

NOTICE

Decision filed 05/18/12. 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.

2012 IL App (5th) 090694-U

NO. 5-09-0694

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).

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

WILLIAM D. NELSON,

Defendant-Appellant.

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Appeal from the  
Circuit Court of  
Bond County.

No. 96-CF-62

Honorable  
Keith Jensen,  
Judge, presiding

JUSTICE SPOMER delivered the judgment of the court.

Presiding Justice Donovan and Justice Welch concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the defendant alleges that his sentence is void but fails to argue any jurisdictional defect, the circuit court's dismissal of his petition for relief from judgment is affirmed.

¶ 2 The defendant, William D. Nelson, appeals the dismissal of his petition for relief from judgment. The Office of the State Appellate Defender has been appointed to represent him. The State Appellate Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994).

¶ 3 The defendant was given proper notice and was granted an extension of time to file briefs, objections, or any other documents supporting his appeal. He has filed a response. We have considered the State Appellate Defender's motion to withdraw as counsel on appeal, as well as the defendant's response thereto. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the

following reasons, we now grant the State Appellate Defender's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Bond County.

¶ 4

#### BACKGROUND

¶ 5

The background of this case has been reviewed numerous times by this court, and thus, we will add only the procedural facts necessary for a determination of the instant appeal. We recite the facts as follows:

"On November 7, 1997, a jury found the defendant, William D. Nelson, guilty of first-degree murder. On November 18, he filed a motion for an extension of time to file a posttrial motion. On February 5, 1998, he filed a second motion for an extension of time.

On March 10, 1998, the court held a sentencing hearing. At the beginning of the hearing, the court noted that ordinarily it would rule on any pending posttrial motions before moving on to consider issues related to sentencing. The court noted, however, that the parties had agreed to proceed with the sentencing hearing that day and leave the defendant's posttrial motion to be considered at some future date. The court granted the defendant's second motion for an extension of time to file a posttrial motion and sentenced the defendant to 45 years in prison.

After several additional motions for extensions of time were filed and granted, the defendant filed his posttrial motion on November 16, 1998. While the motion was pending, the trial judge died, and the case was assigned to a new judge. Subsequently, defense counsel withdrew and was replaced by a new attorney.

On April 24, 2000, the defendant, through his new attorney, filed a supplemental posttrial motion. On June 29, the court held a hearing on the original posttrial motion. At the end of the hearing, the court took the matter under advisement and ordered the supplemental motion set for a hearing on the next

available date. On July 10, the court entered an order denying the original posttrial motion. On September 22, the court held a hearing on the supplemental motion. On November 3, 2000, the court entered an order denying the posttrial motion. This court affirmed the defendant's conviction on direct appeal on October 8, 2002. *People v. Nelson*, No. 5-00-0716 (October 8, 2002) (unpublished order pursuant to Rule 23 (166 Ill. 2d R. 23)).

On February 20, 2001, with his direct appeal still pending, the defendant filed a *pro se* 'Motion for Extension of Time.' In it, he requested an extension of time to file a postconviction petition. He specifically requested that the court extend the deadline from March 8, 2001, to June 8, 2001. (We note that the deadline was actually March 10, not March 8.) He alleged that the extension was necessary because (1) the transcript from the September 2000 hearing on his posttrial motion was not yet available and (2) he needed more time to research the legal arguments he wished to make because a lockdown had limited his access to the prison law library.

On March 13, the State filed an objection to the defendant's motion for an extension of time. The State argued that there was no statutory authority for the relief sought, but it noted that the defendant would not be left without a remedy due to provisions allowing him to file an untimely petition under certain circumstances. See 725 ILCS 5/122-1(c) (West 2002) (providing that a postconviction petition may not be filed after the applicable deadline *unless* the defendant demonstrates that the delay in filing was not due to his own culpable negligence). On March 14, the court allowed the State's objection and denied the defendant's motion.

On March 21, 2001, the defendant sent a letter to the judge asking him to clarify when the postconviction petition would be due. He stated that even the attorneys at the public defender's office could not provide an answer due to the

unusual procedural history of his case. He acknowledged, however, that when he filed his previous motion for an extension of time, he had assumed that the applicable time period began to run when the court sentenced him, based on the Illinois Supreme Court's holding in *People v. Woods*, 193 Ill. 2d 483, 739 N.E.2d 493 (2000). The judge forwarded the letter to the public defender's office.

On April 4, 2003, the defendant filed a *pro se* petition for postconviction relief, raising numerous claims of ineffective assistance of both trial counsel and appellate counsel. He alleged that the delay in filing was not due to his own culpable negligence, and he outlined the long procedural history of his case up to November 2000, when the trial court denied his posttrial motion and he filed his notice of appeal.

On December 3, 2003, the court appointed counsel to represent the defendant. After numerous continuances, appointed counsel filed a supplement to the defendant's *pro se* postconviction petition on July 6, 2007. The supplement did not address the issue of timeliness.

On August 31, 2007, the State filed a motion to dismiss the defendant's petition, arguing that it was not timely filed. The State argued that the deadline for filing the defendant's petition was March 10, 2001, three years after the trial court sentenced him. On September 6, 2007, the defendant filed a response to the State's motion to dismiss, arguing that (1) due to circumstances beyond the defendant's control, his posttrial motions remained pending for two years after his conviction and his appeal was not decided until more than four years after his conviction, and (2) the statutory deadlines do not apply to claims of actual innocence and the defendant has always maintained that he was innocent.

On September 7, the court held a hearing in the matter. On November 2, 2007, the court entered an order dismissing the petition as untimely. The defendant

subsequently filed a motion to reconsider, which the court denied on July 18, 2008." (Emphasis in original.) *People v. Nelson*, No. 5-08-0427, order at 1-3 (2010) (unpublished order under Supreme Court Rule 23).

The court's denial of the defendant's postconviction petition was affirmed on appeal. *Id.*, No. 5-08-0427 (2010) (unpublished order under Supreme Court Rule 23).

¶ 6 On June 23, 2008, the defendant filed a petition for relief from judgment (735 ILCS 5/2-1401(f) (West 2006)), arguing that his conviction was void. In the petition, the defendant asserted (1) that he had received ineffective assistance of counsel by both his trial and his appellate counsel, (2) that the prosecutor had committed misconduct for failure to disclose information, and (3) that the judge had abused his discretion and engaged in judicial misconduct. On August 1, 2008, the State filed a motion to dismiss the petition for failure to state a cause of action upon which relief could be granted. The State argued that a conviction can only be void if the court lacks jurisdiction and that the defendant did not argue that the court lacked jurisdiction. On February 4, 2009, the circuit court dismissed the defendant's petition. On March 5, 2009, the defendant filed a motion to reconsider that was denied the same day.

¶ 7 The defendant filed this timely appeal, and the Office of the State Appellate Defender was appointed. The State Appellate Defender now seeks leave to withdraw as counsel, alleging (1) that the petition failed to allege facts sufficient to demonstrate the judgment was void, (2) that the petition failed to allege facts that the defendant exercised due diligence in bringing his claim of prosecutorial misconduct, and (3) that the defendant did not receive ineffective assistance of counsel. The defendant has responded in a document entitled "Motion to Show Cause." He argues that the unique circumstances of his posttrial motions not being ruled upon until after his sentencing

should not bar his future petitions.

¶ 8

## ANALYSIS

¶ 9

"To obtain relief under section 2-1401, the defendant 'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.' " *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003) (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). "However, where \*\*\* a petitioner seeks to vacate a final judgment as being void [citation], the allegations of voidness 'substitute[ ] for and negate[ ] the need to allege a meritorious defense and due diligence.' " *People v. Vincent*, 226 Ill. 2d 1, 7 n.2 (2007) (quoting *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002)). Petitions for relief from judgment "are subject to the usual rules of civil practice" and, thus, are "subject to dismissal for want of legal or factual sufficiency." *Id.*, 226 Ill. 2d at 8.

¶ 10

When a circuit court dismisses a petition in a section 2-1401 proceeding, the applicable standard of review is *de novo*. *Id.*, 226 Ill. 2d at 18. Moreover, where a dismissal is proper as a matter of law, the circuit court may be affirmed on any basis supported by the record. *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433 (2007).

¶ 11

We first note that the defendant's petition was filed more than 10 years after the defendant was sentenced. Thus, on its face the petition is untimely because it was filed past the two-year time limitation. 735 ILCS 5/2-1401(c) (West 2006). However, if the defendant's sentence is void, as he alleges, then the time limitation does not

apply.

¶ 12 A judgment is void if the court lacked jurisdiction over the parties or lacked authority to enter the judgment. *Sarkissian*, 201 Ill. 2d at 103. Here, the defendant does not even allege that the court lacked jurisdiction, nor does the record support a lack of jurisdiction. The defendant argues ineffective assistance of counsel, prosecutorial misconduct, and abuse of judicial discretion, but he does not once argue that the court lacked jurisdiction. Therefore, the defendant's voidness argument fails.

¶ 13 Moreover, we note even assuming, *arguendo*, that his voidness argument did not fail, the defendant's claims that he should be excused from the section 2-1401 time limitations fail as well. "Points previously raised at trial and other collateral proceedings cannot form the basis of a section 2-1401 petition for relief." *People v. Haynes*, 192 Ill. 2d 437, 461 (2000). The arguments made by the defendant to support his assertion that his sentence is void were all contained in his previous postconviction petition. Therefore, they cannot be the basis of his section 2-1401 petition. Consequently, the circuit court correctly ruled that the defendant's section 2-1401 petition failed to state a cause of action, and it properly granted the State's motion to dismiss the petition.

¶ 14 CONCLUSION

¶ 15 For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel is granted, and the judgment of the circuit court of Bond County is affirmed.

¶ 16 Motion granted; judgment affirmed.