

NOTICE
Decision filed 04/08/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 140149-U

NO. 5-14-0149

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff,)	White County.
)	
v.)	No. 06-CF-107
)	
STEVEN D. STONE,)	
)	
Defendant-Appellee)	Honorable
)	Mark R. Stanley,
(Illinois State Police, Appellant).)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Stewart and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court improperly dismissed Department’s motion to vacate as untimely.

¶ 2 Defendant-appellee, Steven D. Stone, petitioned for an order requiring the Illinois Department of State Police (Department) to expunge and seal his arrest records. The circuit court of White County granted defendant’s request and ordered the Department to expunge all records of his arrest. The Department moved to vacate the expungement order under section 5.2(d)(12) of the Criminal Identification Act (Act) (20 ILCS 2630/5.2(d)(12) (West 2012)), on grounds that the order was void. The circuit court

dismissed the Department's motion to vacate as being untimely. The Department now appeals the dismissal of its motion to vacate contending that the circuit court should have considered the Department's motion, despite being filed 61 days after entry of the expungement order, because the motion challenged the order as being void. The Department asserts that the order expunging defendant's arrest was void because defendant failed to satisfy the requirements for expungement set forth in the Act and the court lacked jurisdiction to expunge the arrest records outside of the narrow statutory confines of the Act. In the alternative, the Department also contends that the motion to vacate should have been construed as a motion seeking relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) and therefore treated as being timely filed. We agree, and accordingly, reverse the trial court's order dismissing the Department's motion to vacate and remand this cause for further proceedings.

¶ 3 The record reveals that on October 2, 2006, defendant pled guilty to bringing contraband into a penal institution, illegal possession of a controlled substance, and illegal possession of drug paraphernalia. He was sentenced to 30 months' probation. On April 24, 2013, defendant filed a petition pursuant to section 5.2 of the Act (20 ILCS 2630/5.2 (West 2012)) to expunge and seal his arrest records. Defendant claimed that he had not been previously convicted of any criminal offenses or violations of any municipal ordinances. He further claimed that he had completed five years of successful probation for purposes of section 410 of the Illinois Controlled Substances Act (720 ILCS 570/410 (West 2012)).

¶ 4 On July 24, 2013, the circuit court granted defendant's petition and ordered that his arrest records be expunged and sealed. In granting the petition, the court noted that defendant had not previously been convicted of any criminal offense or violation of any municipal ordinance. In addition, the court noted that defendant had served notice on the arresting authority and the White County Illinois State's Attorney, and no agency objected within 60 days of the filing of his petition.

¶ 5 The Department was served with the expungement order on July 24, 2013. On September 25, 2013, the Department moved to vacate the expungement order pursuant to section 5.2(d)(12) of the Act, claiming that the order was void because the circuit court lacked authority to enter such an order. The Department pointed out that defendant was ineligible for expungement of his records because, contrary to the requirements of the Act, defendant had a prior conviction for driving under the influence of alcohol. The Department also argued that defendant was ineligible to have his arrest records sealed because he had been sentenced to first offender probation under section 410 of the Controlled Substances Act, and records relevant to the first offender probation may only be sealed four years after a defendant has finished serving his last sentence. See 20 ILCS 2630/5.2; 720 ILCS 570/410 (West 2012). Here, the Department noted, defendant had been sentenced to two years of conditional discharge on the DUI charge and that conditional discharge term did not expire until June 19, 2012. According to the Department, defendant was ineligible to have his first offender probation sealed until June 19, 2016, under section 410 of the Controlled Substances Act. The circuit court dismissed the motion to vacate, holding that it was not timely filed.

¶ 6 The Department filed its motion to vacate pursuant to section 5.2(d)(12) of the Act (20 ILCS 2630/5.2(d)(12) (West 2012)). After an order is final, under section 5.2(d)(12) of the Act, the Department may still challenge that expungement order by filing a postjudgment motion to vacate, reconsider, or modify the order within 60 days of service of the order. See 20 ILCS 2630/5.2(d)(12) (West 2012). Here, the Department filed its motion to vacate the expungement order 61 days after being served with the order. Accordingly, under section 5.2(d)(12), the motion was untimely filed. The Department contends, however, that the circuit court's order was void, and therefore could be challenged at any time. Alternatively, the Department asserts that even if the order of expungement was merely voidable, its motion to vacate was still timely, having been filed within two years of the order being issued, provided the motion to vacate is construed as a motion seeking relief under section 2-1401(c) of the Code of Civil Procedure (735 ILCS 5/2-1401(c) (West 2012)). See also *Hanson v. De Kalb County State's Attorney's Office*, 391 Ill. App. 3d 902, 904, 906, 909 N.E.2d 903, 905, 907 (2009) (Department's motion to vacate circuit court's order directing the Department to issue FOID card was effectively section 2-1401 petition, and thus timely, even though filed 32 days after entry of order). Under section 2-1401(c), a motion to vacate a judgment may be brought within two years of its issuance. See 735 ILCS 5/2-1401(c) (West 2012). Our courts have repeatedly held that because section 2-1401 is the only vehicle by which a litigant can attack a final judgment more than 30 days after its entry, courts are to treat a filing that is too late to be a postjudgment motion as a section 2-1401 petition. *Hanson*, 391 Ill. App. 3d at 906, 909 N.E.2d at 907. The Department points out

that it moved to vacate the judgment ordering expungement on September 25, 2013, less than two years after the order was entered on July 24, 2013. Given that the Department's motion to vacate, viewed effectively as a section 2-1401 petition, was timely filed under section 2-1401(c), we need not address, at this time, whether the circuit court's order of expungement was void or voidable. We therefore remand this cause to the circuit court for further proceedings on the Department's motion to vacate.

¶ 7 For the foregoing reasons, we reverse the order of the circuit court of White County dismissing the Department's motion to vacate, and remand to the circuit court for further proceedings on that motion.

¶ 8 Reversed and remanded.