

NOTICE
Decision filed 03/07/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0693
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

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).

LEROY JENKINS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Williamson County.
)	
v.)	
)	No. 09-MR-90
THE HONORABLE BROCTON LOCKWOOD)	
(Retired) and THE HONORABLE PHILLIP)	
PALMER,)	Honorable
)	Brad K. Bleyer,
Defendants-Appellees.)	Judge, presiding.

JUSTICE DONOVAN delivered the judgment of the court.
Justices Goldenhersh and Welch concurred in the judgment.

RULE 23 ORDER

Held: Where a plaintiff attempts to raise previously adjudicated issues through a *mandamus* complaint, the complaint is barred by collateral estoppel.

The plaintiff, Leroy Jenkins, appeals from the dismissal of his *mandamus* complaint. On appeal, he requests that we reverse the circuit court's order granting the defendants' motion to dismiss. In response, the defendants argue that the circuit court properly dismissed the complaint because it did not state a proper claim for *mandamus* relief. In the alternative, the defendants also argue that the complaint is barred by *laches*. For the following reasons, we affirm the judgment of the circuit court.

BACKGROUND

The background of this case has been reviewed numerous times by this court. Thus we recall the facts previously before this court as follows:

"I. Trial and Direct Appeal

In 1982, the defendant was charged by information in Williamson County with armed robbery, aggravated kidnaping, deviate sexual assault, unlawful restraint, and unlawful possession of firearms by a felon within five years of his discharge from the penitentiary. The misdemeanor weapons charge was later severed from the other charges for trial. On February 8, 1983, the defendant was convicted of the remaining charges. The evidence established that the defendant abducted a pregnant woman at gunpoint from a Jackson County shopping center, where she handed the defendant her money after he had demanded money and threatened to kill her if she did not do so. He then held a gun to her abdomen and forced her to drive him to Freeman Spur in Williamson County. In Freeman Spur, he held the gun to her neck and threatened to blow her head off if she did not perform a sex act on him. While still armed with the gun, the defendant took a radio from the victim's car and fled to his residence, about 100 yards from the place to which he had forced the victim to drive. The victim identified a Sterling Arms .22-caliber semiautomatic pistol that was recovered from the defendant's residence as the weapon with which the defendant had threatened her. Pursuant to section 33B-1 of the Criminal Code of 1961 (Criminal Code) (Ill. Rev. Stat. 1981, ch. 38, par. 33B-1), the defendant was adjudicated to be a habitual criminal who was subject to a sentence of natural-life imprisonment, predicated on his 1980 conviction for the Class X offense of armed robbery and his 1972 convictions for the Class X offenses of armed robbery and rape.

On appeal, this court vacated the unlawful restraint conviction because only one continuous act of detaining or confining had been committed, and we affirmed the judgment of the circuit court in all other respects. *People v. Jenkins*, 126 Ill. App. 3d 1162, 483 N.E.2d 31 (1984) (table) (unpublished disposition pursuant to Supreme

Court Rule 23 (87 Ill. 2d R. 23)).

II. Postconviction Petitions

On December 20, 1991, the defendant filed *pro se* a postconviction petition in which he asserted that his counsel's performance had been deficient in a number of ways. The January 7, 1992, dismissal of the petition was affirmed on appeal on the grounds of forfeiture. *People v. Jenkins*, 269 Ill. App. 3d 1159, 685 N.E.2d 467 (1995) (table) (unpublished order filed pursuant to Rule 23). On August 31, 1994, the trial court dismissed his second *pro se* postconviction petition, which had been filed while his first postconviction petition was pending. The defendant did not appeal from this dismissal. On March 7, 1997, he filed a third *pro se* postconviction petition, and on March 17, 1997, he filed a *pro se* petition for *habeas corpus* relief. On March 26, 1997, the trial court dismissed the defendant's third postconviction petition as frivolous and patently without merit. The court struck as moot other related motions and the defendant's petition for *habeas corpus* relief.

On April 15, 1997, the defendant appealed from the March 26, 1997, dismissal of his third postconviction petition. The State Appellate Defender moved in this court to withdraw as counsel because there was no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551, 95 L. Ed. 2d 539, 107 S. Ct. 1990 (1987). The defendant filed a response after being given proper notice and an extension of time in which to do so. On February 25, 1999, after a plenary review, this court affirmed the trial court's order. *People v. Jenkins*, 302 Ill. App. 3d 1110, 746 N.E.2d 919 (1999) (table) (unpublished order pursuant to Rule 23).

III. Petition for Relief From Judgment

On September 2, 2003, the defendant filed *pro se* a petition for relief from judgment pursuant to section 2-1401 of the Code [of Civil Procedure] (735 ILCS 5/2-

1401 (West 2002)). The gist of the defendant's petition was that his convictions for armed robbery, aggravated kidnaping, and deviate sexual assault were void because the information failed to allege that he had been armed with a dangerous weapon and the void convictions deprived the circuit court of jurisdiction to make a finding that he was a habitual criminal or to impose a natural-life sentence under section 33B-1 of the Criminal Code, and thus, he contended, his sentence must be vacated. He maintained that his trial counsel had provided incompetent assistance, *inter alia*, by not challenging the sufficiency of the information. On October 29, 2003, appointed counsel filed a supplemental petition that incorporated the defendant's *pro se* effort. The petition asserted that the defendant's convictions for armed robbery and aggravated kidnaping were void and his sentence must be vacated. It alleged that the information was defective and that the deficiencies of the charging instrument had not been cured by the giving of jury instructions that required the jury, in order to find him guilty, to find that he had been armed with a dangerous weapon. It also claimed that 'at no time previous to this petition has counsel for Defendant attacked verdicts as void' and that his attorneys' failure to do so deprived him of his right to competent trial and appellate counsel. The defendant sought the reversal of his natural-life sentence and a new sentencing hearing on 'the one remaining charge,' the Class X felony of deviate sexual assault. On November 18, 2003, the defendant filed *pro se* a supplement to his counsel's supplemental petition. This document was stricken by the court on November 19, 2003, because he was represented by counsel.

On November 25, 2003, the State moved to dismiss the defendant's petition. It asserted that the alleged defects in the indictments were errors of law that were not reviewable in the context of a section 2-1401 petition and that they were subject to *res judicata* because they had not been raised in previous actions. It argued that the

conviction for the Class X felony of deviate sexual assault, which the defendant had termed in his pleadings 'the one remaining charge,' qualified him for life imprisonment under section 33B-1. The State sought to have all matters in the pleadings that were not relevant to a claim of a void judgment under section 2-1401(f) stricken from the pleadings and to have the petition dismissed as moot, without a basis in law, and subject to *res judicata*.

On February 27, 2004, appointed counsel and the State appeared in court. The judge found that it was unnecessary to conduct a hearing on the petition or to hear oral argument. He explained at length his reasons for denying the petition for relief from the judgment. On March 10, 2004, the defendant's petition was denied in a written order. The order set out that the defendant's allegations of incompetency of counsel were not properly before the court—more than two years had passed since the entry of the judgment and the defendant had failed to allege that he was under a legal disability or that duress or fraudulent concealment had prevented him from filing a timely petition. Moreover, his previous direct appeal and three postconviction petitions rendered any issue of counsel's performance forfeited or barred by principles of *res judicata*. The order also stated that the defendant had failed to make a substantial showing of any violation of a constitutional right, that his conviction for the Class X offense of deviate sexual assault had been properly charged in the information, that it had not been invalidated by subsequent statutory changes, and that it was not void. He ruled that the defendant had properly been found to be a habitual criminal who was subject to a sentence of natural life in prison. The judge found that even if, *arguendo*, the counts of the information charging the defendant with aggravated kidnaping and armed robbery were defective because they did not allege that he was armed with a dangerous weapon, the charge of deviate sexual

assault did not require that allegation and the information was sufficient to charge him with that crime. The court ruled that the finding that the defendant was a habitual criminal as defined in section 33B-1 could properly be predicated on his conviction for the Class X offense of deviate sexual assault and that a life sentence was required." *People v. Jenkins*, No. 5-04-0705, order at 1-5 (September 5, 2007) (unpublished order pursuant to Supreme Court Rule 23 (eff. July 1, 1994)).

The dismissal of Jenkins' petition for relief from judgment was affirmed on appeal. *Id.* at 14. The appellate court held that he had forfeited all the arguments regarding ineffective assistance of counsel because he had not alleged them in any of the earlier proceedings. *Id.* at 7. Furthermore, the court held that since Jenkins only raised the issue of the charging instrument posttrial, a reversal was only required if he was prejudiced. *Id.* at 10-14. The court found no prejudice to Jenkins and held that the judgment was not void. *Id.* Moreover, the court reasoned that even if the armed robbery charge had been deficient, the charge of deviate sexual assault was alone enough to allow the circuit court to impose a life sentence. *Id.*

IV. Complaint for *Mandamus*

On June 30, 2009, Jenkins filed a complaint for a writ of *mandamus* against Judge Lockwood where he alleged once more that he was being held on a void judgment because of the discrepancy between the charging instrument and the elements included in the jury instructions. He asked to have his judgment vacated and to be released from prison. Judge Lockwood's successor, Judge Palmer, was added as an additional defendant later.

The defendants filed a motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), asserting that *mandamus* was not the proper vehicle for Jenkins' arguments and that the decisions being challenged were discretionary, which made them not reviewable in a *mandamus* action. The defendants also argued that

the action was barred by *laches*.

Jenkins responded by arguing that the action was not barred by *laches* because he had diligently raised these same issues in all of his prior proceedings and that he had a clear right to *mandamus* relief. The defendants then responded that the claim was an impermissible collateral attack on prior proceedings and should be dismissed. The circuit court reviewed all the arguments and granted the motion to dismiss with no hearing. Jenkins filed the instant timely notice of appeal.

CONTENTIONS ON APPEAL

On appeal, Jenkins argues the judgment against him is void because the charges failed to allege an essential element of the crime—that he was armed with a dangerous weapon. He argues that the jury was not instructed on the same elements of the crime that were alleged in the charging instrument. He asks that his conviction be vacated or, in the alternative, that his sentence be reduced.

In response, the defendants argue that Jenkins did not state a proper claim for *mandamus* relief for the following reasons: (1) the complaint was an impermissible collateral attack on his criminal convictions, (2) *mandamus* is not appropriate to challenge discretionary decisions, and (3) Jenkins failed to show a demand that the judge refused to act on. The defendants also argued that even if the complaint alleged a proper claim for relief, the complaint was still barred by *laches*.

STANDARD OF REVIEW

A *mandamus* complaint dismissed under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)) is subject to *de novo* review. *Turner-El v. West*, 349 Ill. App. 3d 475, 480 (2004). All well-pleaded facts and reasonable inferences from the complaint are taken as true, but the conclusions, unsupported by facts, will not be accepted as true. *Id.* at 479. Where the dismissal of a *mandamus* complaint is appropriate as a matter

of law, we may affirm on any basis that is supported by the record. *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 434 (2007).

ANALYSIS

We first address the defendants' argument that this action is an impermissible collateral attack on a prior judgment. The defendants argue that *mandamus* may not be used in this manner and that the circuit court correctly dismissed the *mandamus* complaint.

"The collateral estoppel doctrine bars relitigation of an issue already decided in a prior case." *People v. Tenner*, 206 Ill. 2d 381, 396 (2002). "The doctrine applies when a party participates in two separate and consecutive cases arising on different causes of action and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former case by a court of competent jurisdiction." (Emphasis omitted.) *People v. Hopkins*, 235 Ill. 2d 453, 468 (2009). For the collateral estoppel doctrine to apply, a three-prong test must be met: "(1) the court rendered a final judgment in the prior case; (2) the party against whom estoppel is asserted was a party or in privity with a party in the prior case; and (3) the issue decided in the prior case is identical with the one presented in the instant case." *Tenner*, 206 Ill. 2d at 396.

Here, the first two requirements are easily met. First, there has been a final judgment on Jenkins' petition for relief from judgment. *People v. Jenkins*, No. 5-04-0705 (September 5, 2007) (unpublished order pursuant to Rule 23). Second, Jenkins was a party in the above case, satisfying the second requirement for collateral estoppel.

Thus, we are only left to determine whether the issues previously decided are identical to the issues presented in the instant case. In the instant appeal and in the *mandamus* complaint, he argues that the judgment against him is void and that he should be released from prison or have his sentence reduced. In support of this requested relief, Jenkins argues that the charging instrument did not allege an essential element of the crime

and that the jury instructions differed from the charging instrument. In Jenkins' appeal from the denial of his petition for relief from judgment, the same arguments were at issue. *People v. Jenkins*, No. 5-04-0705 (September 5, 2007) (unpublished order pursuant to Rule 23). The reviewing court held that the judgment was not void and that his petition had been correctly denied. *Id.* Thus, we find that the issues in the instant appeal had been adjudicated in a prior proceeding.

In conclusion, since all three prongs of the collateral estoppel test have been met, we find that Jenkins' *mandamus* complaint is an impermissible collateral attack and is barred by collateral estoppel. A *mandamus* complaint is not a proper place to attack a prior judgment. Jenkins was given an appeal from the denial of his petition for relief from judgment, for a review of those arguments, and he had an opportunity to petition the Illinois Supreme Court for leave to appeal and chose not to do so. He is not allowed to collaterally attack those proceedings through a *mandamus* complaint. In light of our conclusion, we do not address the issue of *laches* or the merits of the case.

CONCLUSION

For the foregoing reasons, we affirm the dismissal of Jenkins' *mandamus* complaint.

Affirmed.