2020 IL App (2d) 190322-U
No. 2-19-0322
Order filed November 4, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FERNANDO VARGAS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 05-CF-962 Honorable William J. Parkhurst, Judge, Presiding.

JUSTICE BRIDGES delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's section 2-1401 petition as untimely. Therefore, we affirm.

¶ 2 Defendant, Fernando Vargas, appeals the trial court's dismissal of his petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2018)). Defendant argues that section 2-1401's time limitations did not apply to his petition because he sought to vacate a void judgment. He alternatively argues that the trial court should have used its equitable powers to toll the limitations period. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 5, 2005, defendant entered a fully negotiated guilty plea to unlawful possession of a controlled substance (720 ILCS 570-402(c) (West 2004)). He was sentenced to two years' probation, ordered to perform community service, and ordered to pay fees and fines. On June 15, 2006, defendant was granted permission to travel to Mexico.

¶ 5 On January 15, 2019, defendant filed a petition under section 2-1401 seeking to vacate his conviction. He alleged that the trial court did not provide all of the necessary admonishments under Illinois Supreme Court Rule 402 (eff. July 1, 1997), and that had he known of his rights, including the right to cross-examine witnesses, he would not have pleaded guilty. Defendant argued that he had a meritorious defense that the controlled substance was not his, and that soon after discovering the rights that he waived by pleading guilty, he worked diligently with counsel to file the 2-1401 petition. Defendant argued that section 2-1401's two-year time limitation did not apply because the judgment was void, in that the trial court's failure to provide certain admonishments violated his due process rights and deprived the trial court of the power to enter the judgment. Defendant further argued that defense counsel was ineffective for failing to advise him of his rights, making the guilty plea void *ab initio*.

¶ 6 On February 11, 2019, the State filed a motion to dismiss defendant's petition. It argued that the petition was time-barred and that the judgment was not void because the trial court had personal and subject matter jurisdiction.

¶ 7 A hearing on defendant's petition took place on March 18, 2019. Defense counsel stated that because defendant was a legal permanent resident who had pleaded guilty to a drug charge, he was subject to detention without bond every time he tried to re-enter the United States from abroad. Counsel further reiterated his arguments that the judgment was void. The trial court granted the State's motion to dismiss, and defendant timely appealed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant argues that the trial court erred in granting the State's motion to dismiss his section 2-1401 petition. Section 2-1401 typically allows for relief from final orders and judgments more than 30 days but less than two years after their entry. 735 ILCS 5/2-1401 (West 2018). To obtain relief under section 2-1401, a party must set forth specific factual allegations showing (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim in the original action; and (3) due diligence in filing the section 2-1401 petition. *People v. Miles*, 2017 IL App (1st) 132719, ¶ 21. However, the time limitation and aforementioned criteria do not apply if the section 2-1401 petition seeks to vacate a void judgment. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002); see also 735 ILCS 5/2-1401(f) (West 2018). Instead, "[t]he allegation that the judgment or order is void substitutes for and negates the need to allege a meritorious defense and due diligence." *Sarkissian*, 201 Ill. 2d at 104. We review the ruling on a section 2-1401 petition *de novo* where it was denied or dismissed on legal grounds, such as in this case. *People v. Abdullah*, 2019 IL 123492, ¶ 13.

¶ 10 Defendant points out that the Illinois supreme court previously recognized void judgments in three contexts: (1) a judgment entered without personal or subject matter jurisdiction; (2) a judgment entered pursuant to a facially unconstitutional statute that is void *ab initio*; and (3) sentences that do not conform to statutory requirements, known as the " 'void sentence rule.' " *People v. Thompson*, 2015 IL 118151, ¶¶ 31-33. Our supreme court abolished the void sentence rule in *People v. Castleberry*, 2015 IL 116916, ¶ 19. However, defendant argues that void judgments are not limited to just the first two categories, as older precedent establishes that fraud will also void a judgment. See, *e.g.*, *Martin v. Judd*, 60 Ill. 78, 84-85 (1871) ("If a judgment should be collusively confessed in a case where no indebtedness whatever existed, it would be fraudulent,

and any party whose interest might be affected, could properly attack it."); *In re Adoption of E.L.*, 315 Ill. App. 3d 137, 154 (2000). Defendant argues that, therefore, the two scenarios described by the supreme court do not set forth the sole bases for voiding a judgment, but rather describe only the most common ones, and that the language used in recent supreme court decisions shows that it has effectively invited lower courts to expand Illinois' voidness doctrine. See *Price*, 2016 IL 118613, ¶¶ 30-31 ("only the most fundamental defects warrant declaring a judgment void" and the supreme court "has *recognized* only three circumstances in which a judgment will be deemed void" (emphasis added)); *People v. Thompson*, 2015 IL 118151, ¶ 31 ("*Typically*, the petitioner will allege that the judgment is void" because the trial court lacked jurisdiction (emphasis added)).

¶ 11 Defendant acknowledges that in *People v. Hubbard*, 2012 IL App (2d) 101158, this court declined to expand the voidness doctrine. There, the defendant argued that his conviction was void because the trial court misadvised him of the sentencing range, rendering his guilty plea involuntary. *Id.* ¶ 6. We held that a judgment is void only if the court that entered it lacked jurisdiction. *Id.* ¶ 12. We reasoned that because the voluntariness of a guilty plea has no bearing on jurisdiction, an involuntary plea could not render a conviction void. *Id.* We stated that although federal courts employed different standards for voidness, nothing in the United States Constitution required Illinois courts applying Illinois law to use the same definition. *Id.* ¶ 24. We further stated that while "voidness in federal law is a broad concept with weak procedural effects, voidness in Illinois law is a narrow concept with strong procedural effects, and the application of the federal standard would not provide that defendant have the ability to attack his plea at any time." *Id.* ¶ 26.

¶ 12 Defendant argues that we should reject *Hubbard*'s reasoning because it was inaccurate at the time it was decided, as it relied exclusively on *People v Davis*, 156 Ill. 2d 149 (1993), and overlooked cases that provided other bases for void judgments, such as the void sentence rule and

fraud. Defendant additionally argues that it was decided prior to our supreme court's decisions in *Thompson* and *Price*, which acknowledged a more expansive voidness doctrine in Illinois.

¶ 13 Defendant cites a long list of out-of-state and federal cases in support of his argument that most jurisdictions hold that sufficiently serious due process violations that deprive a party of the opportunity to be heard will cause a judgment to be void. Defendant then argues that such a scenario was present here, in that his guilty plea was involuntary because of due process violations that deprived him of his right to be heard. He argues that we should adopt national standards of voidness and hold that the judgment was void.

¶ 14 We reject defendant's argument that his judgment should be vacated as void. We note that defendant pleaded guilty on July 5, 2005, but filed his section 2-1401 about 13½ years later, on January 15, 2019. Thus, he filed his petition well-beyond section 2-1401's two-year deadline. See 735 ILCS 5/2-1401 (West 2018). The deadline would not apply if the judgment was void. Defendant does not argue that the trial court lacked personal or subject matter jurisdiction, or that the statutes on which the judgment was based were facially unconstitutional, which are the well-established bases for void judgments. See *Price*, 2016 IL 118613, ¶ 31. Defendant also recognizes that this court has already held in *Hubbard* that an involuntary guilty plea will not render a judgment void (*Hubbard*, 2012 IL App (2d) 101158, ¶ 12), but he urges us not to follow that case. However, we believe that *Hubbard*'s early rejection of the void sentence rule, which the supreme court later explicitly rejected, makes *Hubbard* more reliable rather than less reliable, as defendant argues. We also do not believe that the limited phrases that defendant cites from *Thompson* and *Price* (see *supra* ¶ 10) are an invitation for the appellate court to expand the voidness doctrine, and we explained in *Hubbard* why adopting a federal standard would be inappropriate (see *Hubbard*, 2012 IL App (2d) 101158, ¶¶ 24-26).

¶ 15 We further find without merit defendant's argument that fraud provides an independent basis to void a judgment. Rather, in *In re Adoption of E.L.*, 315 Ill. App. 3d 137, which defendant cites, explained:

> "Courts distinguish between fraud which prevents a court from acquiring jurisdiction or merely gives the court colorable jurisdiction, and fraud occurring after the court's valid acquisition of jurisdiction, such as false testimony or concealment. [Citations.] Only judgments procured by the former type of fraud are void." *Id.* at 154.

In other words, only fraud that deprives a court of jurisdiction makes the judgment void. See also *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 165 (1983) ("It is well established that once a court acquires jurisdiction, subsequent fraud, concealment, or perjury will not render its order void."). Accordingly, the trial court did not err in granting the State's motion to dismiss defendant's section 2-1401 petition as time-barred.

¶ 16 Defendant argues that if his judgment of conviction is not void, the trial court should have exercised its equitable powers to toll the statute of limitations. Defendant states that although equitable tolling is limited to extraordinary circumstances (*Clay v. Kuhl*, 189 Ill. 2d 603 (2000)) and our supreme court has applied equitable tolling in only one case (see *Williams v. Board of Review*, 241 Ill. 2d 352, 360 (2011)), the trial court should have applied the doctrine here because the facts of this case also present extraordinary circumstances. Defendant argues that his guilty plea was involuntary in part because he was unaware of the attendant circumstances, particularly the immigration consequences. Defendant argues that although he is allowed to remain a legal permanent resident and is not subject to deportation, if he returns to the United States after going abroad, he risks being miscategorized by immigration services and unlawfully detained. Defendant argues that he could not have discovered the risk until recently because he was able to return from

Mexico without incident during the limitations period, but on a subsequent trip he was detained and had to file a *habeas corpus* action to be released.

¶ 17 Defendant's argument is not persuasive. As the State points out in its brief, defendant forfeited the argument by failing to include it in his petition. *People v. Bramlett*, 347 Ill. App. 3d 468, 475 (2004). Further, section 2-1401's two-year limitation period "must be adhered to in the absence of a clear showing that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed" (*People v. Caballero*, 179 Ill. 2d 205, 210-211 (1997)), which was not present in this case. Finally, "[e]quitable tolling of a statute of limitations may be appropriate if the defendant has actively misled the plaintiff, or if the plaintiff has been prevented from asserting his or her rights in some extraordinary way, or if the plaintiff has mistakenly asserted his or her rights in the wrong forum." *Clay*, 189 Ill. 2d at 614. None of these circumstances apply. Accordingly, the trial court did not err by not applying the doctrine of equitable tolling.[1]

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we affirm the judgment of the Kane County circuit court.

¶ 20 Affirmed.

[1] Defendant argues in his reply brief that this court should apply the doctrine of equitable tolling. However, arguments raised for the first time in a reply brief are also forfeited (Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018)). Even otherwise, the same analysis would apply.