

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).

2018 IL App (4th) 160133-U

No. 4-16-0133

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 28, 2018

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
PERRY E. HAMPTON,)	No. 09CF1903
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Harris and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted the office of the State Appellate Defender’s motion to withdraw as appellate counsel and affirmed the trial court’s dismissal of defendant’s section 2-1401 petition as no meritorious issue could be raised on appeal.

¶ 2 This appeal comes to us on a motion from the office of the State Appellate Defender (OSAD) to withdraw as appellate counsel on the ground no meritorious issue could be raised on appeal. We grant OSAD’s motion and affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a February 2010 trial, a jury found defendant, Perry E. Hampton, guilty of residential burglary (720 ILCS 5/19-3 (West 2008)). In March 2010, the trial court sentenced

defendant to 29 years' imprisonment. Defendant appealed, and this court granted him fine and fee relief. *People v. Hampton*, 2012 IL App (4th) 100219-U.

¶ 5 While his appeal from his conviction and sentence was pending, defendant filed a petition for relief from judgment under section 2-1401 of the Code of Civil Code (735 ILCS 5/2-1401 (West 2010)) and a petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)). The trial court later denied the section 2-1401 petition and summarily dismissed the postconviction petition. Defendant appealed from the summary dismissal of the postconviction petition, and this court affirmed. *People v. Hampton*, 2014 IL App (4th) 120527-U.

¶ 6 While his appeal from the summary dismissal of his postconviction petition was pending, defendant filed a second section 2-1401 petition. The trial court later denied the petition. Defendant appealed, and this court granted defendant's motion for summary remand. *People v. Hampton*, No. 4-13-1055 (Feb. 25, 2014). On remand, defendant filed a motion for substitution of judge, which was denied, and the State filed a motion to dismiss, which was granted. Defendant appealed, and this court affirmed. *People v. Hampton*, 2016 IL App (4th) 140489-U.

¶ 7 While his appeal from the dismissal of the second section 2-1401 petition was pending, defendant, on September 11, 2015, filed a third section 2-1401 petition. In the petition, defendant asserted the judgment of conviction and sentence is void and plain error occurred when (1) his trial counsel brought to the trial court's attention he was eligible for extended-term sentencing and then the court relied on an unidentified document to establish the existence of a prior conviction; (2) the jury was instructed on residential burglary as a lesser-included offense

of armed violence and the evidence was insufficient; (3) the jury instructions failed to include language that mere presence is insufficient to prove accountability; (4) the jury was instructed on accountability when he was not proven guilty beyond a reasonable doubt; (5) the court abused its discretion in imposing an excessive sentence and his trial counsel did not argue all evidence in mitigation; (6) his trial counsel failed to admit 911 tapes into evidence and cross-examine a police officer concerning an exculpatory statement; (7) his trial counsel failed to enter a time-frame chart into evidence; (8) the prosecutor committed misconduct by arguing misleading facts and evidence; and (9) the court refused the jury's request to see a transcript of his trial testimony.

¶ 8 On January 22, 2016, the trial court dismissed defendant's third section 2-1401 petition as untimely. The court further found, even if it considered the claims raised in the petition on their merits, the claims were factually and legally insufficient and frivolous and patently without merit.

¶ 9 In February 2016, defendant filed a timely notice of appeal from the dismissal of his third section 2-1401 petition, and the trial court appointed OSAD to represent defendant on appeal. In March 2018, OSAD filed a motion for leave to withdraw as counsel, asserting no meritorious claim could be raised on appeal. This court allowed defendant leave to file a response to OSAD's motion by May 1, 2018. Defendant has not done so.

¶ 10 II. ANALYSIS

¶ 11 OSAD contends any argument suggesting the trial court erred in dismissing defendant's third section 2-1401 petition would be without merit. After its review, OSAD concluded (1) defendant's petition was ripe for adjudication; (2) defendant's petition is untimely and no exception to the statute of limitations applies; (3) the judgment of conviction and

sentence is not void; and (4) the claims raised in the petition are either forfeited, subject to *res judicata*, or without merit.

¶ 12 OSAD concluded defendant's petition was ripe for adjudication. We agree. Our supreme court has held a section 2-1401 petition is ripe for adjudication after the opposing party has had 30 days to answer. *People v. Carter*, 2015 IL 117709, ¶ 16, 43 N.E.3d 972; *People v. Laugharn*, 233 Ill. 2d 318, 322, 909 N.E.2d 802, 804-05 (2009). Here, the trial court ruled on defendant's petition well outside the 30-day period for the State to respond.

¶ 13 OSAD concluded defendant's petition is untimely and no exception to the statute of limitations applies. We agree. A section 2-1401 petition must be filed not later than two years after the entry of the judgment, excluding time during which the petitioner is under a legal disability or duress or the ground for relief is fraudulently concealed. *People v. Caballero*, 179 Ill. 2d 205, 210-11, 688 N.E.2d 658, 660-61 (1997). Here, defendant filed his section 2-1401 petition more than five years after the judgment of conviction and sentence was entered. The petition further does not allege the delay was due to a legal disability or duress or caused by the ground for relief being fraudulently concealed.

¶ 14 OSAD concluded the judgment of conviction and sentence is not void. We agree. "[A] void judgment may be attacked at any time through a section 2-1401 petition." *People v. Rucker*, 2018 IL App (2d) 150855, ¶ 18. A judgment is void if (1) the court that entered the judgment lacked personal or subject matter jurisdiction or (2) it is based on a facially unconstitutional statute that is void *ab initio*. *People v. Thompson*, 2015 IL 118151, ¶¶ 31-32, 43 N.E.3d 984. Here, defendant did not raise any claim suggesting the trial court lacked personal or subject matter jurisdiction or the judgment was based on a facially unconstitutional statute that is

void *ab initio*.

¶ 15 Without a showing the judgment of conviction and sentence is void or an exception to the statute of limitations applies, defendant's section 2-1401 petition is untimely and dismissal was proper.

¶ 16

III. CONCLUSION

¶ 17 We grant OSAD's motion to withdraw as counsel and affirm the trial court's dismissal of defendant's section 2-1401 petition.

¶ 18 Affirmed.