

NOTICE

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2022 IL App (4th) 200534-U

NO. 4-20-0534

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

April 14, 2022

Carla Bender

4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | McLean County |
| JOHNNIE LEE BANKSTON, |) | No. 13CF1045 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Charles M. Feeney III, |
| |) | Judge Presiding. |

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices DeArmond and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* We grant the Office of the State Appellate Defender's motion to withdraw as counsel and affirm the trial court's judgment dismissing defendant's petition for relief from judgment.

¶ 2 This case comes to us on the motion of the Office of the State Appellate Defender (OSAD) to withdraw as counsel on the ground no meritorious issues can be raised in this case.

We grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In August 2013, the State charged defendant, Johnnie Lee Bankston, by information with three counts of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(3) (West 2012)) (counts I through III) and three counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2012)) (counts IV through VI). Later that same month, the charges were superseded by indictment.

¶ 5 On February 6, 2014, defendant entered into a fully negotiated plea agreement whereby he agreed to plead guilty to aggravated criminal sexual assault (counts I and II) in exchange for the State dismissing the remaining four counts and recommending defendant be sentenced to two consecutive terms of 10 years' imprisonment. Defendant stipulated to the following factual basis:

“Your Honor, if this matter were to proceed to hearing the State would present evidence by way of testimony and also various exhibits. Testimony from [J.P.], the victim, in this case, would be that the defendant came into her bedroom on [August 6, 2013], that he asked her to lay back, that he took her clothes off, that he began touching her in various ways, that she asked him to stop, and that he continued. That he inserted [his] penis into her vagina, and at one point rolled her over and inserted [his] penis into her anus. That during these things when she asked him to stop, he told her that if she spoke or made any sounds, or talked about it that he would kill her mother. That thereafter the defendant left the room. [J.P.] was taken to the hospital. Hours later a sex assault kit was performed. We would offer testimony by the individual that conducted that sex assault kit, and individuals from the Illinois State police crime lab in Morton that analyzed the specimens on those. Testimony would be in the evidence—in report form would show that [semen] was recovered from a vaginal swab that did show positive for [semen], that the compared analysis of that swab matched the defendant. The probability of it not being *** him were one in 5.2 quintillion of males.”

The trial court accepted the plea agreement and sentenced defendant as stated. Defendant did not file a motion to withdraw his plea and did not appeal.

¶ 6 In August 2015, defendant filed a postconviction petition, which the trial court dismissed following a third-stage evidentiary hearing. This court affirmed the trial court's judgment. See *People v. Bankston*, 2020 IL App (4th) 180027-U.

¶ 7 On December 9, 2019, defendant filed the instant petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2018)). Defendant argued (1) he should have pleaded guilty to the “lessor [*sic*] included offense” of criminal sexual assault and not the “most serious charge” of aggravated criminal sexual assault; (2) although he pleaded guilty to two counts of aggravated criminal sexual assault, the State offered DNA evidence in support of only one of the counts; (3) his consecutive sentences were not supported by the record; (4) he was not admonished regarding parole or registration as a sex offender; and (5) the “laboratory results” supported the “lessor [*sic*] included offense” of criminal sexual assault. The State filed a motion to dismiss defendant's section 2-1401 petition, arguing defendant's petition was untimely filed and not subject to any exceptions.

¶ 8 On October 20, 2020, the trial court conducted a hearing on defendant's petition for relief from judgment. The State argued defendant's petition was untimely, given defendant pleaded guilty and was sentenced on February 6, 2014, and did not file his section 2-1401 petition until December 9, 2019. Defendant did not argue his petition was timely but alleged the State fraudulently concealed information from the grand jury and the evidence did not support “the aggravated factors to these offenses.” The State informed the court defendant failed to provide a transcript of the grand jury proceedings. After argument, the trial court granted the State's motion to dismiss, finding defendant's section 2-1401 petition time-barred and not subject to any exceptions.

¶ 9 Defendant appealed the trial court's dismissal, and on October 22, 2020, this court appointed OSAD to represent defendant. In July 2021, OSAD filed a motion for leave to withdraw as defendant's counsel and attached a supporting memorandum of law, citing *People v. Kuehner*, 2015 IL 117695, ¶ 15, 392 N.E.3d 655, and *People v. Meeks*, 2016 IL App (2d) 140509, ¶ 8, 51 N.E.3d 1109. In September 2021, defendant filed a motion in response to appellate counsel's motion for leave to withdraw as defendant's counsel. Defendant alleged his appellate counsel was not competent and requested this court appoint new appellate counsel. This court ordered defendant's motion taken with the case. On November 2, 2021, the State filed its brief, and on February 28, 2022, defendant filed his reply brief.

¶ 10 II. ANALYSIS

¶ 11 As an initial matter, OSAD cites *People v. Buchanan*, 2019 IL App (2d) 180194, ¶ 5, 145 N.E.3d 722, where the appellate court granted OSAD's motion to withdraw as counsel and affirmed the dismissal of the defendant's section 2-1401 petition. OSAD contends two members of the appellate court panel, in *dicta*, opined OSAD should have sought to withdraw on the basis the trial court had no authority to appoint OSAD to an appeal from a civil proceeding under section 2-1401. *Buchanan*, 2019 IL App (2d) 180194, ¶ 17. In this case, OSAD specifically states it does not move to withdraw on the basis the trial court lacked authority to appoint OSAD to this appeal. Accordingly, we decline to address this basis for withdrawal.

¶ 12 OSAD contends no meritorious argument can be made the trial court erred in dismissing defendant's untimely petition for relief from judgment. The State argues the trial court did not err in dismissing defendant's petition because it was time-barred and there were no errors to excuse defendant's untimely filing. Defendant does not assert his petition was timely

filed but contends the State fraudulently concealed information from the grand jury and, thus, his untimeliness should be excused.

¶ 13 “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 the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition.” *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000). A defendant is entitled to relief if he demonstrates (1) a meritorious claim or defense, (2) due diligence in presenting the claim in the original action, and (3) due diligence in filing the section 2-1401 petition. *People v. Lee*, 2012 IL App (4th) 110403, ¶ 15, 979 N.E.2d 992. Generally, a petitioner must file his petition no more than two years after the court enters its final judgment. 735 ILCS 5/2-1401(c) (West 2018). A petitioner’s untimeliness may be excused if he demonstrates he was under a legal disability or duress, or the grounds for relief were fraudulently concealed. *People v. Caballero*, 179 Ill. 2d 205, 210-11, 688 N.E.2d 658, 660-61 (1997).

¶ 14 To make a successful showing of fraudulent concealment for purposes of section 2-1401, the defendant must “ ‘allege facts demonstrating that his opponent affirmatively attempted to prevent the discovery of the purported grounds for relief and must offer factual allegations demonstrating his good faith and reasonable diligence in trying to uncover such matters before trial or within the limitations period.’ ” *People v. Coleman*, 206 Ill. 2d 261, 290, 794 N.E.2d 275, 293 (2002) (quoting *People v. McLaughlin*, 324 Ill. App. 3d 909, 918, 755 N.E.2d 82, 89 (2001)). “It is well established that fraudulent concealment sufficient to toll the two-year limitation period of the statute requires ‘affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief.’ ” *Coleman*, 206 Ill. 2d at 290-91

(quoting *Crowell v. Bilandic*, 81 Ill. 2d 422, 428, 411 N.E.2d 16, 18 (1980)). We review *de novo* the trial court's dismissal of a section 2-1401 petition as untimely. *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 15 Defendant argues in his response to OSAD's motion to withdraw as appellate counsel, because the State fraudulently concealed evidence before the grand jury, the trial court lacked personal and subject matter jurisdiction. We note the two-year time limitation does not apply to petitions brought on grounds of voidness. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104, 776 N.E.2d 195, 202 (2002). However, it is clear that the judgment entered in the instant matter was not void. The trial court unquestionably had both subject matter jurisdiction and personal jurisdiction.

¶ 16 Defendant pleaded guilty and was sentenced on February 6, 2014. Defendant did not file his section 2-1401 petition until December 9, 2019, after the two-year limitations period expired. Defendant argues the limitations period was tolled because the State fraudulently concealed information from the grand jury, leading to indictments for "the more severe" charge of aggravated criminal sexual assault and not "the [lesser] charge" of criminal sexual assault. We note the grand jury returned six indictments against defendant, three charges of aggravated criminal sexual assault and three charges of criminal sexual assault. Defendant alleges the State misled the grand jury by informing the grand jury that defendant, while committing criminal sexual assault of J.P., threatened to kill J.P.'s mother if J.P. spoke of the assault, but the State did not disclose facts in support of "the [lesser] charge" of criminal sexual assault, including: (1) defendant was "caught" in a motel room with J.P.'s mother, (2) J.P.'s mother sent \$50 to defendant's jail "account," and (3) the DNA evidence was secured from a vaginal swab and not

an anal swab. Defendant asserts these additional facts would have supported the criminal sexual assault charges but not the aggravated criminal sexual assault charges.

¶ 17 The record on appeal is insufficient to address defendant's argument the State fraudulently concealed evidence from the grand jury. Defendant has again failed to include the grand jury transcripts in the record. Without the grand jury transcripts, it is impossible to determine exactly what evidence the State presented during the grand jury proceedings.

¶ 18 "An appellant has the burden to present a sufficiently complete record of the proceedings below to support a claim of error." *People v. Fair*, 193 Ill. 2d 256, 264, 738 N.E.2d 500, 504 (2000). In the absence of a complete record on appeal, it will be presumed the order entered by the circuit court was in conformity with law and had a sufficient factual basis. *Fair*, 193 Ill. 2d at 264. Therefore, any doubts which may arise from the incompleteness of the record regarding the grand jury proceedings will be resolved against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459 N.E.2d 958, 959 (1984). Because we cannot adequately review defendant's claim the evidence presented to the grand jury was inaccurate or misleading without the actual grand jury transcripts, we assume the grand jury proceedings were in conformity with the law.

¶ 19 Even if we assume defendant's version of the events is true, *i.e.*, the State did not disclose to the grand jury (1) defendant was "caught" in a motel room with J.P.'s mother, (2) J.P.'s mother sent \$50 to defendant's jail "account," and (3) the DNA evidence was secured from a vaginal swab and not an anal swab, defendant acknowledges in his reply brief "the facts was [*sic*] well known" when he pleaded guilty. Despite the knowledge of these facts, defendant still pleaded guilty.

¶ 20 Defendant's section 2-1401 petition was untimely, and he has failed to show the two-year statute of limitations for filing a section 2-1401 petition should be tolled due to fraudulent concealment. We agree with OSAD no meritorious argument can be made the trial court erred in dismissing defendant's section 2-1401 petition, and we deny defendant's motion requesting this court appoint new appellate counsel.

¶ 21 III. CONCLUSION

¶ 22 We grant OSAD's motion for leave to withdraw as counsel and affirm the trial court's judgment.

¶ 23 Affirmed.