisonment for the concealment of a homicidal death conviction, to be served consecutively. We affirmed his convictions on direct appeal. *People v. Wagner*, No. 2-01-1289 (Oct. 21, 2003) (unpublished order under Supreme Court Rule 23). Defendant filed an amended postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) that the trial court dismissed at the second stage. This court affirmed the trial court's dismissal. *People v. Wagner*, 2015 IL App (2d) 121189-U (January 26, 2015) (unpublished order under Supreme Court Rule 23).

¶ 5 On May 9, 2013, defendant filed a "Petition for Relief of Judgment Under [section] 2-1401(f)" of the Code of Civil Procedure (Code) (735 ILCS 5/1401(f) (West 2012)), asserting that he was denied due process and equal protection under the law because (1) the Illinois Department of Corrections unconstitutionally added MSR and truth-in-sentencing to his sentence without any authorization from the sentencing court; (2) his sentence did not conform to the

mandatory supervised release statute under 730 ILCS 5/3-3-3 where the MSR statute provided that he was to receive 50% and be released under the statute, which was the legislative intent in February 1978 and is the law today; (3) the sentencing court did not ask him which sentencing statutes or scheme he wanted to be sentenced under; since there were two different mandatory sentencing statutes at the time he was sentenced; (4) the State failed to state an offense for concealment of a homicide and failed to satisfy the elements of the concealment statute, thereby rendering his conviction null and void, and (5) the sentencing court failed to conform with the truth-in-sentencing statutes because it failed to inform the public of the actual length of time he would actually serve under the statute.

¶ 6 On May 13, 2013, the State filed a motion to dismiss arguing that the petition was untimely and that the issues were without merit. Specifically, the State argued that defendant's petition should be dismissed pursuant to section 2-1401(c) of the Code because it was filed more than two years after his conviction and defendant established none of the exceptions to the limitations period enunciated in *People v. Harvey*, 196 Ill. 2d 444 (2001)). The State expressly stated that the following claims should be dismissed as untimely and meritless: (1) defendant's "claim based on the truth-in-sentencing act," (2) defendant's "claim based on the mandatory supervised release statute," and (3) defendant's "claim based on his assertion that the State failed to prove him guilty of concealment of a homicide."

¶ 7 On July 17, 2013, defendant filed a response to the State's motion to dismiss. On August 1, 2013, the State filed its reply. After a hearing on September 9, 2013, the trial court dismissed defendant's petition as untimely. On October 15, 2013, defendant filed a motion to reconsider. On October 24, 2013, the State filed its response. On April 15, 2014, the trial court denied defendant's motion. Defendant timely appealed.

¶ 8

II. ANALYSIS

¶ 9 Defendant argues that the trial court abused its discretion by dismissing his petition as untimely because the State raised the issue in its motion to dismiss rather than as an affirmative defense, and, therefore, the trial court erred by *sua sponte* dismissing his petition as untimely.

¶ 10 We begin by noting the familiar principles regarding petitions for relief from judgment pursuant to section 2-1401(f) of the Code (735 ILCS 5/2–1401(f) (West 2012)). It is well settled that when a trial court enters a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, our review is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). Section 2-1401 provides a comprehensive, statutory procedure that allows for vacating a final judgment older than 30 days. *People v. Moran*, 2012 IL 111165, ¶ 12; see also *Vincent*, 226 Ill. 2d at 6. Section 2-1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but that it not be a continuation of the original action. *Vincent*, 226 Ill. 2d at 6; 735 ILCS 5/2-1401(b) (West 2012). The Code further requires that the petition be supported by affidavit or other appropriate showing as to matters not of record. *Vincent*, 226 Ill. 2d at 6; 735 ILCS 5/2–1401(b) (West 2012). 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 8. Most important to this appeal, in general, a defendant must file his section 2-1401 petition within two years after entry of the judgment from which he seeks relief. See 735 ILCS 5/2-1401(c) (West 2012). The two-year period is a statute of limitations, not a jurisdictional prerequisite. *People v. Malloy*, 374 Ill. App. 3d 820, 823 (2007). If the State properly asserts the limitations period as an affirmative defense, the trial court may dismiss the petition on the basis of untimeliness. *Id.* However, “[t]ime during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.” 735 ILCS 5/2–1401(c) (West 2012).

¶ 11 In the present case, it is undisputed that the State properly asserted the limitations period in its motion to dismiss. Further, the record indicates that defendant filed his section 2-1401 petition over 11 years after entry of the final judgment. Accordingly, the trial court did not *sua sponte* dismiss defendant's petition as untimely and none of the exceptions to the limitations period apply.

¶ 12 Defendant cites *People v. Smith*, 386 Ill. App. 3d, 473 (2008), to support his argument. In *Smith*, the appellate court held that a trial court could *sua sponte* dismiss a section 2-1401 petition on any basis except for untimeliness. *Id.* at 476. However, in *Smith* the State did not file a motion to dismiss or any responsive pleading asserting that the defendant's petition was untimely. Conversely, in this case the State filed a motion to dismiss alleging untimeliness. Therefore, the trial court did not dismiss defendant's petition *sua sponte*. Accordingly, *Smith* is distinguishable from this case.

¶ 13 Next, defendant argues that the trial court's order dismissing his motion is void because his petition was not assigned to Judge Hallock but to Judge Barsanti and, therefore, the trial court lacked jurisdiction to grant the State's motion to dismiss. Defendant contends that Judge Hallock lacked subject matter jurisdiction to hear defendant's petition because he was not the assigned judge according to "General Order No. 13-24 of Assignment of Judges" issued by Chief Judge Judith M. Brawka.

¶ 14 Defendant mistakenly believes that the trial court's subject matter jurisdiction is derived from an order of assignment of judges. However, a trial court's jurisdiction is conferred entirely by our state constitution. See *In re Luis R.*, 239 Ill. 2d 295, 300 (2009); Ill. Const. 1970, art. VI, § 9. As our supreme court explained:

“[T]he *only* consideration is whether the alleged claim falls within the general class of cases that the court has the inherent power to hear and determine. If it does, then subject matter jurisdiction is present.” *Luis R.*, 239 Ill. 2d at 301.

Moreover, jurisdiction is vested in courts and not in individual judges. *People v. Gray*, 363 Ill. App. 3d 897, 900 (2006). Accordingly, the trial court had jurisdiction to dismiss defendant’s petition.

¶ 15 In addition, the record shows that Judge Brawka properly denied defendant’s motion for a substitution of judge pursuant to section 114-5(a) of the Code (725 ILCS 5/114-5(a) (West 2014)). Under the statute, a defendant must establish, *inter alia*, that the motion was timely filed and that it was filed before any substantive rulings in the case. *People v. Evans*, 209 Ill. 2d 194, 215 (2004). The statute provides that motions for substitution must be filed within 10 days after a cause has been placed on the trial call of a judge. 725 ILCS 5/114-5(a) (West 2002). Because assignments are not uniform, a motion is timely if it is filed within 10 days of when a defendant could be “charged with knowledge” that the judge has been assigned to his case. *Id.* at 216.

¶ 16 A review of the record shows that defendant’s motion for substitution was untimely and, therefore, properly denied. Defendant filed his motion for substitution on September 30, 2013. Defendant relates in his brief that on May 15, 2013, the trial court ordered him to file a response to the State’s motion to dismiss. This order is signed by Judge Hallock. Defendant’s response, filed on July 17, 2013, indicates that Judge Hallock is the presiding judge. Finally, there is no doubt that defendant knew that Judge Hallock had been assigned to his case when defendant appeared in open court before Judge Hallock on September 5, 2013, 25 days before defendant filed his motion for substitution. Therefore, defendant’s motion for substitution was not timely and, thus, was properly denied.

¶ 17 Next, defendant argues that his sentence of 30 years for first degree murder is void because he was sentenced to serve 100% under the truth-in-sentencing statute and to serve three years mandatory supervised release. Defendant contends that there is a direct conflict between the truth-in-sentencing and MSR statutes because defendant will remain “in custody” on MSR after the completion of his 30-year “sentence, which is clearly beyond [defendant’s] sentence.” Defendant asserts that the truth-in-sentencing statute as applied to his case is unconstitutional. Because defendant raises these arguments for the first time on appeal, these arguments are forfeited. See *People v. Thompson*, 2015 IL 118151, ¶ 27 (holding that the appellate court properly determined that the defendant forfeited his as-applied constitutional challenge because he raised it for the first time on appeal).

¶ 18 Defendant also argues that his sentence for first degree murder is void because the truth-in-sentencing statute is unconstitutional as a violation of the separation of powers doctrine. Defendant argues that his sentence is void because the Illinois legislature passed Public Act 90-592, which re-enacted the truth-in-sentencing provisions of Public Act 89-404 that were struck down by this court in *People v. Reedy*, 295 Ill. App. 3d 34 (1998), prior to our supreme court’s ruling in this matter (*People v. Reedy*, 186 Ill. 2d 1 (1999)).

¶ 19 Although part of the truth-in-sentencing statute (730 ILCS 5/3-6-3 (West 2000)), enacted by Public Act 89-404, was ruled unconstitutional, (*Reedy*, 186 Ill. 2d 1), Public Act 90-592 (eff. June 19, 1998) “deleted and recodified the entire truth-in-sentencing legislation originating from Public Act 89-404.” *Reedy*, 186 Ill. 2d at 17. Because Public Act 90-592 was in effect on the date of defendant’s offense and sentencing, defendant’s sentence was proper under the truth-in-sentencing statute.

¶ 20

III. CONCLUSION

¶ 21 The judgment of the circuit court of Kane County is affirmed.

¶ 22 Affirmed.