

NOTICE
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2012 IL App (4th) 100291-U

Filed 1/13/12

NO. 4-10-0291

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|--------------------------------------|---|--------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Champaign County |
| TONY T. CLARK, |) | Nos. 93CF151A |
| Defendant-Appellant. |) | 95CF741A |
| |) | |
| |) | Honorable |
| |) | Thomas J. Difanis, |
| |) | Judge Presiding. |

JUSTICE COOK delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The office of the State Appellate Defender's motion to withdraw as counsel on appeal is granted and the trial court's judgments are affirmed as defendant can raise no meritorious issues in this appeal.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 1993, in Champaign County case No. 93-CF-151, following a series of controlled drug transactions, defendant, Tony T. Clark, was charged with unlawfully possessing with the intent to deliver less than one gram of a substance containing cocaine. In June 1993, defendant pleaded guilty. In exchange for his guilty plea, defendant was sentenced to 24 months

of probation.

¶ 5 In February 2010, defendant filed a petition for a writ of error *coram nobis* in case No. 93-CF-151. Defendant alleged that the State's factual basis at the plea hearing was insufficient to establish his guilt and that his trial counsel deprived him of effective assistance by coercing him into pleading guilty. Later that month, the State moved to dismiss, arguing, *inter alia*, that the petition was barred by the two-year statute of limitations for a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In March 2010, the trial court dismissed defendant's petition in that case.

¶ 6 In June 1995, in Champaign County case No. 95-CF-741, the State charged defendant with armed violence and possession with the intent to deliver more than five grams of a substance containing cocaine. In September 1995, defendant pleaded guilty to the possession offense. In exchange for his plea, the armed violence charge was dismissed and defendant was sentenced to seven years' imprisonment.

¶ 7 In December 2008, defendant filed a petition for a writ of error *coram nobis* in case No. 95-CF-741. Defendant alleged his trial counsel was ineffective by not proceeding to trial after Christopher Wills told her he was willing to testify on defendant's behalf that Wills, not defendant, possessed the pistol and controlled substances that defendant was charged with possessing. Defendant further alleged his counsel was ineffective by failing to inform him before he pleaded guilty that his conviction could lead to enhanced sentences for future offenses. Defendant further alleged that he was innocent on the basis of Wills's assertions.

¶ 8 Approximately two weeks later, in January 2009, the trial court dismissed defendant's petition *sua sponte*. On appeal, this court vacated and remanded for further

proceedings. *People v. Clark*, No. 4-09-0065 (November 19, 2009) (unpublished order under Supreme Court Rule 23).

¶ 9 On remand, in February 2010, the State filed a motion to dismiss defendant's petition. The State argued, *inter alia*, that the petition was untimely under section 2-1401. In March 2010, the trial court granted the State's motion to dismiss.

¶ 10 This appeal from the judgments in case Nos. 93-CF-151 and 95-CF-741 followed. OSAD was appointed to serve as defendant's attorney on appeal.

¶ 11 In May 2011, OSAD moved to withdraw, attaching to its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by June 5, 2011. Defendant has done so, and the State has responded. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 12 II. ANALYSIS

¶ 13 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief as the trial court properly dismissed defendant's petitions as untimely. We agree.

¶ 14 As "the General Assembly abolished the common law writ system and replaced it with the statutory postjudgment petition" established in section 2-1401, we consider both defendant's petitions as petitions under that statute. *People v. Vincent*, 226 Ill. 2d 1, 7, 871 N.E.2d 17, 22 (2007). "A section 2-1401 petition for relief from a final judgment is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause,

unknown to petitioner and the court at the time judgment was entered, which, if then known, would have prevented its rendition." *People v. Mahaffey*, 194 Ill. 2d 154, 181, 742 N.E.2d 251, 266 (2000).

¶ 15 In general, a section 2-1401 petition must be filed within two years of the judgment that it collaterally attacks; otherwise, "it cannot be considered." *Id.*; see also 735 ILCS 5/2-1401(c) (West 2008). This limitations period is tolled for any period during which "the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed." 735 ILCS 5/2-1401(c) (West 2008). "A person may also seek relief beyond section 2-1401's two-year limitations period where the judgment being challenged is void. [Citation.] In addition, section 2-1401's limitations period may be waived by the opposing party." *People v. Harvey*, 196 Ill. 2d 444, 447, 753 N.E.2d 293, 295 (2001).

¶ 16 Defendant's petitions were filed 13 and 16 years after the judgments they challenge, well outside the 2-year limitations period. Nothing in the record suggests defendant was under legal disability or duress at any time between the entry of the judgments and the filing of his section 2-1401 petitions. Further, defendant does not challenge the judgments as void, and the State raised the time bar before the trial court, ensuring the defense is properly before us.

¶ 17 OSAD notes a potential argument defendant could have asserted is that the ground for relief in case No. 95-CF-741 was fraudulently concealed in that defendant's attorney did not inform him of Wills's offer of potentially exculpatory testimony. However, as OSAD points out, "[t]o make a successful showing of fraudulent concealment, the defendant must allege facts demonstrating that *his opponent* affirmatively attempted to prevent the discovery of the purported grounds for relief ***." (Emphasis added and internal quotation marks omitted.)

People v. Coleman, 206 Ill. 2d 261, 290, 794 N.E.2d 275, 293 (2002). That is, "[f]raudulent concealment under section 2-1401(c) which will toll the two year limitation period contemplates affirmative actions by one's opponent or by the court, not one's own attorney." *People v. Baskin*, 213 Ill. App. 3d 477, 485, 572 N.E.2d 1067, 1072 (1991). Accordingly, defendant's allegation that his attorney withheld potentially exculpatory evidence from him and thereby affected his decision to plead guilty is no excuse for the 13-year delay between the entry of judgment and the filing of defendant's section 2-1401 petition in case No. 95-CF-741.

¶ 18 In his additional points and authorities presented to this court, defendant asserts that OSAD's memorandum in support of its *Finley* motion fails to note defendant's allegations that his trial counsel in case No. 93-CF-151 failed to advise him of the collateral consequences of his guilty plea, including that defendant may have subjected himself to sentencing enhancements for future crimes. (Defendant alleges he is now serving an undischarged term of life imprisonment resulting from a federal conviction and the operation of a sentencing enhancement based on prior convictions.) However, our determination that defendant inexcusably filed his section 2-1401 petitions outside the two-year limitations periods precludes any consideration of the merits of defendant's petitions.

¶ 19 III. CONCLUSION

¶ 20 For the foregoing reasons, we conclude no meritorious issues can be raised on appeal in this case and, accordingly, we grant OSAD's motion to withdraw and affirm the trial court's judgments. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal.

¶ 21 Affirmed.