

No. 1-10-3346

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 89 CR 11854
	)	89 CR 11855
	)	89 CR 11856
	)	
ROBERTO CHAVEZ,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE MURPHY delivered the judgment of the court.  
Presiding Justice Steele and Justice Salone concurred in the judgment.

**ORDER**

¶ 1 *Held:* Dismissal of defendant's joint petition for relief under section 2-1401 of the Code and the Post-Conviction Hearing Act affirmed where defendant's section 2-1401 petition was untimely filed and he lacked standing to obtain post-conviction relief.

¶ 2 Defendant Roberto Chavez appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his joint petition for relief under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)) and the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He contends that he has standing to proceed under the Act and that his petition was timely filed, that the filing limitations under the Act and section 2-1401 of the Code are unconstitutional, and that he set forth a cognizable claim

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of ineffective assistance of trial counsel under both to warrant further proceedings in the trial court.

¶ 3 The record shows that defendant is a native and citizen of Mexico who became a permanent resident of the United States in May 1986. He was charged with three counts of armed robbery in 1989, and failed to appear for trial. A warrant for his arrest was executed in 2004, and in September 2005, he pled guilty to three counts of the lesser included offense of robbery. He was then sentenced, in accordance with the plea agreement, to concurrent terms of 36 months' probation which was terminated satisfactorily on September 12, 2008.

¶ 4 During the guilty plea proceeding, the court admonished defendant as follows:

"Do you understand that the pleas of guilty here could have certain immigration consequences, first being you could [be] deported as a result of these convictions. \*\*\* You can also be excluded from admission to the United States. That means if you were to leave the country and then try to reenter the United States they can stop you at the border and refuse you admission to the United States.

\*\*\* You could also be refused to [be] naturalize[d] [] as a citizen."

Defendant indicated that he understood these admonishments.

¶ 5 The court also admonished defendant of his appeal rights, and the manner in which to perfect them. Defendant, however, did not file a post-plea motion within 30 days, or otherwise attempt to perfect an appeal from the judgment entered on his plea conviction.

¶ 6 After defendant completed his probation on the robbery offenses, the Immigration and Naturalization Service (INS) instituted deportation proceedings against him. In April 2010, defendant, through counsel, filed a section 2-1401 motion to vacate his plea. He alleged that his trial counsel was ineffective for misadvising him at the guilty plea proceeding that there would be no immigration consequences, "even in the face of" the trial court's admonishments. He maintained that:

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"[a]t the same time that he was being admonished by [the trial court] regarding his potential for deportation, however, [his] counsel affirmatively advised him that there would be *no immigration consequences* as a result of the Court's findings."  
(Emphasis in original.)

As a result, he claimed that he "completed his criminal matter with a belief that, regardless of what the Court instructed him, he would not face" deportation due to his guilty plea.

¶ 7 In support of his claim, defendant attached his own affidavit in which he averred that he was admonished by the court that there may be immigration consequences as a result of the guilty plea. He also averred that his counsel informed him that he might encounter some difficulties with immigration but failed to inform him that as a result of the conviction he would absolutely and certainly be deported.

¶ 8 In July 2010, the State filed a motion to dismiss defendant's petition. The State alleged that the motion to vacate was untimely, that defendant's constitutional claim of ineffective assistance of trial counsel was not proper under section 2-1401, and that defendant failed to establish a claim of ineffective assistance of trial counsel. The State also noted that there was no prejudice to defendant where he was admonished by the court that there were immigration consequences, and maintained that defendant cannot be rewarded for ignoring the court's admonitions.

¶ 9 Defendant filed a response to the State's motion to dismiss claiming that he alleged an error of fact which was cognizable under section 2-1401, that his motion was timely filed, that the two-year time limitation did not apply to the allegedly void judgment, and that he was diligent in presenting his motion once he learned that he was misadvised. He also claimed that he established a constitutional claim of ineffective assistance of trial counsel.

¶ 10 In October 2010, defendant, through counsel, filed a joint amended motion to vacate and

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a petition for post-conviction relief. In this motion, defendant reiterated his ineffective assistance of trial counsel claim, alleging again that, based on counsel's representation that there would be no immigration consequences resulting from his guilty plea, he entered his plea on the belief that, regardless of what the court instructed him, he would not face deportation because of it. He also alleged that his section 2-1401 motion was timely because he was unaware of the impact or the consequences of his conviction at the time he pled guilty, and that had he been correctly advised by his counsel, he would not have pled guilty.

¶ 11 The State subsequently filed an amended motion to dismiss alleging that the section 2-1401 petition was untimely and that the issue raised was not proper under section 2-1401. The State also alleged that defendant could not establish prejudice based on counsel's incorrect advice where he was aware of the immigration consequences when he pleaded guilty as the court had advised him of such. The State further alleged that defendant lacked standing to bring a post-conviction petition because he was not imprisoned within the meaning of the Act as he had completed his probation.

¶ 12 The circuit court granted the State's motion to dismiss defendant's petition. In doing so, the court found that defendant's section 2-1401 petition was untimely in that it was required to be filed "within 30 days after the judgment is entered," and that defendant did not present a proper section 2-1401 claim. The court also noted that defendant did not establish a claim of ineffective assistance of trial counsel where he was advised of the possible deportation consequences of his plea by the trial court at the time he pled guilty. With regard to the post-conviction claims, the court found that defendant had no standing to bring a post-conviction petition because he completed his probation in 2008.

¶ 13 In this appeal from that order, defendant first claims that he had standing to pursue post-conviction relief. He maintains that he is considered imprisoned for purposes of the Act since he is subject to deportation. In support of his position, defendant relies on *Padilla v. Kentucky*, 559 U.S. \_\_\_, 130 S. Ct. 1473 (2010). In doing so, he recognizes the supreme court's recent decision

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in *People v. Carrera*, 239 Ill. 2d 241, 255-56 (2010), that *Padilla* does not change its position that a defendant subject to deportation does not have standing under the Act, but maintains that *Carrera* was wrongly decided.

¶ 14 We initially observe that we are bound by the decisions of the supreme court and have no authority to overrule them. See, e.g., *People v. Artis*, 232 Ill. 2d 156, 164 (2009); *People v. Mallory*, 374 Ill. App. 3d 820, 822 (2007); *People v. Palmer*, 141 Ill. App. 3d 234, 238 (1986). In addition, we note that this court has addressed and rejected defendant's claim post *Carrera*, finding that a defendant, who has completed his probation and is facing deportation, did not have standing to file a petition for post-conviction relief. *People v. Vinokur*, 2011 IL App (1st) 090798, ¶6, 7.

¶ 15 In reaching that conclusion, this court explained that a defendant is imprisoned in the penitentiary for purposes of the Act when his liberty is actually constrained *by the state*, and, accordingly, where defendant has fully served *his underlying sentence*, he has no standing to file a petition for post-conviction relief. (Emphasis added.) *Vinokur*, ¶6-8. Deportation is thus viewed as a collateral consequence of a plea, and the constraint on his liberty as a result of the plea, ends with the completion of probation. *Vinokur*, ¶7, citing *Carrera*, 239 Ill. 2d at 257. We find that reasoning sound and likewise conclude that defendant was no longer imprisoned, for purposes of the Act, at the time he filed his petition, and thus lacked standing to do so. *Padilla's* failure to classify deportation as either a collateral or direct consequence does not change that conclusion. *Carrera*, 239 Ill. 2d at 256-57.

¶ 16 Defendant's further claim that he is entitled to post-conviction relief even if he is not imprisoned for purposes of the Act because he otherwise has no legal remedy to withdraw his petition was also rejected in *Carrera*, 239 Ill. 2d at 258, and *Vinokur*, ¶10. As explained therein, defendant has a remedy to challenge his conviction, so long as the challenge is made while he is serving the sentence imposed on that conviction (*Carrera*, 239 Ill. 2d at 259; *Vinokur*, ¶10); however, the remedy set forth in the Act cannot be expanded to bring defendant's case within

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reach of the Act (*Carrera*, 239 Ill. 2d at 259). We therefore conclude that the circuit court correctly concluded that it could not consider defendant's post-conviction claim as he lacked standing to bring it. *Carrera*, 239 Ill. 2d at 259.

¶ 17 Defendant next claims that his section 2-1401 claim for relief from judgment should have been considered because it was timely filed. We disagree.

¶ 18 The purpose of a section 2-1401 petition is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry. *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). To obtain relief under this section, defendant must file a petition no later than two years after the entry of the order of judgment (735 ILCS 5/2-1401 (West 2010)), and set forth a meritorious defense or claim, due diligence in presenting that defense or claim to the circuit court, and due diligence in filing the petition (*People v. Glowaki*, 404 Ill. App. 3d 169, 171 (2010)). Absent an evidentiary hearing on a petition, our review of the dismissal of a section 2-1401 petition is *de novo* (*People v. Vincent*, 226 Ill. 2d 1, 14-15 (2007)), and we may affirm that dismissal on any basis supported by the record, regardless of the reasoning or the grounds relied upon by the circuit court (*People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008)).

¶ 19 In this case, the circuit court dismissed, as untimely, defendant's section 2-1401 petition which was filed three years after the two-year limitations period expired. 735 ILCS 5/2-1401(c) (West 2010). Defendant contends that he is not barred from seeking relief because the basis for relief was concealed in that he did not become aware of the immigration consequences of his plea until September 2009, when he was ordered removed by an immigration judge due to his conviction. The concealment exception to the timeliness requirement, however, is *fraudulent* concealment (*People v. McLaughlin*, 324 Ill. App. 3d 909, 918 (2001)), which defendant concedes did not occur. Moreover, defendant was aware of the immigration consequences as the trial judge admonished him of such at the guilty plea proceeding.

¶ 20 We also observe that defendant has made no argument under the legal disability or duress

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exceptions to the two-year time limitation. *People v. Caballero*, 179 Ill. 2d 205, 210-11 (1997).

Accordingly, he has waived them for review. *People v. Givens*, 237 Ill. 2d 311, 326 (2010).

¶ 21 Notwithstanding, defendant claims that the two-year limitation period violates his Fourteenth Amendment right to equal protection (U.S. Const., amend. XIV). He maintains that given the importance the Supreme Court placed on the opportunity to challenge a past conviction in *Padilla*, the ability to file a motion to vacate falls within the fundamental right to access the courts. He cites to *Padilla's* determination that deportation is "intimately related" to the criminal process, for his claim that the Supreme Court has emphasized the importance on an opportunity to challenge a past conviction when deportation is on the line.

¶ 22 Our review shows that defendant has taken *Padilla's* findings out of context. *Padilla* analyzed a claim of ineffective assistance of trial counsel where defendant alleged that counsel failed to advise him of the immigration consequences of his plea and told him that he did not have to worry about deportation. *Padilla* held that defendant's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country and subject him to automatic deportation. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1478, 1486-87. In so holding, *Padilla* emphasized that a desire to stay in the United States may be more important to an attorney's client than any prison sentence, and thus the importance of accurate legal advice for non-citizens accused of crimes has never been more important. *Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1480, 1483. The key point in *Padilla* was the importance of counsel advising his client of the deportation consequence (*Padilla*, 559 U.S. at \_\_\_, 130 S. Ct. at 1483) which does not equate to the importance of the ability to file a motion to vacate as argued by defendant here. Moreover, the record clearly shows that the plea court admonished defendant of the potential deportation consequence of his plea, so he was aware of this possibility.

¶ 23 Defendant also maintains that the limitation period in section 2-1401 violates his equal protection rights as guaranteed by the Fourteenth Amendment. He specifically claims that the filing limitation treats citizens and non-citizens differently by not providing non-citizen

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defendants a reasonable opportunity to pursue relief when they become aware of the "near-certain deportation" due to their convictions.

¶ 24 The constitutional guarantee of equal protection requires that the government treat similarly situated individuals in a similar manner (*People v. Ramsey*, 239 Ill. 2d 342, 409 (2010)), unless the government demonstrates an appropriate reason to treat them differently (*People v. Whitfield*, 228 Ill. 2d 502, 512 (2007)). Here, the two-year filing limitation in section 2-1401 treats citizens and non-citizens alike in that both have the same period of time, two years, in which to file a section 2-1401 petition unless they can establish duress, fraudulent concealment or legal disability. The fact that a non-citizen may be subject to deportation for his convictions, does not extend the limitations period for filing a section 2-1401 motion or establish one of the three exceptions. Here, defendant has not alleged any of the three exceptions, and, in fact, conceded that there was no fraudulent concealment.

¶ 25 Defendant further contends that the two-year limitation period violates his rights to remedy and justice under the Illinois Constitution (Ill. Const. 1970, art. I, §12). That section provides that:

"Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly." Ill. Const. 1970, art. I, §12

¶ 26 Our supreme court has held that this section only expresses a philosophy, that it does not require a specific remedy in any specific form, and that limiting or restricting available remedies, does not violate this aspirational goal. *People v. Averett*, 237 Ill. 2d 1, 22 (2010). In this case, there was a two-year filing limitation period which defendant did not meet, and he failed to allege any of the three exceptions to excuse his untimely filing. Accordingly, we find defendant's claim without merit.

¶ 27 In light of our decision, we need not consider the remainder of defendant's arguments

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(*Carrera*, 239 Ill. 2d at 259), and, accordingly, affirm the judgment of the circuit court of Cook County.

¶ 28 Affirmed.