

**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).

2014 IL App (4th) 121047-U

NO. 4-12-1047

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

July 2, 2014

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, )

Plaintiff-Appellee, )

v. )

EDWARD D. THOMPSON, )

Defendant-Appellant. )

) Appeal from

) Circuit Court of

) Champaign County

) No. 99CF245

) Honorable

) Jeffrey B. Ford,

) Judge Presiding.

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PRESIDING JUSTICE APPLETON delivered the judgment of the court.  
Justices Knecht and Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* Just because the record lacks "a certificate of the clerk showing the impaneling of the grand jury" (Ill. S. Ct. R. 608(a)(2) (eff. Dec. 13, 2005)), it does not follow that defendant's conviction and sentence are void so as to excuse him from meeting the two-year deadline for filing a petition for relief from judgment (see 735 ILCS 5/2-1401(c) (West 2012)).

¶ 2 Defendant, Edward D. Thompson, appeals from the denial of his petition for relief from judgment. See 735 ILCS 5/2-1401 (West 2012). In his petition, which he filed on September 13, 2012, he contends that, under *People v. Gray*, 261 Ill. 140, 141-42 (1913), his conviction of first degree murder (720 ILCS 5/9-1(a)(1) (West 1998)) is void because the record lacks a "certificate of grand jury impanelment" showing that "a grand jury was summoned by a subpoena, assembled, and impaneled, as well as sworn in by a judge." See Ill. S. Ct. R. 608(a)(2) (eff. Dec. 13, 2005).

¶ 3 Pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993), the office of the State Appellate Defender (OSAD) has filed a motion to withdraw from representing defendant, because, as OSAD explains in an accompanying memorandum, it does not believe a reasonable argument could be made in support of this appeal. Defendant has responded with additional points and authorities, and he also has filed a reply brief in response to the State's brief. After considering these arguments, we agree with OSAD's assessment of the merits of this case. Therefore, we grant OSAD's motion to withdraw, and in our *de novo* review (see *People v. Vincent*, 226 Ill. 2d 1, 18 (2007)), we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In February 1999, a grand jury returned an indictment against defendant. The indictment had three counts, each of which charged him with committing the first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 1998)) of Barry Robinson on January 23, 1999.

¶ 6 The indictment is in the record. It is signed by the foreperson of the grand jury, and each count of the indictment states that the grand jurors were "sworn."

¶ 7 According to Rule 608(a), however, "[t]he record on appeal must contain \*\*\* a certificate of the clerk showing the impaneling of the grand jury if the prosecution was commenced by indictment." Ill. S. Ct. R. 608(a)(2) (eff. Dec. 13, 2005). Black's Law Dictionary 563 (8th ed. 2004) (defining "empanel" as "[t]o swear in (a jury) to try an issue or case"). The record does not appear to contain such a certificate, although a docket entry for February 18, 1999, states: "Indictment returned in open Court on 03 Counts," and a docket entry for February 25, 1999, states that defendant was arraigned on the indictment and that he pleaded not guilty and requested a trial by jury.

¶ 8 On July 15, 1999, a jury found defendant guilty of the first degree murder of Robinson.

¶ 9 On August 31, 1999, the trial court sentenced defendant to imprisonment for 45 years.

¶ 10 II. ANALYSIS

¶ 11 Ordinarily, a petition for relief from judgment "must be filed not later than 2 years after the entry of the order or judgment." 735 ILCS 5/2-1401(c) (West 2012). In computing those two years, however, one must exclude the time during which the petitioner was "under legal disability or duress" or during which "the ground for relief [was] fraudulently concealed." *Id.* Also, the two-year deadline is completely inapplicable if the judgment being challenged is void. 735 ILCS 5/2-1401(f) (West 2012); *People v. Gosier*, 205 Ill. 2d 198, 206 (2001).

¶ 12 The judgment in a criminal case is the sentence (*People v. Shaw*, 2014 IL App (2d) 121105, ¶ 3), and because defendant was sentenced in August 1999, his petition, filed in September 2012, clearly is beyond the two-year deadline. The petition does not allege disability, duress, or fraudulent concealment. Instead, defendant contends, on the authority of *Gray*, that his conviction and sentence are void.

¶ 13 In *Gray*, the record showed that a grand jury had indicted the defendant for burglary and larceny, the trial court had arraigned him on the indictment, he had pleaded guilty, and the court had sentenced him to imprisonment. *Gray*, 261 Ill. at 141. The record did not show, however, that the grand jury had been sworn. *Id.* For that reason, the supreme court reversed the judgment. *Id.* at 142. The supreme court reasoned: "Without being sworn the grand jury was without jurisdiction to take any action, and it is as essential that the record show

an indictment by a grand jury having jurisdiction as a judgment by a court having jurisdiction." *Id.* In short, "[t]he record [had to] show that the grand jury was sworn." *Id.* at 141.

¶ 14 Assuming, for the sake of argument, that article VI, section 9, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. VI, § 9) has not rendered *Gray* obsolete (see *People v. Hughes*, 2012 IL 112817, ¶ 29; *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334-35 (2002)), *Gray* is distinguishable on its facts. In *Gray*, the record failed to show the grand jury had been sworn. In the present case, by contrast, each count of the indictment shows the grand jury was sworn. *Gray* does not require that this showing take the form of "a certificate of the clerk." Ill. S. Ct. R. 608(a)(2) (eff. Dec. 13, 2005). All *Gray* requires is that the showing be in the record. *Gray*, 261 Ill. at 141 ("The record also must show that the grand jury was sworn[.]").

¶ 15 III. CONCLUSION

¶ 16 For the foregoing reasons, we affirm the trial court's judgment. We award the State \$50 in costs against defendant.

¶ 17 Affirmed.