

FOURTH DIVISION  
November 23, 2016

No. 1-15-1724

**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.	)	No. 02501033701
	)	
HAIDAR Q. JARABA,	)	Honorable
	)	Raymond L. Jagielski,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ELLIS delivered the judgment of the court.  
Justices McBride and Howse concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Judgment denying a "Motion to Re-Open Expungement" affirmed where the motion was brought more than four years after the petition to expunge was granted.

¶ 2 Haidar Q. Jaraba appeals from the circuit court's order denying his motion to reconsider the denial of his "Motion to Re-Open Expungement." On appeal, Jaraba contends that the court erred in finding that it lacked jurisdiction to rule upon the motion to reopen. For the following reasons, we affirm.

¶ 3 In 2002, Jaraba was charged with violating section 2 of the Counterfeit Trademark Act (765 ILCS 1040/2 (West 2002)), a Class A misdemeanor. On March 25, 2003, Jaraba pleaded guilty to the charge and was sentenced to six months of court supervision. In 2010, Jaraba petitioned to expunge his arrest records, stating that he successfully completed the order of supervision. The circuit court granted the petition to expunge on April 9, 2010.

¶ 4 More than four years later, on November 26, 2014, Jaraba filed a "Motion to Re-Open Expungement," which stated, in its entirety, as follows:

"Now comes the petitioner, Haidar Q. Jaraba, by and through his attorney, Jonathan Minkus and moves this honorable court to re-open the above-captioned matter which was previously ordered expunged by this honorable court.

Wherefore, counsel prays that an order be entered directing the Cook County Clerk of the Circuit Court to temporarily re-open the expungement in this matter to allow Counsel to file a motion to file a petition for post-conviction relief."

The record indicates that the circuit court "denied" the motion to reopen on March 18, 2015, but the record does not include a transcript of the court's ruling.

¶ 5 At some point thereafter, Jaraba filed a motion to reconsider, which is not included in the record. At the May 20, 2015, hearing on the motion to reconsider, Jaraba rested on his motion without argument. The State asserted that the court had no jurisdiction to consider either the motion to reopen or the motion to reconsider, as motions to modify, vacate, or reconsider expungement orders must be filed within 60 days of the entry of the original order, or may be filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West

2014)). The State argued that the motion to reopen did not specify section 2-1401 as the basis for the relief sought and, even assuming the motion could be construed as a section 2-1401 petition, the motion was untimely because it was brought more than two years after the entry of the original order.

¶ 6 The court denied the motion to reconsider "for the reasons [it] stated previously."

¶ 7 On appeal, Jaraba contends that the court erred in finding that it lacked jurisdiction to rule upon the motion to reopen. Jaraba asserts that his motion to reopen was a section 2-1401 petition, which the circuit court should have granted because it had the authority to vacate, modify, and reconsider the order expunging his prior misdemeanor pursuant to that section. Jaraba also maintains that his motion had merit where he received ineffective assistance of counsel in the underlying misdemeanor case because he was erroneously advised that a guilty plea would not affect his immigration status.

¶ 8 Section 5.2 of the Criminal Identification Act governs the expungement and sealing of certain criminal records. 20 ILCS 2630/5.2 *et seq.* (West 2010). A petitioner or any party entitled to notice who wishes to vacate, modify, or reconsider an order granting a petition to expunge may do so by filing a motion within 60 days of service of the order. 20 ILCS 2630/5.2(d)(12) (West 2010). If such a motion is filed more than 60 days after service of the order, then it "shall comply with subsection (c) of Section 2-1401 of the Code of Civil Procedure." 20 ILCS 2630/5.2(d)(12) (West 2014).

¶ 9 Initially, we note that although Jaraba now asserts his motion to reopen the expungement was brought pursuant to section 2-1401, the motion did not so state. Nevertheless, a motion may be treated as a section 2-1401 petition even if not expressly labeled as such. *Sarkissian v.*

*Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002). Section 2-1401 proceedings are reviewed *de novo* when a judgment on the pleadings or dismissal for failure to state a cause of action has been entered. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). We therefore review the court's "denial" of the motion to reopen *de novo*.

¶ 10 Section 2-1401 provides relief from "final orders and judgments, after 30 days from the entry thereof" (735 ILCS 5/2-1401(a) (West 2014)), and applies to criminal and civil proceedings. *Vincent*, 226 Ill. 2d at 8. The petition must affirmatively set forth a meritorious defense to the original action and show that it was brought with due diligence. *Sarkissian*, 201 Ill. 2d at 103. It must be filed not later than two years after the entry of the order or judgment unless the delay is the result of circumstances such as disability or the ground for relief was fraudulently concealed. 735 ILCS 5/2-1401(c) (West 2014). Absent a basis to excuse the delay, a petition filed after the two-year limitations period cannot be considered unless the limitations period is waived by the opposing party, or the petition challenges a void judgment. *People v. Thompson*, 2015 IL 118151, ¶ 29.

¶ 11 In the instant case, although the court's reason for denying the "Motion to Re-Open Expungement" is unclear, we may affirm for any reason warranted by the record. *People v. Caballero*, 179 Ill. 2d 205, 211 (1997). Jaraba brought his motion to reopen the expungement more than four years after entry of the expunging order without alleging any reason to excuse the delay. Thus, the motion was untimely under the expungement and sealing statute, which required a motion to modify or reconsider an expungement order to comply with the two-year limitation period in section 2-1401(c). 20 ILCS 2630/5.2(d)(12) (West 2014); 735 ILCS 5/2-1401(c) (West 2014). The State did not waive this delay in the court below. During the proceeding on the

motion to reconsider, the State pointed out the ambiguous nature of the motion to reopen, objected to Jaraba's attempt to characterize it as a section 2-1401 petition in his motion to reconsider, and argued that, even assuming it was a section 2-1401 petition, it was nevertheless untimely. Accordingly, there was no reason to excuse the delay to which the State objected and a dismissal of the motion as untimely would have been proper.

¶ 12 Even if the State had waived the timeliness objection, the court could have denied the motion based on the pleadings. If the State fails to answer a section 2-1401 petition, the court may nevertheless determine whether the allegations in the petition entitle the petitioner to relief as a matter of law. *Vincent*, 226 Ill. 2d at 10. To allege a meritorious defense to the original action, a section 2-1401 petition must allege an error of fact, which, if then known, would have prevented rendition of the order or judgment. *People v. Pinkonsly*, 207 Ill. 2d 555, 565-66 (2003). Here, the motion to reopen was patently devoid of any facts that could be deemed admitted in the event of a waiver by the State. As such, denial of the motion to reopen based on the failure to state a cause of action would also have been proper. See *Vincent*, 226 Ill. 2d at 9. Accordingly, we find ample reason in the record to affirm the denial of Jaraba's untimely and ambiguous request for relief from the expungement order he himself sought to obtain.

¶ 13 Finally, we note that Jaraba maintains that he received ineffective assistance of counsel in the underlying misdemeanor case because he was advised that a guilty plea would not affect his immigration status. A meritorious defense under section 2-1401 involves errors of fact, not law. *Pinkonsly*, 207 Ill. 2d at 565. "We have long held that section 2-1401 proceedings are not an appropriate forum for ineffective-assistance claims because such claims do not challenge the factual basis for the judgment." *Id.* at 567. Accordingly, Jaraba's ineffective assistance of counsel

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claim, had he raised it in the motion to reopen, would not entitle him to relief from the order expunging his misdemeanor. Denial of the motion was proper.

¶ 14 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 15 Affirmed.