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SIXTH DIVISION
December 15, 2017

No. 1-15-1236
2017 IL App (1st) 151236-U

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. 94 CR 10750
)	
ROBERT WALTON,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in dismissing petitioner's section 2-1401 petition as untimely.

¶ 2 This appeal stems from the trial court's dismissal of petitioner Robert Walton's petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). Petitioner sought relief from the judgment of conviction entered against him on February 16, 1995, where following a bench trial, he was found guilty of attempted first degree murder. The court sentenced petitioner to a term of 50 years in the Illinois Department of Corrections. On appeal, petitioner contends that the circuit court erred in dismissing his section 2-1401 petition where it raised a legitimate claim that the State never provided a copy of the grand jury transcripts he requested during discovery, and that were necessary for his defense

during his trial. For the following reasons, we affirm the decision of the circuit court dismissing petitioner's section 2-1401 petition.

¶ 3

BACKGROUND

¶ 4 Petitioner was arrested in connection with the shooting death of the victim, which took place on April 11, 1994, and charged with attempted murder and aggravated battery with a firearm. He was found guilty of both offenses following a bench trial. The trial court merged the aggravated battery conviction into the attempted murder conviction and sentenced petitioner to 50 years in prison. Petitioner's conviction was affirmed on direct appeal. *People v. Walton*, No. 1-95-0897 (1997) (unpublished under Supreme Court Rule 23). In August 1997, petitioner filed a *pro se* postconviction petition, alleging that the State presented false testimony and that petitioner's trial counsel was ineffective for several reasons. On December 11, 1997, petitioner's postconviction petition advanced to the second stage because it was on the trial court's docket for more than 90 days. See 725 ILCS 5/122-2.1 (West 1998). The State then filed a motion to dismiss petitioner's postconviction petition, which was granted on the basis of timeliness. Petitioner appealed and this court affirmed the second-stage dismissal of defendant's postconviction petition. *People v. Walton*, No. 1-05-1391 (2006) (unpublished under Supreme Court Rule 23).

¶ 5 In August 2013, petitioner filed a "petition for a writ of *mandamus*," requesting that the State provide him with "copies of all discovery material which includes police reports, Judge's docket entry, grand jury transcripts, [etc.]" Petitioner alleged that the State and defense counsel hid and concealed grand jury transcripts from him, causing him to believe that they did not exist. Petitioner argued that as a result, his indictment was not valid and was fraudulent. Petitioner also requested a copy of the common law record from his original case. On August 14, 2013, the trial

court granted petitioner's request for a copy of his common law record, but denied his request for other discovery materials, including the grand jury transcripts. On December 2, 2013, the trial court denied petitioner's petition for a writ of *mandamus*.

¶ 6 On November 13, 2013, petitioner filed a *pro se* section 2-1401 petition for relief from judgment. 735 ILCS 5/2-1401 (West 2014). In his petition, petitioner alleged that his conviction and sentence were obtained by fraud. He claimed that the parties and the trial court had "concealed fraudulent grand jury transcripts" from him. Petitioner alleged that the record failed to show that the grand jury was constitutionally convened and sworn in accordance with the statutory requirements. Petitioner claimed that where the record did not show that the grand jury was properly convened and sworn in, the trial court lacked jurisdiction to proceed to trial. Petitioner further alleged that he was arrested without probable cause and was held without a preliminary hearing for 13 days until the grand jury convened. Petitioner argued that appellate counsel was ineffective for failing to raise an issue relating to the grand jury.

¶ 7 A hearing was held on petitioner's section 2-1401 petition, in which the court asked defendant if he had previously filed a postconviction petition. Petitioner responded, "No." When the trial court asked if petitioner knew the difference between the two, petitioner responded, "Yep. Yep." The trial court then stated, "Well, ineffective assistance of counsel is not a claim that can be handled on a [section 2-]1401 [petition]. Do you understand that?"

¶ 8 Thereafter, on March 25, 2015, the trial court issued a written order dismissing petitioner's section 2-1401 petition. The court noted that the claims petitioner raised were constitutional in nature and therefore not appropriate claims for relief pursuant to section 2-1401. The trial court further stated that it had admonished petitioner that his petition was not an

appropriate vehicle for constitutional claims and inquired whether he wished to re-file, to which petitioner had declined.

¶ 9 The trial court also noted that generally, a petition for relief from judgment made pursuant to section 2-1401 must be filed within two years after the entry of judgment being challenged, and that here, petitioner filed his petition over 18 years after the trial court entered a judgment of conviction against him. The court recognized that there are exceptions to the two-year limitations period if the judgment is void, a clear showing has been made that the grounds for relief were fraudulently concealed, or the opposing party waives the limitations period. The court then stated that petitioner's fraudulent concealment argument was without merit where the State was not required to provide a copy of the transcripts of the grand jury proceedings to petitioner, and that the petitioner's mistaken belief that the indictment was flawed did not render the transcript a document containing exculpatory evidence. The trial noted that the indictment clearly indicated that the jury was "chosen, selected, and sworn," and thus appeared to comply with the requirements of having been returned in open court and signed by the grand jury foreman as a true bill.

¶ 10 The trial court found that petitioner's contention that he was arrested and detained without probable cause was a matter of trial record and therefore, failure to raise that issue on direct appeal precluded postconviction review. The trial court also stated that a section 2-1401 petition is an inappropriate vehicle for claims alleging a violation of constitutional rights.

¶ 11 Finally, the trial court stated that petitioner's claim that trial counsel was ineffective for failing to raise the issues of the grand jury indictment failed because the petitioner's claim that the grand jury indictment was invalid and unconstitutionally obtained were without merit.

¶ 12 Petitioner now appeals from the *sua sponte* dismissal of his section 2-1401 petition.

¶ 13

ANALYSIS

¶ 14 On appeal, petitioner argues that the trial court erred in dismissing his section 2-1401 petition where it raised a meritorious claim that the State never provided a copy of the grand jury transcripts that were requested during discovery and were necessary for petitioner's defense during trial. Specifically, petitioner argues that his petition was not untimely and that his petition did not lack substantive merit.

¶ 15 Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days. 735 ILCS 5/2-1401 (West 2014). A petition brought under this provision is not a continuation of the original proceeding, but a commencement of a new cause of action, subject to the rules of civil procedure, with the purpose of bringing to the trial court's attention of facts not of record which, if known by the court at the time the judgment was entered, would have prevented its rendition. *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 30. A section 2-1401 petitioner bears the burden to allege and prove facts sufficient to justify relief. *In re Marriage of Buck*, 318 Ill. App. 3d 489, 493 (2000).

¶ 16 In order to be entitled to relief pursuant to section 2-1401, the petitioner is required to affirmatively plead specific factual allegations supporting each of the following elements: (1) the existence of a meritorious claim; (2) due diligence in presenting that claim in the original action; and (3) due diligence in seeking relief under section 2-1401. *In re Petition of the Village of Kildeer to Annex Certain Territory*, 124 Ill. 2d 533, 544 (1988).

¶ 17 A section 2-1401 petition must be filed within two years of entry of the relevant final judgment. 735 ILCS 5/2-1401 (West 2014). The statute requires that the petition be supported by affidavit or other appropriate showing as to matters not of record. 735 ILCS 5/2-1401(b) (West 2014). The statute further provides for an exception to the time limitation for legal disability and

duress, or if the ground for relief is fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2014). “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.” *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). Section 2-1401 is a civil remedy that extends to criminal and civil cases. *Id.* at 8.

¶ 18 Our supreme court has consistently held that proceedings under section 2-1401 are subject to the usual rules of civil practice. *Ostendorf v. International Harvester Co.*, 89 Ill. 2d 273, 279 (1982). When the opposing party does not answer the petition, this constitutes an admission of all well-pleaded facts, and the trial court may decide the case on the pleadings, affidavits, exhibits, and supporting material before it, including the record of the prior proceedings. *Vincent*, 226 Ill. 2d at 9. Here, the State’s failure to answer the petition constituted an admission of all well-pleaded facts, and rendered petitioner’s petition ripe for adjudication. *Id.* The State’s failure to answer made the issue for the court a question of whether the allegations in petitioner’s petition entitled him to relief as a matter of law. *Id.* The trial court *sua sponte* dismissed the petition with prejudice. A trial court’s judgment on the pleadings or a dismissal of a section 2-1401 petition is reviewed *de novo*. *Cavitt v. Repel*, 2015 IL App (1st) 133382, ¶ 42.

¶ 19 Timeliness

¶ 20 Petitioner first acknowledges that his section “2-1401 petition was late,” as it was filed 18 years after his conviction. He nevertheless argues that the trial court erred in dismissing his petition as untimely for two reasons: (1) the State did not raise the limitations period as a defense; and (2) the statute of limitations is tolled where the respondent fraudulently concealed relevant facts.

¶ 21 Petitioner cites to *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003), in support of his proposition that because the State failed to raise the limitations period as a defense, it may be waived. In *Pinkonsly*, the court noted that section 2-1401 has an exception to its limitations period for delays attributable to disability, duress, or fraudulent concealment, and that if the State wished to argue that the defendant's section 2-1401 petition was untimely, it should have done so before the trial court, "where any amendments could have been made and any factual disputes could have been resolved." *Id.* Here, in contrast, petitioner specifically addressed the lateness of his petition and alleged that one of the exceptions to the limitations period excused his lateness: fraudulent concealment. Accordingly, the reasoning in *Pinkonsly* is inapplicable to the case at bar.

¶ 22 Our supreme court has expressly held that a trial court may *sua sponte* dismiss section 2-1401 petitions, as long as it is after the 30-day period that the opposing party has to respond. See *Vincent*, 226 Ill. 2d at 5. Our supreme court has specifically addressed a trial court's *sua sponte* dismissal of a section 2-1401 petition based on the limitations period. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). While our supreme court in *Laugharn* ultimately held that it was premature to dismiss a defendant's petition on the basis of timeliness before the conclusion of the 30-day period to answer or otherwise plead, it at no point stated that a *sua sponte* dismissal of a defendant's petition on the basis of timeliness would not otherwise be proper. We likewise decline to make that finding. Here, the State did not respond to petitioner's section 2-1401 petition, and the dismissal occurred well over 30 days since petitioner filed his section 2-1401 petition. Thus, it was proper for the trial court to *sua sponte* dismiss petitioner's petition as untimely.

¶ 23 Petitioner alternatively contends that the statute of limitations was tolled in this case where the State fraudulently concealed grand jury transcripts. Specifically, petitioner argued in his petition that he requested grand jury transcripts, but they were never made available to him by the State. He alleged that the State, trial counsel, and the circuit clerk “have and still are concealing fraudulent grand jury transcripts.” As part of discovery, petitioner asked for “[a]ny transcript of Grand Jury Minutes containing testimony of the accused and testimony before the Grand Jury of those witnesses who may be called to testify at trial. This is to include any transcription made of witnesses’ testimony that may be favorable to the defense.” In the State’s answer, it stated, “[t]he transcript of the Grand Jury minutes and/or Preliminary Hearing, if any, will be made available to the defense for inspection and copying upon being received by the [State].” Petitioner alleges that such transcripts were never provided to him.

¶ 24 “To prove fraudulent concealment in a section 2-1401 petition, the petition must prove by clear and convincing evidence that the respondent intentionally misstated or concealed a material fact which the respondent had a duty to disclose and that the petitioner detrimentally relied on the respondent’s statement or conduct.” *Cavitt*, 2015 IL App (1st) 133382, ¶ 46. Here, the petition merely stated that without the grand jury transcripts, there was no way to show that the grand jury was ever properly sworn in or impaneled, and therefore prove proper jurisdiction. There was simply no evidence in the petition or attached affidavits that indicated the State fraudulently concealed grand jury testimony from petitioner. Rather, the petition merely stated that the petitioner requested the transcripts during discovery, and that the State responded that it would provide them to petitioner if given access to them. Petitioner nevertheless maintains, relying on *Ostendorf*, 89 Ill. 2d at 282, that the statute of limitations was tolled in this case.

¶ 25 In *Ostendorf*, the petitioners asked the respondent, International Harvester for information concerning any test conducted on “the model 806 tractor.” *Ostendorf*, 89 Ill. 2d at 280. International Harvester responded that records concerning specific tests were no longer available. *Id.* In other interrogatories, the petitioners asked whether any officer or employee had ever stated an opinion to any supervising or managerial employee recommending against the use of the gas tank incorporated in the 806 tractor, or similar ones, and whether International Harvester had ever received any recommendations from any person or company against using the gasoline tank and electrical harness incorporated in the 806 tractor. *Id.* at 280-81.

International Harvester’s response to both questions was, “Not to our knowledge.” *Id.* at 281.

¶ 26 With their section 2-1401 petition, the petitioners in *Ostendorf* submitted documents obtained from International Harvester by the petitioners’ counsel in another case he was working on. The documents included an eight-page report, dated August 21, 1964, of fuel loss by vaporization through the fuel cap vent and fuel tank pressures in the 806 tractor, compiled by International Harvester’s research engineers. *Id.* The report stated in part that the fuel tank pressures constituted “a definite safety hazard.” *Id.* Another report, dated May 26, 1965, concerned recommendations of design changes for a prototype tractor that was to have a design similar to the 806 to avoid “all the fuel tank heating and vaporization problems that have arisen on other [International Harvester] tractors with similar design.” *Id.* The report referred to tests on the 806 and stated the vaporization of the fuel raised the fuel tank pressure “which constitutes a safety hazard,” and that the test group “strongly recommends that the fuel tank be relocated to eliminate the safety hazard.” *Id.*

¶ 27 The *Ostendorf* court found that, taking the petitioner’s allegations as true, it must assume International Harvester had knowledge of the existence of the reports yet failed to produce them

when requested. The court found that the existence of the reports demonstrated International Harvester's failure to comply with the requirements of full and frank disclosure imposed by our discovery rules. *Id.* at 282. The court specifically stated, "In the context of discovery, which is supposed to be conducted in good faith and a spirit of cooperation for the purpose of ascertaining the truth, such half-truths are equivalent to outright lies. They have the effect of affirmative concealment, since they imply that there is no information or evidence to be sought." *Id.* The court found that "failure to comply with the obligation of full and truthful disclosure imposed on litigants by our discovery rules constitutes a fraudulent concealment for purposes of tolling a statute of limitations." *Id.*

¶ 28 Our case is wholly inapposite to *Ostendorff*. Here, there are no documents indicating that the State had access to the grand jury transcripts, and thus even if we take the allegations in petitioner's petition as true, there was simply no evidence presented to indicate that the State in any way fraudulently concealed grand jury transcripts from petitioner. Rather, petitioner merely stated that without the grand jury transcripts, there was no way to show that the grand jury was impaneled and sworn in, and thus no way to prove jurisdiction.

¶ 29 As a final matter, we note that a fraudulent concealment argument does not toll the limitations period indefinitely. See *Cavitt*, 2015 IL App (1st) 133382, ¶ 49. In *In re Marriage of Streur*, 2011 IL App (1st) 082326, ¶ 7, a former wife filed a section 2-1401 petition, seeking to vacate a portion of a judgment for dissolution of marriage. The former wife alleged in her petition that prior to the entry of the dissolution of marriage judgment, the former husband made false statements of material fact regarding his income and assets upon which she relied, and that she could not have presented the matter to the court before the entry of judgment. *Id.* The trial court dismissed the section 2-1401 petition as time-barred because it was filed two years after the

former wife had filed a second amended petition for rule to show cause on essentially the same grounds as found in the section 2-1401 petition. *Id.* ¶ 8. On appeal, this court affirmed the dismissal, finding that because the former wife had filed a second petition for rule to show cause that alleged that the former husband had failed to make a full and complete disclosure of his income from all sources in an effort to evade his full obligation of unallocated family support, it was “clear that she was aware of a possible claim on that date, but waited until November 2006, more than two years later, to file her section 2-1401 petition claim.” *Id.* ¶ 33. The *Streur* court found that even if the statute of limitations was tolled as a result of the former husband’s fraud, it was clear from the June 2004 pleading that the former wife “had knowledge of a possible basis for vacating the judgment but waited more than two years to file that petition.” *Id.* See also *Cavitt*, 2015 IL App (1st) 133382, ¶ 50-52 (the filing of the section 2-1401 petition in 2010, was time-barred where it was done more than two years after the petitioner’s belief, if not outright knowledge, of alleged fraudulent inducement).

¶ 30 Similarly in the case at bar, we find that petitioner could not sufficiently plead or prove that he exercised due diligence in presenting his section 2-1401 petition when it was filed more than 18 years after his judgment and conviction. Petitioner received the answer from the State during discovery that if provided the grand jury transcripts, it would give petitioner copies. No additional evidence of fraudulent concealment has been submitted since that answer. Petitioner could have raised this issue of fraudulent concealment at any point before the filing of this section 2-1401 petition. Accordingly, we agree with the trial court that this petition was time-barred. Because we find that defendant’s section 2-1401 petition was properly dismissed as untimely, we need not reach the merits of the petition.

¶ 31

CONCLUSION

No. 1-15-1236

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 33 Affirmed.