

No. 1-16-2169

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 02 CR 8449
)	
TOMMY JONES,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's section 2-1401 petition to vacate a summary dismissal order from 2007 was untimely. Thus, we grant the State Appellate Defender's motion to withdraw and affirm the circuit court's dismissal of the section 2-1401 petition.

¶ 2 Defendant Tommy Jones appeals from the dismissal of his *pro se* “Petition to Vacate Judgment,” which he brought pursuant to section 2-1401 of the Code of Civil Procedure (Code). 735 ILCS 5/2-1401 (West 2014).

¶ 3 Following a 2004 jury trial, defendant was found guilty of first degree murder. He was sentenced to 50 years in prison, including a 25-year firearm sentencing enhancement. On direct appeal, we affirmed defendant’s conviction and sentence. *People v. Jones*, No. 1-04-2069 (2006) (unpublished order under Supreme Court Rule 23).

¶ 4 In 2007, defendant filed a *pro se* postconviction petition, which the trial court summarily dismissed as frivolous and patently without merit. Defendant appealed, contending that his petition stated the gist of a meritorious claim that his trial counsel was ineffective. We affirmed the trial court’s dismissal of the petition. *People v. Jones*, No. 1-07-2632 (2009) (unpublished order under Supreme Court Rule 23).

¶ 5 In 2014, defendant filed a *pro se* petition under section 2-1401 of the Code, alleging that, pursuant to *Alleyne v. United States*, 570 U.S. 99 (2013), the 25-year sentence enhancement imposed upon him was void. The trial court denied the petition. On appeal, we granted counsel’s motion to withdraw and affirmed the trial court’s denial of the petition. *People v. Jones*, 2015 IL App (1st) 141114-U.

¶ 6 On July 16, 2015, defendant filed another *pro se* section 2-1401 petition. It is that petition that is at issue in the instant appeal. Defendant claims that the 2007 summary dismissal of his *pro se* postconviction petition was void because the trial court did not issue a written order, but rather, ruled orally. On September 29, 2015, defendant filed a *pro se* “request for entry of default,” due to the State’s failure to answer his petition. The trial court dismissed the section 2-

1401 petition on March 30, 2016, finding, *inter alia*, that the trial court was not required to enter a written order summarily dismissing the 2007 postconviction petition. The trial court also denied defendant's request for a default judgment, explaining that responsive pleadings are not required in section 2-1401 proceedings. This court allowed defendant's late notice of appeal from the trial court's dismissal order of March 30, 2016.

¶ 7 The State Appellate Defender, who was appointed to represent defendant on appeal, has filed a motion in this court along with a supporting brief pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), requesting leave to withdraw from representing defendant based on its conclusion that an appeal in this cause would be frivolous. In its supporting brief, the State Appellate Defender acknowledges that the circuit court summarily dismissed the defendant's postconviction petition in 2007 without *any* written order. The State Appellate Defender also acknowledges that section 122-2.1(a) of the Post Conviction Hearing Act (Act) provides that the circuit court's summary dismissal of a postconviction petition shall be in the form of a "written order specifying the findings of fact and conclusions of law it made in reaching its decision." 725 ILCS 5/122-2.1(a)(2) (West 2016). Nonetheless, the State Appellate Defender suggests that the defendant's claim of error is frivolous in light of *People v. Porter*, 122 Ill. 2d 64 (1988), which discussed section 122-2.1(a) of the Act. In *Porter*, our supreme court held that, although it was "advisable that the trial court state its reasons for dismissal," it was not "mandatory," and so "the failure to specify the findings of fact and conclusions of law in the written order does not require reversal of the dismissal order." *Id.* at 82.

¶ 8 Defendant has filed a response to the State Appellate Defender's motion to withdraw, in which he argues that *Porter* does not control in his case, as he challenges the lack of *any* written

summary dismissal order, not merely the circuit court’s failure to include written findings of fact or conclusions of law. Defendant relies on *People v. Perez*, 2014 IL 115927, which also discussed the requirements of section 122-2.1(a) of the Act. As noted by defendant, *Perez* emphasized the procedural requirements for an order of dismissal, including a written order:

“Section 122–2.1(a) is very clear about what the court must do within 90 days if it is dismissing a petition pursuant to this section. *** If the court is dismissing the petition, the order must be a ‘written order’ that contains ‘findings of fact and conclusions of law,’ and this written order is a ‘final judgment’ that must be served on the petitioner within 10 days of its entry.” *Id.* ¶ 12.

Perez elsewhere indicated that the circuit court’s “public expression” of the summary dismissal of a postconviction petition would not be sufficient under the Act. See *id.* ¶ 23 (“[T]he statute requires something *more* than public expression. Section 122–2.1(a) specifically requires that, when a trial court is summarily dismissing a postconviction petition, the court must *enter its final written judgment order*, *** within 90 days.” (Emphases in original.))

¶ 9 The defendant asserts that his claim of error is governed by *Perez* and not *Porter*. The defendant urges that, under *Perez*, a “written order is mandatory” whereas *Porter* merely held that “it is not mandatory that a written order contain[s] a reason” for summarily dismissing a postconviction petition. We cannot say that the distinction urged by defendant is a frivolous argument, especially as the 2014 *Perez* decision did not contain any reference to the 1988 *Porter* decision. In our view, defendant has stated at least an arguable claim that the lack of *any* written order of summary dismissal could constitute error under the language of the Act and *Perez*.

¶ 10 Nonetheless, because the instant appeal arises upon the denial of a section 2-1401 petition, we find that the defendant's appeal is without merit for an independent reason: his petition is untimely. Subject to exceptions not at issue here, a section 2-1401 petition "must be filed not later than 2 years after the entry of the order or judgment" that the petition seeks to vacate. 735 ILCS 5/2-1401 (West 2016). In this case, it is undisputed that the instant section 2-1401 petition was filed in July 2016, well over two years beyond the 2007 summary dismissal that defendant seeks to vacate. Furthermore, as defendant does not suggest that the circuit court lacked jurisdiction at that time, he cannot claim that the 2007 dismissal was "void" and subject to collateral attack at any time. See *LVNV Funding, LLC v. Trice*, 2015 IL 116126, ¶ 27. Thus, the defendant's section 2-1401 petition was subject to dismissal as untimely.

¶ 11 Accordingly, on that procedural basis, we grant the State Appellate Defender leave to withdraw. However, we note that, were it not for the untimeliness of the section 2-1401 petition, we could find that defendant presented an arguably meritorious claim that the 2007 summary dismissal was erroneous due to the lack of a written order. Thus, although we grant the instant motion to withdraw on procedural grounds, we advise the State Appellate Defender to be cognizant of the underlying substantive issue raised by defendant, should it arise in future appeals.

¶ 12 Accordingly, we grant the motion of the State Appellate Defender for leave to withdraw as counsel and affirm the judgment of the circuit court.

¶ 13 Affirmed.