

NOTICE
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2016 IL App (4th) 150457-U

NO. 4-15-0457

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 29, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ANISH B. DAVE,)	No. 04CF978
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The two-year limitation in section 2-1401(c) of the Code of Civil Procedure (735 ILCS 5/2-1401(c) (West 2014)) bars the petition for relief from judgment.

¶ 2 In September 2014, defendant, Anish B. Dave, petitioned for relief from the judgment against him in this criminal case. See 735 ILCS 5/2-1401 (West 2014). The trial court granted the State's motion to dismiss the petition. We affirm the trial court's judgment because the petition is untimely under section 2-1401(c) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(c) (West 2014)).

¶ 3 I. BACKGROUND

¶ 4 On March 21, 2006, pursuant to a fully negotiated plea agreement with the State, defendant pleaded guilty to one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(d))

(West 2004)), and the trial court sentenced him to probation for 24 months. The remaining three counts of the information were dismissed.

¶ 5 That same day, the trial court entered another order, in addition to the sentencing order. In this additional order, the court certified defendant as a "sex offender" and ordered him to "comply with the Sex Offender Registration Act [(730 ILCS 150 (West 2004))]," which, according to the order, imposed a "10[-]year registration requirement."

¶ 6 On July 17, 2013, defendant filed a petition for postconviction relief, in which he made two claims: (1) his plea of guilty was inadequately informed and involuntary due to defense counsel's failure to advise him such a plea "would have and could have profound consequences on [his] immigration status as well as on his ability to remain in the United States," and (2) defense counsel provided ineffective assistance by failing to investigate a defense that defendant had been mistaken as to the victim's age.

¶ 7 On October 16, 2013, the trial court granted the State's motion to dismiss the postconviction petition because of defendant's lack of standing: specifically, because he had fully served his sentence and hence was no longer a "person imprisoned in the penitentiary." 725 ILCS 5/122-1(a) (West 2012).

¶ 8 On June 27, 2014, by summary order, we affirmed the dismissal of the postconviction petition, holding that defendant did indeed lack standing because he no longer was "imprisoned in the penitentiary." *Id. People v. Anish*, No. 4-13-0991 (June 27, 2014) (summary order under Supreme Court Rule 23(c)(2)).

¶ 9 On September 15, 2014, defendant filed a petition for relief from judgment. See 735 ILCS 5/2-1401 (West 2014). He alleged that his guilty plea, dating from eight years ago, was inadequately informed and involuntary because (1) defense counsel had misadvised him of

the possible immigration consequences of pleading guilty to aggravated criminal sexual assault and (2) the trial court had failed to warn him of these possible immigration consequences.

¶ 10 Anticipating an objection of untimeliness, defendant contended, in his petition, that the judgment the trial court had entered on his guilty plea was "void" because the judgment (that is, the sentence) lacked a lump-sum surcharge, the imposition of which section 5-9-1(c) of the Unified Code of Corrections (730 ILCS 5/5-9-1(c) (West 2004)) required. See 735 ILCS 5/2-1401(f) (West 2014) ("Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief.").

¶ 11 On October 6, 2014, the State filed a motion to dismiss the petition because defendant had filed it beyond the two-year period of limitation in section 2-1401(c) of the Code of Civil Procedure (735 ILCS 5/2-1401(c) (West 2014)).

¶ 12 On October 14, 2014, before the trial court ruled on the State's motion for dismissal, defendant filed a "supplement" to his petition. In this "supplement," he argued the trial court's sex-offender-registration order was "void" because he actually was a "sexual predator" (730 ILCS 150/2(E)(1) (West 2004)), rather than a "sex offender" (730 ILCS 150/2(A) (West 2004)), and hence, he was required to register for life instead of merely for 10 years as the order assumed (see 730 ILCS 150/7 (West 2004)). Also, he complained that, in the guilty-plea hearing, the trial court failed to warn him of the collateral consequence of having to register for life.

¶ 13 On December 9, 2014, Judge Harry E. Clem held a hearing on the State's motion for dismissal. After hearing arguments, he took the matter under advisement.

¶ 14 In a docket entry of January 20, 2015, Judge Clem "determined that the allegations of [d]efendant's petition [were] sufficient to state a cause of action for relief pursuant

to [section 2-1401]," and he denied the State's motion for dismissal. He ordered the State to file a responsive pleading within 21 days.

¶ 15 On February 10, 2015, the State filed an answer to the petition, in which the State "incorporate[d] by reference all arguments contained in the [S]tate's previously filed motion to dismiss the matter."

¶ 16 A hearing on the petition was scheduled for April 6, 2015. Defendant informs us in his brief, however, that "Judge Clem fell ill on April 6, 2015," and that "Judge Thomas J. Difanis rendered a written order in his stead, without hearing arguments on [the] petition."

¶ 17 In his order, Judge Difanis "vacate[d] the [c]ourt's finding from January 20, 2015, and rule[d] on the matters as set forth in the pleadings." He found three such "matters" in the pleadings.

¶ 18 First, there was "defendant's claim that the sentence [was] void due to the fact that the lump-sum surcharge was \$59.83 short of the required amount." Judge Difanis concluded this claim was both "frivolous" and "time-barred."

¶ 19 Second, there was the claim of "ineffective assistance of counsel based upon [defendant's] status as a naturalized citizen." Judge Difanis remarked: "The defendant could have raised this argument in his post-conviction petition but instead argued that his conviction might preclude him from sponsoring his wife's citizenship."

¶ 20 Third, there was the claim that Judge Clem had incorrectly ordered defendant to register for only 10 years instead of for life. Judge Difanis stated in his order: "[This] does not justify vacating his plea and judgment. The requirement of the sex offender registration is totally collateral to his plea."

¶ 21 Therefore, finding the petition for relief from judgment to be "frivolous" and "patently without merit," Judge Difanis granted the State's motion for dismissal.

¶ 22 On April 27, 2015, defendant filed a motion for reconsideration, in which he pointed out that nothing had changed, and the State had made no new arguments, between January 20, 2015, when Judge Clem denied the motion for dismissal, and April 6, 2015, when Judge Difanis granted the motion. There already had been a full and fair hearing on the motion for dismissal, followed by a ruling. Because "no new grounds [had been] supplied by the State," defendant objected to Judge Difanis's decision to vacate Judge Clem's decision. Defendant complained: "What remains is one judge substituting his judgment for another judge in matters already adjudicated, when neither party had requested that or formally moved for that. This is a denial of [defendant's] right to due process." Defendant requested Judge Difanis to vacate his dismissal of his petition for relief from judgment.

¶ 23 On May 4, 2015, Judge Difanis declined to do so.

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 Section 2-1401(c) of the Code (735 ILCS 5/2-1401(c) (West 2014)) provides:

"(c) Except as provided in Section 20b of the Adoption Act [(750 ILCS 50/20b (West 2014))] and Section 3-32 of the Juvenile Court Act of 1987 [(705 ILCS 405/2-32 (West 2014))] or in a petition based upon Section 116-3 of the Code of Criminal Procedure of 1963 [(725 ILCS 5/116-3 (West 2014))], the petition must be filed not later than 2 years after the entry of the order or judgment. Time 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."

¶ 27 Defendant does not invoke any of the statutory exceptions set forth in the first sentence of that quoted text. Nor does he claim he was under legal disability or duress or that a ground for relief was fraudulently concealed from him. Instead, he contends that the judgment against him in this criminal case is void because statutes were violated. He points out that failing to impose upon him a lump-sum surcharge violated section 5-9-1(c) of the Unified Code of Corrections (730 ILCS 5/5-9-1(c) (West 2004)) and that ordering him to register for only 10 years instead of for life violated sections 2(E)(1) and 7 of the Sex Offender Registration Act (730 ILCS 150/2(E)(1), 150/7 (West 2004)). He cites such cases as *People v. Thompson*, 209 Ill. 2d 19 (2004), in which the supreme court said: "We have very recently reiterated that a sentence which does not conform to a statutory requirement is void." *Thompson*, 209 Ill. 2d at 24.

¶ 28 During the pendency of this appeal, however, the supreme court abolished the void sentence rule. *People v. Castleberry*, 2015 IL 116916, ¶ 19. As the supreme court explained in *Castleberry*, a judgment is void only if it was entered by a court lacking either personal jurisdiction or subject-matter jurisdiction. *Id.* ¶¶ 11, 15. We do not understand defendant to be challenging the circuit court's personal jurisdiction. See *People v. Woodall*, 333 Ill. App. 3d 1146, 1156 (2002) ("A criminal defendant confers personal jurisdiction upon the trial court when he appears and joins the issues with a plea."). Rather, we understand him to be challenging the circuit court's subject-matter jurisdiction. In criminal cases, the circuit court obtains its subject-matter jurisdiction from article VI, section 9, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 9). *Castleberry*, 2015 IL 116916, ¶ 18. Because a circuit court's subject-matter jurisdiction over criminal cases comes from the constitution, a circuit court cannot lose

jurisdiction over a criminal case by "fail[ing] to satisfy a certain statutory requirement or prerequisite." (Internal quotation marks omitted.) *Id.* ¶ 15.

¶ 29 Contrary to defendant's assumption, the judgment he challenges is not void, no matter what statutes the circuit court violated. Therefore, we conclude, in our *de novo* review (*People v. Vincent*, 226 Ill. 2d 1, 18 (2007)), that his petition for relief from judgment is barred by the two-year limitation in section 2-1401(c) (735 ILCS 5/2-1401(c) (West 2014)). "[T]he petition must be filed not later than 2 years after the entry of the order or judgment." 735 ILCS 5/2-1401(c) (West 2014). The judgment in a criminal case is the sentence. *People v. Caballero*, 102 Ill. 2d 23, 51 (1984). The circuit court sentenced defendant on March 21, 2006, and he filed his petition for relief from judgment on September 15, 2014, more than two years later. The petition is untimely.

¶ 30

III. CONCLUSION

¶ 31 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$40 statutory assessment against defendant as costs.

¶ 32 Affirmed.