FIRST DIVISION
February 18, 2014

No. 1-11-1479

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 98 CR 5630
	)	
DONTAY MURRAY,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant's petition for relief from judgment was improperly dismissed when the complained-of judgment, the summary dismissal of a *pro se* postconviction petition, was void.

¶ 2 Defendant Dontay Murray appeals from the dismissal of his *pro se* petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)) (the Code).[1] The section 2-1401 petition challenged, as void, the circuit court's

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[1] Defendant's first name is also spelled Dantay in the record.

previous summary dismissal of defendant's *pro se* postconviction petition. On appeal, defendant contends that (1) he is entitled to relief under section 2-1401 because the circuit court's summary dismissal of his *pro se* postconviction petition was void; and (2) the circuit court's order summarily dismissing his *pro se* postconviction petition was also void because it was issued pursuant to an unconstitutional statutory scheme that fails to appoint counsel to *pro se* defendants at the first stage of postconviction proceedings. For the following reasons, we reverse the judgment of the trial court and remand this cause for further proceedings.

¶ 3 After a jury trial, defendant was convicted of first degree murder and armed robbery, and sentenced to 28 years in prison. In affirming that judgment on direct appeal, this court noted, *inter alia*, that defendant's claim that he was denied effective assistance of counsel by trial counsel's failure to request that the jury be instructed on the lesser-included offense of involuntary manslaughter was not properly before the court because the record did not indicate whether trial counsel or defendant made the decision not to request such an instruction and our review on direct appeal was limited to matters contained in the trial record. See *People v. Murray*, No. 1-01-0769, Order at 12 (2002) (unpublished order under Supreme Court Rule 23).

¶ 4 Following that appeal, defendant filed a *pro se* postconviction petition alleging that he was denied effective assistance of counsel when defense counsel failed to request that the jury be instructed on the lesser-included offense of involuntary manslaughter and to consult defendant regarding this decision. The petition was stamped "received" on February 19, 2003, and "filed" on February 20, 2003. On May 23, 2003, the circuit court summarily dismissed the petition as frivolous and patently without merit. Although the common law memorandum of orders ("half sheet") indicates that defendant filed a notice of appeal from this decision on July 2, 2003, no record of that appeal appears in the records of this court.

¶ 5 In June 2006, defendant filed the pending *pro se* section 2-1401 petition for relief from judgment, alleging that the circuit court's 2003 order summarily dismissing his postconviction petition was void because it was entered 93 days after the petition was filed. After hearing argument on the State's motion to dismiss, the trial court granted the motion and dismissed the petition.

¶ 6 On appeal, defendant contends that the trial court erred when it dismissed his petition for relief from judgment because the complained-of judgment, the summary dismissal of his *pro se* postconviction petition, was void when it was entered 93 days after the petition was filed, and a void order can be challenged at any time. The State concedes that postconviction petitions cannot be dismissed more than 90 days after they were filed, and that the postconviction petition at issue was dismissed 93 days after it was filed. The State, however, contends that this order was voidable, rather than void, and consequently, not subject to attack in a section 2-1401 proceeding.

¶ 7 Section 2-1401 of the Code provides a statutory mechanism by which a final order or judgment may be vacated or modified more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2006). The purpose of a section 2-1401 petition is to bring facts to the attention of the court which, if known at the time of the judgment, would have precluded its entry. *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). The petition must be filed no later than two years following the entry of judgment, excluding the time during which the defendant was under a legal disability or duress or the ground for relief was fraudulently concealed. *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 9. However, a petition challenging a judgment as void is not subject to the limitations period. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001); see also *People v. Raczkowski*, 359 Ill. App. 3d 494, 496-97 (2005) (if the circuit court lacked jurisdiction over the parties or the subject

matter or exceeded its statutory power to act, the judgment is void and may be attacked at any time). Absent an evidentiary hearing on a petition, this court reviews the dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14-15, 17 (2007); see also *Deutsche Bank National Trust Co. v. Hall-Pilate*, 2011 IL App (1st) 102632, ¶ 12 (a section 2-1401 petition seeking relief based on an allegation that the underlying judgment is void is reviewed *de novo*).

¶ 8 Here, the circuit court summarily dismissed defendant's *pro se* postconviction petition in May 2003, and defendant did not challenge that denial until June 2006, approximately three years later. Although defendant concedes that more than two years have elapsed since the complained-of order, he contends that he is not barred from seeking relief because he is attacking a void judgment, which is not subject to the two-year time limitation of section 2-1401(c). See 735 ILCS 5/2-1401(c) (West 2006). While it is true that a defendant may attack a void judgment at any time (*Raczkowski*, 359 Ill. App. 3d at 496-97), the judgment must actually be void in order to overcome the two-year time limit (*Harvey*, 196 Ill. 2d at 447). Therefore, the first question before us is whether the circuit court's order summarily dismissing defendant's *pro se* postconviction petition is void.

¶ 9 Our supreme court has held that a void order is "one entered by a court without jurisdiction of the subject matter or the parties, or by a court that lacks the inherent power to make or enter the order involved." *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371, 379-80 (2005); see also *Raczkowski*, 359 Ill. App. 3d at 496-97. Whether a judgment is void presents a question of law which this court reviews *de novo. People v. Rodriguez*, 355 Ill. App. 3d 290, 293-94 (2005).

¶ 10 At the first stage of review under Post-Conviction Hearing Act (Act), the circuit court must examine the petition within 90 days of its filing and either (1) enter an order dismissing it as frivolous or patently without merit or (2) docket it for second stage proceedings under the Act. 725 ILCS 5/122-2.1 (West 2002). The 90-day time limit is mandatory. See *People v. Porter*, 122 Ill. 2d 64, 83-85 (1988) (concluding the 30-day time limit provided by the statute at that time was mandatory). A court's failure to comply with the Act's mandatory 90-day time limit renders any subsequent summary dismissal void. *People v. Brooks*, 221 Ill. 2d 381, 389 (2006); see also *People v. Arna*, 168 Ill. 2d 107, 112-13 (1995) (a sentence that does not comply with a statutory requirement is void); *People v. Boclair*, 202 Ill. 2d 89, 99 (2002) (the Act does not authorize the dismissal of a postconviction petition during the first stage of proceedings based on untimeliness). If the court fails to enter an order dismissing a postconviction petition as frivolous or patently without merit within 90 days, it must docket the petition for second-stage proceedings. 725 ILCS 5/122-2.1 (West 2002).

¶ 11 Here defendant's *pro se* postconviction petition was file-stamped on February 19, 2003. Pursuant to section 122-2.1(a) of the Act (725 ILCS 5/122-2.1(a) (West 2002)), the circuit court then had 90 days to determine whether the petition was frivolous and patently without merit. Our supreme court has determined that the statutorily-allotted time frame for the summary dismissal of a postconviction petition is mandatory and noncompliance renders the dismissal order void. See *Porter*, 122 Ill. 2d at 85-86. Accordingly, because the circuit court did not deny defendant relief until May 23, 2003, more than 90 days later, that order is void. See *People v. Adams*, 338 Ill. App. 3d 471, 473 (2003) (the 90-day period set forth in section 122-2.1(a) of the Act is mandatory). Therefore, the section 2-1401 petition was not properly dismissed and must be reinstated for further proceedings.

¶ 12 We reject the State's contention that the order summarily dismissing the postconviction petition was voidable, rather than void, because the circuit court had personal jurisdiction over defendant and subject matter jurisdiction over the proceeding. Along that line, we are unpersuaded by the State's reliance on *People v. Davis*, 156 Ill. 2d 149 (1993). In *Davis,* our supreme court criticized the carelessness in which courts interchangeably use the terms "void" and "voidable" stating that:

> "The term 'void' is so frequently employed interchangeably with the term 'voidable' as to have lost its primary significance. Therefore, when the term 'void' is used in a judicial opinion it is necessary to resort to the context in which the term is used to determine precisely the term's meaning." *Davis*, 156 Ill. 2d at 155.

¶ 13 The *Davis* court then explained that the term "void" is reserved only for those judgments rendered by a court that lacked jurisdiction and that when a court lacks jurisdiction any resulting judgment may be attacked, directly or indirectly, at any time. *Id.* A "voidable" judgment, on the other hand, is one entered in error by a court which has jurisdiction, and is therefore not subject to collateral attack. *Id.* at 155-56. The court then highlighted the three elements of jurisdiction, *i.e.*, personal jurisdiction, subject matter jurisdiction, and "the power to render the particular judgment or sentence." *Id.* at 156. With regard to the third element, the court clarified that the "jurisdiction or power to render a particular judgment does not mean that the judgment rendered must be one that should have been rendered, for the power to decide carries with it the power to decide wrong as well as to decide right." *Id.*; see also *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002) (" '[a] judgment, order or decree entered by a court which lacks

jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally' ") (quoting *Barnard v. Michael*, 392 Ill. 130, 135 (1945)).

¶ 14 Thus, contrary to the State's assertion, an order can be void when, although the court has subject matter jurisdiction and personal jurisdiction, the court lacks the power to render the particular judgment or sentence. *Davis*, 156 Ill. 2d at 156. Here, although the circuit court had subject matter jurisdiction and personal jurisdiction, it lacked the power, under the Act, to summarily dismiss defendant's postconviction petition after 90 days had passed since its filing, and, consequently, its order was void. See *id.* at 155-56. Although the *Davis* court bemoaned the interchangeable use of the terms void and voidable and instructed readers to read the term in context to determine which term was actually intended (*Id.* at 155), we reject the State's assertion that when our supreme court used the term "void" in *Brooks* and *Porter* to describe summary dismissals entered outside the time limit outlined by the Act, the court actually meant voidable. See *Porter*, 122 Ill. 2d at 86 (because the then 30-day rule of section 122-2.1 was mandatory and not discretionary, a trial court's noncompliance with the Act rendered the dismissal of a postconviction petition "void"); *Brooks*, 221 Ill. 2d at 389-91 (finding that the trial court's order was dismissing a postconviction petition was not void when it was entered within 90 days of the petition's "docketing").

¶ 15 Ultimately, although the circuit court had jurisdiction over defendant and the postconviction proceeding, it failed to comply with the statutorily allotted time frame for the summary dismissal of a postconviction petition (*Porter*, 122 Ill. 2d at 83-85), and, consequently, its order dismissing defendant's petition was void (*Raczkowski*, 359 Ill. App. 3d at 496-97).

Accordingly, the trial court erred when it dismissed defendant's petition for relief from judgment. *Harvey*, 196 Ill. 2d at 447.

¶ 16 Because we are reversing the dismissal of defendant's petition for relief from judgment, we need not address defendant's alternative constitutionally-based contentions. See *People v. Lee*, 214 Ill. 2d 476, 482 (2005); *In re E.H.*, 224 Ill. 2d 172, 178 (2006) (constitutional issues should be reached only as a last resort).

¶ 17 For the foregoing reasons, we reverse the dismissal of defendant's petition for relief from judgment and direct the trial court to grant the petition and advance defendant's *pro se* postconviction petition for further proceedings pursuant to the Act.

¶ 18 Reversed and remanded with directions.