



hearing, the court set a trial date of June 22, 1999. However, on June 8, 1999, the defendant's counsel filed a motion to withdraw, and on June 14, 1999, the court granted the motion after consulting with the defendant. This delay was attributed to the defendant. The court then moved the trial date to August 10, 1999. Another attorney was appointed to the defendant and that attorney moved to withdraw on June 21, 1999. On July 12, 1999, that counsel's motion to withdraw was granted and the court appointed the defendant a new attorney. The new defense counsel filed a motion to continue on July 23, 1999, which the court granted on August 2, 1999, after determining that the defendant did not object. The new trial date was set for September 21, 1999. Again, this delay was attributed to the defendant. On September 2, 1999, defense counsel filed another motion to continue, which the court granted on September 7, 1999, after determining that the defendant agreed with the motion to continue. The new trial date was set for November 2, 1999, and the delay was attributed to the defendant.

¶ 5 At a motion hearing on November 2, 1999, the State moved to dismiss counts II and III of the charges against the defendant and proceed only on count I. The original count I charged the defendant with first-degree murder while committing a forcible felony, armed robbery, pursuant to section 9-1(a)(3) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(3) (West 1998)). At that hearing, the State sought to amend count I by changing the charge to committing first-degree murder during the course of an *attempted* armed robbery. Defense counsel objected, indicating that they were not prepared to defend against the amended charge. The court determined that the amendment was not sought to change a formal defect and that it would prejudice and surprise the defendant. However, the court determined that it had the discretion to decide whether the amendment would be permitted. It allowed the State to amend the charge. Defense counsel then requested time to prepare for trial under the legal theory in the amended count I. The court had both defense counsel and the State

calculate whether the defendant's speedy trial rights would be violated if the delay was attributed to the State. After determining that a one-week delay would not violate the defendant's speedy trial rights, the court gave defense counsel a week to prepare for trial and attributed the delay to the State.

¶ 6 The trial began on November 9, 1999. The jury found the defendant guilty of first-degree murder while attempting to commit an armed robbery. On December 16, 1999, the defendant filed a motion for a new trial and a motion in arrest of judgment. On January 7, 2000, the court denied both motions and sentenced the defendant to 27 years' imprisonment. The defendant's conviction was affirmed on direct appeal. *People v. Harris*, No. 5-00-0078 (2001) (unpublished order pursuant to Supreme Court Rule 23). This court also affirmed the dismissal of the defendant's petition for postconviction relief. *People v. Harris*, No. 5-08-0114 (2009) (unpublished order pursuant to Supreme Court Rule 23).

¶ 7 The defendant filed his postjudgment petition on March 28, 2012, arguing that his conviction was void because his statutory speedy trial rights were violated. The State moved to dismiss the petition. The circuit court granted the motion to dismiss. This appeal followed.

¶ 8 ANALYSIS

¶ 9 We review the dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). Generally, a section 2-1401 petition must be filed within two years after the entry of the order or judgment (735 ILCS 5/2-1401(c) (West 2010)). The final judgment in a criminal case is the sentencing. *People v. Jake*, 2011 IL App (4th) 090779, ¶ 24. A petitioner has two years to file a postjudgment petition unless the judgment of the circuit court is void (735 ILCS 5/2-1401(f) (West 2010)). A judgment is void when the circuit court lacked the inherent power to render the judgment or sentence or where the court lacked both personal and subject matter jurisdiction. *People v. Raczkowski*, 359 Ill. App.

3d 494, 496-97 (2005). Thus, if the judgment is void, a defendant may attack the judgment at any time. *Id.*

¶ 10 Here, the defendant argues that his conviction is void because his speedy trial rights were violated. He does not argue that the court lacked personal or subject matter jurisdiction, but that it lacked the inherent power to render the judgment in his case. We find that *People v. Pearson*, 88 Ill. 2d 210, 216 (1981), solves this issue. In *Pearson*, the supreme court held that the passage of time, for purposes of speedy trial rights, did not remove the circuit court's jurisdiction. *Id.* Further, a circuit court will not be ousted of jurisdiction from making a mistake of fact, law, or both. *People v. Sharifpour*, 402 Ill. App. 3d 100, 121 (2010). Thus, even if the defendant's speedy trial rights were violated, such a violation would not strip the circuit court of its power to render a judgment.

¶ 11 The defendant further argues that a mere allegation of voidness would negate the two-year time limit. This simply is not true. A judgment must be actually void in order to overcome the two-year time limit. See *People v. Harvey*, 196 Ill. 2d 444, 447 (2001). For those reasons, we find that the defendant's conviction is not void because the circuit court had the inherent power to render the defendant's conviction. As the defendant's conviction is not void, he cannot overcome the two-year time period in which he could have filed his section 2-1401 petition. The defendant was sentenced 12 years ago, which is far beyond the time in which he could have timely filed his petition. Thus, the defendant's section 2-1401 petition was untimely and was properly dismissed.

¶ 12 Even if the defendant's section 2-1401 petition had been timely, the defendant waived and forfeited the speedy trial issue when he did not raise the issue during trial and did not raise the issue in a posttrial motion. Failure to raise an issue during trial as well as in a posttrial motion constitutes waiver of that issue on appeal. *People v. Coleman*, 227 Ill. 2d 426, 433 (2008). "Waiver" is a voluntary relinquishment of a known right, whereas

"forfeiture" is a failure to assert that right. *Gallagher v. Lenart*, 226 Ill. 2d 208, 229-30 (2007). Dismissal is proper where a section 2-1401 petition raises only claims which could have been raised in the trial court or on direct review. *People v. Mamolella*, 42 Ill. 2d 69, 70-71 (1969).

¶ 13 In this case, when the State sought to amend count I of the charge, defense counsel objected not because of a speedy trial issue, but because it had prepared a defense based on the original count I. The court even had both the State and defense counsel calculate whether allowing a week for defense counsel to prepare for trial under the amended count I would violate the defendant's speedy trial rights. Defense counsel did not object when the State asserted, and the court agreed, that the weeklong extension would not violate the defendant's speedy trial rights. When defense counsel did not object to the State's and the court's calculation, it constituted a waiver of the speedy trial issue. Further, in the defendant's posttrial motion as well as his motion in arrest of judgment, he did not raise a speedy trial issue. He also did not raise the issue in his direct appeal, his *pro se* postconviction petition, his amended postconviction petition, or his appeal from the second stage dismissal of his amended postconviction. Thus, by not raising the issue before and after the trial, the defendant forfeited this issue. For that reason, dismissal of the defendant's section 2-1401 petition was proper.

¶ 14 Next, the postjudgment petition was properly dismissed because the petition fails to allege new facts that would have prevented the rendition of the judgment. "The purpose of a section 2-1401 petition for relief from judgment is to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner or court at the time the judgment was entered, which, if known then, would have prevented the judgment's rendition." *People v. Harris*, 391 Ill. App. 3d 246, 249 (2009). Relief is based not on information that arises after the judgment is rendered, but on information that was available before the judgment

was rendered that could have changed how the judgment was rendered. *People v. Haynes*, 192 Ill. 2d 437, 461 (2000).

¶ 15 Here, the defendant does not allege facts that were unknown to him or the court at the time of trial, as he relies solely on the record and transcripts from the circuit court proceedings. Instead, the defendant alleges a new legal claim, the speedy trial issue, based on existing facts. A section 2-1401 petition is not the appropriate vehicle to submit a new legal claim based on existing facts that were known to the defendant during the prosecution of his case. Thus, dismissal was appropriate upon this legal basis.

¶ 16 Finally, even if the defendant had presented new facts that would have entitled him to relief under section 2-1401, his speedy trial rights were not violated. A postjudgment petition for relief from judgment is subject to dismissal for want of legal or factual sufficiency, and thus, the petition may be dismissed upon a challenge that, even taking as true its allegations, it does not state a meritorious defense or diligence. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007).

¶ 17 The defendant argues that when the State amended count I of the charge, it brought a new and additional charge and, thus, continuances and delays attributed to the defendant on the original charge should not have been attributed to the defendant on the amended charge per *People v. Williams*, 94 Ill. App. 3d 241, 248-49 (1981). The State contends that it did not bring new and additional charges when it amended the original count I but instead corrected a formal defect. As noted above, the circuit court found that the State was not amending the charge to correct a formal defect but allowed the State to amend the charge anyway. We agree with the State.

¶ 18 In *People v. Knaff*, 196 Ill. 2d 460, 473-74 (2001), the Illinois Supreme Court found that it was unnecessary to include a lesser-included offense in a charging document because the State would have to prove every element of the lesser-included offense when it sought

to convict a defendant on the greater offense. The court held that failing to include the lesser-included offense should not surprise the defendant.

¶ 19 The same is true here. The State initially charged the defendant with armed robbery but sought to amend the charge to attempted armed robbery. Attempted armed robbery is a lesser-included offense, and thus the defendant should not have been surprised when the State moved to amend the charging instrument. The delays attributed to the defendant prior to the amendment were therefore attributed to the defendant after the amendment. The defendant's speedy trial rights were not violated.

¶ 20 **CONCLUSION**

¶ 21 For the foregoing reasons, the judgment of the circuit court of Williamson County is affirmed.

¶ 22 Affirmed.