No. 2—10—0075
Order filed April 13, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 93—CF—1354
LARRY C. HAYES,	)	Honorable Victoria A. Rossetti,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: Although the trial court erred in dismissing defendant's section 2—1401 petition as untimely, as the limitations period does not apply to a petition alleging that a judgment is void, the dismissal was proper, as the judgment was not void; the indictment was not defective for vagueness, unlawful possession of a controlled substance with intent to deliver did not have elements identical to those of simple possession or attempted delivery, and thus the judgment was not void for an alleged violation of the proportionate-penalties clause.

Defendant, Larry C. Hayes, filed a petition under section 2—1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2—1401 (West 2008)), in which he asserted that his conviction on a drug charge was void because the indictment was flawed and because the statutory provision under

which he was convicted was void *ab initio* for violating the proportionate-penalties clause of the Illinois Constitution (Ill. Const.1970, art. I, §11). The court dismissed the petition as untimely. We hold that untimeliness was not a proper basis for the dismissal of a petition that asserted voidness claims. However, we further hold that defendant's conviction was not void, so that dismissal was nevertheless proper. We thus affirm.

I. BACKGROUND

On July 14, 1993, a grand jury indicted defendant on one count of unlawful possession, with intent to deliver, of 900 grams or more of a substance containing cocaine. This count cited section 401(a)(2)(D) of the Controlled Substances Act (720 ILCS 570/401(a)(2)(D) (West 1992)). It alleged that defendant "on or about June 28, 1993, in the County of Lake and State of Illinois, knowingly and unlawfully possessed with the intent to deliver 900 grams or more of a substance containing cocaine, a controlled substance, other than as authorized in the Controlled Substances Act." The grand jury also indicted him on a count of unlawful possession of 900 grams or more of a substance containing cocaine (720 ILCS 570/402(a)(2)(D) (West 1992)). The language of that count was the same except for the allegation of intent to deliver. A jury convicted defendant on both counts, and the court sentenced him to 55 years' imprisonment on the possession-with-intent-to-deliver count. On March 20, 1995, this court affirmed the conviction. *People v. Hayes*, No. 2—94—0288 (1995) (unpublished order under Supreme Court Rule 23).

Defendant then filed a series of petitions collaterally attacking his conviction. The most recent of these he filed on July 15, 2008; this was the current section 2—1401 petition, which the trial court described as the seventh collateral attack filed by defendant.

In the petition, defendant first claimed that the indictment was insufficient because it merely recited the statutory elements of the offense. He cited *People v. Fields*, 339 Ill. App. 3d 689, 696-97 (2003), a case in which we held that, where a "statute defines the offense in only general terms," or "encompasses a wide variety of conduct," a sufficient indictment "must define the nature and elements of the offense in terms that are more specific than the broad and general language of the statute." He asserted that, because the indictment simply mirrored the statutory definition of the offense, it was insufficiently specific and so fatally flawed. He argued that a fatally flawed indictment is void, rendering the resulting conviction void as well.

He next claimed that the penalties allowed for possession with intent to deliver controlled substances violate the proportionate-penalties clause. He asserted that, because, for large quantities of drugs, intent to deliver generally can be inferred from the quantity, possession with intent to deliver and simple possession have the same elements, but the penalties are harsher for possession with intent to deliver. He also argued that possession with intent to deliver is indistinguishable from attempted delivery, but the penalties for attempted delivery are lower, and creating another proportionate-penalties clause violation.

The State moved to dismiss the petition. It asserted that the petition was untimely. Defendant responded that untimeliness was not a proper defense; this was because he was attacking the judgment as void and that such an attack is not subject to section 2—1401's limitations period.

The court dismissed defendant's petition, ruling that it was too late and, further, that it failed to state the necessary elements of a section 2—1401 petition: a meritorious defense, diligence in raising the defense in the original action, and diligence in filing the petition. Defendant then filed

a postjudgment motion, which the court denied, and defendant timely appealed. He now reiterates the same arguments that he made in his petition.

The State has responded, arguing first that, because the judgment was not *in fact* void, the petition was untimely. It also argues that dismissal was proper on the alternative basis that the voidness claims were fatally and irreparably deficient as a matter of law.

We agree with defendant that the dismissal for untimeliness was improper, as a petition brought on voidness grounds need not be brought within the two-year limitations period of section 2—1401(c) of the Code (735 ILCS 5/2—1401(c) (West 2008)). However, we agree with the State that the conviction was not void as the indictment in this case was not defective. We further hold that the penalties for the possession with intent to deliver offense charged in this case do not violate the proportionate-penalties clause.

II. ANALYSIS

The dismissal for untimeliness was improper. Supreme court precedent is clear that, when a section 2—1401 petition attacks an order as void, section 2—1401(c)'s two-year limitations period is inapplicable. The court, in *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95 (2002), addressed the issue while resolving what filing is the proper vehicle in which to attack an order as void:

> "[I]n *People v. Harvey*, 196 Ill. 2d 444, 454 (2001), four members of this court held that a motion to vacate a void judgment is properly designated a petition for relief from judgment under section 2—1401 of the Code of Civil Procedure [citation]. Pursuant to *Harvey*, paragraph (f) of section 2—1401, which provides, 'Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method

> to procure that relief,' does not exclude, but merely differentiates, post-judgment petitions brought on voidness grounds from general section 2—1401 petitions. [Citation.] Under paragraph (f), the general rules pertaining to section 2—1401 petitions—that they must be filed within two years of the order or judgment, that the petitioner must allege a meritorious defense to the original action, and that the petitioner must show that the petition was brought with due diligence—do not apply. *Petitions brought on voidness grounds need not be brought within the two-year time limitation*. Further, the allegation that the judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." (Emphasis added.) *Sarkissian*, 201 Ill. 2d at 104.

This passage clearly states that what matters are the *grounds* of the claim, not the *merits* of the claim. Furthermore, a careful reading of *Harvey* shows that the court was deliberate in referring to petitions brought on voidness grounds, and not petitions attacking void orders. If one reads all the separate sections of *Harvey*, it is clear that the five justices who participated in concurrences, despite disagreeing about the function of section 2—1401, all agreed that no statute of limitations applied to a filing challenging a judgment on voidness grounds. *Harvey*, 196 Ill. 2d at 452 (McMorrow, J., specially concurring, joined by Freeman, J.) ("a post-judgment motion seeking relief on the basis that the judgment is void is not bound by the two-year limitation"); *Harvey*, 196 Ill. 2d at 457 (Fitzgerald, J., specially concurring, joined by Thomas and Garman, JJ.) ("because defendant challenges his extended-term sentence on the basis that the judgment is void, his challenge is proper and not restricted by the two-year limitation period in section 2—1401").

Moreover, in *Harvey*, the court relied on *R. W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304 (1986), a case that held that a "defendant who is contesting personal jurisdiction is not

'strictured by either the time limitations [citation] or the requirement of due diligence to which petitions relying on' section 2—1401 must conform." *R. W. Sawant*, 111 Ill. 2d at 309 (quoting *Home State Savings Ass'n v. Powell*, 73 Ill. App. 3d 915, 917 (1979)). A claim of lack of personal jurisdiction is a voidness claim (*e.g.*, *In re M.W.*, 232 Ill. 2d 408, 414 (2009)), so the *R. W. Sawant* court agreed that it is an *assertion* of voidness that makes the limitations period inapplicable.

We further note that the quoted passage of *Sarkissian* also shows that the trial court erred in dismissing the petition on the basis that defendant failed to state the standard section 2—1401 elements. Again, "the general rules pertaining to section 2—1401 petitions—[including] that *** the petitioner must allege a meritorious defense to the original action, and that the petitioner must show that the petition was brought with due diligence—do not apply." *Sarkissian*, 201 Ill. 2d at 104.

Nevertheless, because defendant is wrong that his conviction is void, dismissal of his petition was proper. See *In re Marriage of Morreale*, 351 Ill. App. 3d 238, 241 (2004) (we may affirm on any basis). Defendant asserts that the indictment failed to properly charge an offense and that the judgment was therefore void. Assuming, *arguendo*, that such a flaw renders a judgment void, we hold that nothing was wrong with the indictment in this case. Our supreme court has explained what a charging instrument must contain as follows:

> "Under section 111—3(a) of the Code [of Criminal Procedure of 1963] (725 ILCS 5/111—3(a) (West 2006)),[1] a charging instrument must include: (1) the name of the offense, (2) the statutory provision, (3) the nature and elements of the charged offense, (4) the date and county, and (5) the name of the accused. When evaluating the sufficiency of a charging

[1]The version of section 111—3(a) in effect when defendant was indicted had identical provisions. 725 ILCS 5/111—3(a) (West 1992).

> instrument, the question is not whether additional particularity could have been added but instead whether there was sufficient particularity to allow the accused to prepare a defense." *People v. Klepper*, 234 Ill. 2d 337, 351 (2009).

The indictment at issue here included all these statutory elements.

It is true that when an offense encompasses a wide variety of conduct the indictment must say more; it must inform the defendant of the *particular conduct* that is being charged. *Fields*, 339 Ill. App. 3d at 696-97. This rule is inapplicable here. The offense of unlawful possession, with intent to deliver, of 900 grams or more of a substance containing cocaine encompasses only a very narrow range of conduct. The difference is obvious when one examines a count of the indictment at issue in *Fields*:

> " '[O]n or about the 16th day of April, 1999, at and within DuPage County, Illinois, [defendant] committed the offense of Money Laundering in that said defendant knowingly engaged in a financial transaction in criminally derived property with a value exceeding $10,000.00 and knew that the financial transaction was designed in whole or in part to conceal the source of the criminally derived property in violation of 720 ILCS 5/29B—1 [(West 2000)].' " *Fields*, 339 Ill. App. 3d at 696.

This language mirrors that in the statute. However, it does not make clear what specifically the State alleged that the defendant did. The indictment here, by contrast, charged a precisely defined offense.

Defendant next asserts that, because possession with intent to deliver has "identical elements" to simple possession and attempted delivery, but a higher penalty, the penalty therefore violates the proportionate-penalties clause of the Illinois Constitution. We disagree. Defendant is correct that the "identical elements" test is a proper test of whether the penalty for an offense violates

the proportionate-penalties clause. *E.g.*, *People v. Hauschild*, 226 Ill. 2d 63, 82-84 (2007). If two offenses have identical elements but one has a higher penalty—at issue in *Hauschild* were armed robbery while armed with a firearm and armed violence predicated on robbery—then the higher penalty violates the proportionate-penalties clause. *Hauschild*, 226 Ill. 2d at 82. For a violation to exist however, the elements must be truly identical, not just similar or related. *People v. Christy*, 139 Ill. 2d 172, 180 (1990).

Possession with intent to deliver, simple possession, and attempted delivery all have distinctly different elements.

Possession with intent to deliver has, obviously, the element of intent to deliver, in addition to what the law requires for simple possession. Compare 720 ILCS 570/401(a)(2)(D) (West 1992) with 720 ILCS 570/402(a)(2)(D) (West 1992). We agree with defendant that the intent element may be inferred when the quantities of drugs involved are very large. See, *e.g.*, *People v. Jennings*, 364 Ill. App. 3d 473, 481 (2005) ("Because direct evidence of intent to deliver a controlled substance is rare, intent is commonly inferred from circumstantial evidence such as the nature, quantity, and packaging of the contraband.") The permissibility of the inference, however, does not mean that the intent element ceases to exist. The offenses do not have identical elements.

Attempted delivery requires the State to prove that, with the intent to commit delivery, a defendant does any act that constitutes a substantial step toward delivery. See 720 ILCS 5/8—4(a) (West 1992). Given the way the law defines attempt, the State does not need to prove possession of the drug to prove attempted delivery. Thus, these two offenses also do not have identical elements.

Defendant has asked us to strike the State's brief on the basis that it was untimely. The State missed the filing deadline for the brief and then sought our leave to file it late. We granted leave over defendant's objection and do not now reverse our position. Under Illinois Supreme Court Rule 343(c) (eff. July 1, 2008), this court may extend the time for a party to file a brief. We exercised that power here.

III. CONCLUSION

For the reasons stated, we affirm the dismissal of defendant's section 2—1401 petition.

Affirmed.