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2017 IL App (3d) 150393-U

Order filed October 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0393 Circuit No. 05-CF-221
JAMES A. MALONE,	)	Honorable John L. Hauptman,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Holdridge concurred in the judgment.
Justice McDade specially concurred.

ORDER

¶ 1 *Held*: Defendant's motion for relief from judgment was properly dismissed as untimely.

¶ 2 Defendant, James A. Malone, appeals following the circuit court's dismissal of his section 2-1401 motion, in which he argued that plea counsel represented him despite a *per se* conflict of interest. Defendant contends that his motion was timely because the State fraudulently concealed the conflict of interest, thus tolling the two-year time period in which section 2-1401 motions must be brought. We affirm.

¶ 3 FACTS

¶ 4 On September 27, 2005, defendant pled guilty to unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2004)). The court sentenced defendant to a term of four years' probation. The record shows that defendant was represented by William McNeal at his plea hearing, but was previously represented by Alan Schmidt. Defendant was discharged from probation on December 9, 2009. The order of discharge noted that defendant had not complied with the terms and conditions of probation and that he was imprisoned in the Oxford federal correctional center until 2016.

¶ 5 Defendant filed a *pro se* postconviction petition on June 7, 2011. In the petition, defendant alleged, *inter alia*, that McNeal had appeared in his case for the prosecution before eventually representing defendant in plea proceedings. Defendant asserted that the resulting conflict of interest effectively deprived him of his sixth amendment right to counsel. In support of his allegation, defendant attached a docket sheet showing that on June 15, 2005, the State was represented by "ASA McNeal." The circuit court dismissed the petition, finding that defendant did not have standing because he was not in custody on the offense being challenged.

¶ 6 On September 20, 2012, defendant filed a motion titled "Motion Pursuant to 28 U.S.C. § 1651 All Writ Act/Relief From Judgement." In this motion, defendant again raised the issue of conflicted representation. Defendant also explained that he had first learned about the conflict in 2011 while preparing a federal motion. Throughout his motion, defendant repeatedly referred to McNeal's representation as a "Fraud on the Court." Defendant alleged that "it was through fraudulent concealment, and misrepresentation that resulted in 'officers of the court' securing a judgement in their favor." Defendant further asserted that McNeal never informed defendant that he had formerly been a prosecutor on the case. Once again, defendant attached to his motion a

copy of the docket sheet, which showed the State was represented by "ASA McNeal" on June 15, 2005.

¶ 7 The circuit court summarily dismissed defendant's motion. In doing so, the court pointed out that the motion was apparently brought under a federal statute. The court also held that the motion, even if construed as a section 2-1401 motion, was both untimely and not supported by an affidavit.

¶ 8 On November 27, 2013, defendant filed another motion, this time titled as a "Motion Pursuant to 28 U.S.C. § 1651 All Writ Act." This motion was substantively identical to defendant's previous motion. The circuit court dismissed the motion "[f]or the same reasons" given in its previous dismissal. Defendant appealed the dismissal of each of his motions.

¶ 9 On appeal, this court reversed, finding that the circuit court improperly dismissed the motions, construed as section 2-1401 motions, before the 30-day period for response had lapsed. *People v. Malone*, No. 3-14-0005 (Mar. 2, 2015) (summary order).

¶ 10 On remand, the State filed a motion to dismiss, arguing that the petition was untimely and not supported by an affidavit. In arguing *pro se* against the State's motion, defendant explained that he did not learn about the conflict of interest until 2011, when, while in federal custody, he read a copy of the docket sheet in his case. The court granted the State's motion on the grounds raised in its motion.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant argues that the circuit court erred in granting the State's motion to dismiss. Specifically, defendant contends that he satisfactorily explained the reason for his delay in raising the conflict of interest issue. Alternatively, defendant argues that the circuit court erred in not allowing him to correct any defects in his motion prior to dismissing it. We find defendant

failed to sufficiently plead facts showing fraudulent concealment on the part of the State, and therefore affirm on the grounds that defendant's motion was untimely.

¶ 13 Section 2-1401 of the Code of Civil Procedure provides an avenue through which a person may challenge a final order or judgment. 735 ILCS 5/2-1401 (West 2012). A petition for relief from judgment brought under section 2-1401 "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." 735 ILCS 5/2-1401(c) (West 2012).

> "To be entitled to relief under section 2-1401, a petitioner must set forth allegations supporting: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting the claim or defense to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief." *People v. Coleman*, 206 Ill. 2d 261, 289 (2002).

¶ 14 When a defendant requests that the circuit court apply exceptions to the two-year time limit under section 2-1401, he bears the burden of clearly showing through factual allegations " 'that he previously made diligent attempts to uncover matters he now purports entitle him to judicial relief or otherwise demonstrate in significant detail how he could not have obtained such information before the limitations period expired.' " *People v. McLaughlin*, 324 Ill. App. 3d 909, 918 (2001) (quoting *People v. Boclair*, 312 Ill. App. 3d 346, 349 (2000) (*rev'd on other grounds*, 202 Ill. 2d 89 (2002))). To make a successful showing of fraudulent concealment, the defendant must " 'allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the

limitations period.' " *Coleman*, 206 Ill. 2d at 290 (quoting *McLaughlin,* 324 Ill. App. 3d at 918). Our supreme court has emphasized that it is "well established" that a showing of fraudulent concealment requires affirmative acts designed to prevent the discovery of the grounds for relief. *Id*. at 290.

¶ 15 In the present case, defendant pled guilty to the instant offense on September 27, 2005. Defendant filed the first of the two section 2-1401 motions under consideration on September 20, 2012, almost seven full years later. Accordingly, defendant's motion was filed outside of the two-year period contemplated by section 2-1401, and he was therefore burdened with showing, through factual allegations, that some exception to that time requirement be granted.

¶ 16 In his motions, defendant asserted that his grounds for relief—*i.e.*, the existence of plea counsel's conflict of interest—was fraudulently concealed from him. Initially, we would note that defendant's factual allegations were facially insufficient to demonstrate fraudulent concealment. Defendant simply alleged in his motions that McNeal never told him that he had once been a prosecutor on the case. Similarly, on appeal, defendant argues that the State fraudulently concealed the conflict of interest by "never disclosing to [defendant] that McNeal had an actual *per se* conflict of interest." In both instances, defendant misapprehends the principle of fraudulent concealment. The State's purported failure to give defendant information cannot be construed as an affirmative act. Indeed, it is well-settled that "[s]ilence alone will not constitute fraudulent concealment[.]" *In re Marriage of Halas*, 173 Ill. App. 3d 218, 224 (1988). Thus, the State's silence on the matter falls far short of the "affirmative[] attempt[] to prevent the discovery of the purported grounds for relief" necessary for a showing of fraudulent concealment. See *Coleman*, 206 Ill. 2d at 290 (quoting *McLaughlin,* 324 Ill. App. 3d at 918).

¶ 17 Furthermore, defendant's argument for fraudulent concealment is directly refuted by the docket sheet attached to defendant's motions, as well as his explanation for his delay. Defendant claimed that he first learned of the conflict by reading the docket sheet in his case in 2011. However, that fact would only serve to confirm that the information had been openly and publicly available in the court file, and defeat any claim that the State had made any attempt to conceal the information. In *People v. Madej*, 193 Ill. 2d 395, 402-03 (2000), our supreme court rejected the defendant's argument of fraudulent concealment where the information in question was freely available in public documents.[1] The same result is warranted here.

¶ 18 On appeal, defendant insists that because he was imprisoned and indigent, he was not able to access the docket sheet to obtain the information crucial to his section 2-1401 motion. This argument is unpersuasive. Initially, defendant clearly *did* have access to the docket sheet, as he was able to procure it as early as his 2011 postconviction petition. Defendant provides no explanation—either on appeal or in his original motions—for why he was purportedly unable to obtain the docket sheet before that time. Furthermore, defendant's failure to look at his court file for the six years between his conviction and 2011 demonstrates an affirmative lack of diligence in bringing his section 2-1401 petition. See *Coleman*, 206 Ill. 2d at 289; see also *Halas*, 173 Ill. App. 3d at 224 ("[T]he issue of fraudulent concealment is necessarily analyzed in the context of the due diligence requirement.").

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[1]*Madej* is relevant to the present case in a second way. In *Madej*, the defendant, a Polish national, argued that the State had fraudulently concealed from him the fact that the Vienna Convention entitled him to consular assistance. As referenced above, our supreme court noted that that information was not concealed, but, in fact, freely and publicly available to the defendant. The court continued: "Even if we accept defendant's contention that the State was obligated to inform defendant of these rights, we are unable to conclude that this failure can constitute fraud when the rights are a matter of public record." *Madej*, 193 Ill. 2d at 403. Similarly, even if McNeal was derelict in his duty to inform defendant of the conflict, the ease with which defendant could have discovered the conflict, which was apparently preserved on the public court record, defeats any conclusion of fraudulent concealment.

¶ 19 In summary, defendant failed to allege facts showing that the State took affirmative steps to fraudulently conceal the grounds for relief raised in his section 2-1401. Accordingly, there was no tolling of the statute of limitations of section 2-1401, and the circuit court properly dismissed defendant's petition as untimely. Because defendant's petition actually refuted any potential claim of fraudulent concealment, we find the circuit court did not err by dismissing the petition, rather than giving defendant an opportunity to correct any defects. We would note that because defendant's section 2-1401 petition was already filed outside of the two-year window, the dismissal has no tangible effect on defendant's ability to refile a new petition. *People v. Vari*, 2016 IL App (3d) 140278, ¶ 19.

¶ 20 CONCLUSION

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

¶ 22 Affirmed.

¶ 23 JUSTICE McDADE, specially concurring.

¶ 24 I agree with the majority's analysis and conclusion that defendant failed to plead facts showing fraudulent concealment on the part of the State or facts that would otherwise exempt his claim from the two-year limitation on section 2-1401 claims. For that reason, I concur with the majority's holding that the dismissal of defendant's motion was proper. However, I write separately to address the patent inequity in the fact that the law must deny this defendant any relief.

¶ 25 A criminal defendant's sixth amendment right to the effective assistance of counsel includes the right to conflict-free representation. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). A per se conflict of interest exists where certain facts about defense counsel's status alone constitute a disabling conflict. *Id.* This includes situations in which defense counsel is a

former prosecutor who previously participated in the prosecution of the defendant. *Id.* at 143-44 (citing *People v. Lawson*, 163 Ill. 2d 187, 217-18 (1994)). Our supreme court has made clear that "a per se conflict is grounds for automatic reversal." *Hernandez*, 231 Ill. 2d at 143.

¶ 26 It is undisputed that defense counsel in the present case represented defendant at his plea hearing despite a per se conflict of interest. The record shows that defendant was represented by William McNeal at his plea hearing. The record also shows that a person with the last name "McNeal" represented the State against defendant at a previous court date in the same matter. While this initially leaves some room for doubt—as it might be chalked up to mere happenstance—much should be gleaned from the State's silence on the issue. Neither in the circuit court nor in this court has the State denied that it was, in fact, the same McNeal who represented both the State and defendant in this case. Certainly, if there were two separate McNeals, the State would be privy to such information, and would be quick to point it out.

¶ 27 In being represented by an attorney with a per se conflict, defendant was deprived of the right to counsel guaranteed by the sixth amendment to the United States Constitution and article I, section 8 of the Illinois Constitution. U.S. Const., amend VI; Ill. Const. 1970, art. I, § 8. While all constitutional errors are serious, our supreme court has made clear that a per se conflict of interest is a particularly egregious violation by deeming it cause for the automatic reversal of a conviction.

¶ 28 Nevertheless, though defendant would be clearly entitled to full relief on the merits, the circuit court and this court have had no option but to dismiss his petition for a lack of timeliness under section 2-1401. Two courts, bound by procedural requirements, have been forced to endorse a patently unconstitutional conviction.

¶ 29 I would suggest that any criminal conviction achieved following such a blatant and serious deprivation of a fundamental constitutional right should be considered void.

¶ 30 A challenge to a void judgment may be brought at any time, and thus would not be subject to the two-year limitation period of section 2-1401. See *People v. Ernest Thompson*, 209 Ill. 2d 19, 25 (2004). While our supreme court has recently reduced the number of scenarios in which voidness applies by eliminating the void sentence rule (see *People v. Castleberry*, 2015 IL 116916), other instances of voidness remain applicable. See *People v. Dennis Thompson*, 2015 IL 118151, ¶¶ 31-32. For example, a defendant may challenge as void a conviction founded upon a facially unconstitutional statute. *Id.* ¶ 32. I submit that the inclusion of egregious and undisputed violations of fundamental constitutional rights among the ways in which a conviction may be rendered void would not be too substantial an extension of the voidness doctrine.

¶ 31 I recognize, however, that the judicial creation of new categories of voidness claims is the exclusive prerogative of our supreme court. On the current state of the law, defendant's claims do not raise an issue of voidness, such that he could avoid the two-year limitation period of section 2-1401. For that reason only, I concur in the result.