

2012 IL App (1st) 102471-U

THIRD DIVISION  
January 25, 2012

No. 1-10-2471

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the  |
|                                      | ) | Circuit Court of |
| Plaintiff-Appellee,                  | ) | Cook County.     |
|                                      | ) |                  |
| v.                                   | ) | No. 03 CR 26668  |
|                                      | ) |                  |
| JOSEPH MARTINEZ,                     | ) | Honorable        |
|                                      | ) | Michael Brown,   |
| Defendant-Appellant.                 | ) | Judge Presiding. |

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PRESIDING JUSTICE STEELE delivered the judgment of the court.  
Justices Neville and Murphy concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the circuit court's *sua sponte* dismissal of defendant's section 2-1401 petition was premature, we vacate the circuit court's judgment and remand for further proceedings.

¶ 2 Defendant Joseph Martinez appeals from a circuit court order dismissing his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). On appeal, defendant solely contends that the circuit court's *sua sponte* dismissal of his petition less than 30 days after its filing violates the Illinois Supreme

Court's holding in *People v. Laugharn*, 233 Ill. 2d 318 (2009), and must be vacated. We vacate the circuit court's judgment and remand for further proceedings.

¶ 3 The record shows that prior to trial, defendant's codefendant Valerie Padin, who is not a party to this appeal, filed a motion for substitution of judges, and the court transferred both of their cases. After reassignment, defendant did not seek further reassignment by filing his own motion for substitution of judges.

¶ 4 Following a 2006 jury trial, defendant was convicted of first degree murder and sentenced to 75 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Martinez*, No. 1-07-0059 (2009) (unpublished order under Illinois Supreme Court Rule 23). Defendant subsequently filed a postconviction petition, which the circuit court dismissed as frivolous and patently without merit. An appeal in that cause is pending before this court. See *People v. Martinez*, No. 1-11-1911.

¶ 5 On May 5, 2010, defendant filed the instant section 2-1401 petition, alleging that his case was improperly reassigned from Judge Preston Bowie to Judge James Egan in violation of section 114-5 of the Code of Criminal Procedure (725 ILCS 5/114-5 (West 2010)), because it was his codefendant, not he, who moved to substitute judges. Defendant thus maintains that this improper substitution of judges renders his conviction void.

¶ 6 On May 28, 2010, the following proceedings took place regarding defendant's section 2-1401 petition:

"THE COURT: This is the matter of Joseph Martinez. It comes on the court's docket pursuant to a *pro se* motion for post-conviction relief under 2-1401. The Court has reviewed the defendant's petition. I have prepared a written order, and I will enter that order pursuant to the reasons stated in the written order, the

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defendant's *pro se* motion for relief under section 2-1401 is denied. Clerk notify defendant. The matter is off call.

Mr. O'Malley [Assistant State's Attorney]: What is the case number on that, Judge?

THE COURT: 03 CR 26668. He's the 01 defendant."

The written order further indicates that the circuit court dismissed defendant's petition, finding that defendant's case was properly reassigned, and defendant was under the false belief that Judge Egan never had authority over his case.

¶ 7 On appeal, defendant contends that the circuit court's *sua sponte* dismissal of his section 2-1401 petition less than 30 days after its filing violates the Illinois Supreme Court's holding in *Laugharn* and must be vacated. We agree.

¶ 8 According to *Laugharn*, 233 Ill. 2d at 323, a court may not dismiss a section 2-1401 motion *before* the 30-day time period has passed during which the opposing party should respond. Here, defendant filed the subject motion on May 5, 2010, and the circuit court denied it on May 28, 2010. The State had not filed a response and the 30-day period had not expired for the filing of a response. Accordingly, the circuit court ruled prematurely (*Laugharn*, 233 Ill. 2d at 323), and we must vacate the order denying defendant's section 2-1401 petition.

¶ 9 In reaching this conclusion, we need not reach the merits of the petition as advanced by the State. The State specifically maintains that the substitution of judge claim raised by defendant in his section 2-1401 petition lacks merit, and the circuit court was correct in rejecting his erroneous claim. However, the supreme court in *Laugharn* remanded the cause to the circuit court for further proceedings and explicitly stated that it expressed no opinion on the merits of the argument raised by the defendant in his petition. *Laugharn*, 233 Ill. 2d at 324. Therefore, we

follow the supreme court's holding in *Laugharn* and do not express any opinion on the merits of defendant's section 2-1401 petition.

¶ 10 We also reject the State's argument that because an assistant State's Attorney was present in court when the circuit court ruled on defendant's petition, the State waived its opportunity to contest the factual allegations raised in the petition. We previously addressed this issue in *People v. Clemons*, 2011 IL App (1st) 102329. In that case, the State was present during the section 2-1401 proceedings, but remained silent. We found that the State's silence did not render the section 2-1401 petition ripe for adjudication and vacated the order of dismissal. *Clemons*, 2011 IL App (1st) 102329 at ¶ 17; see also *People v. Gray*, 2011 IL App (1st) 091689 ¶¶ 21-22 (following *Clemons*).

¶ 11 Here, as in *Clemons*, the State was present during the proceedings and remained silent. It was only after the trial court dismissed defendant's petition that the State commented, "What is the case number on that, Judge?" This question posed by the State after the circuit court denied defendant relief does not change the fact that the State was silent during the proceedings, making this case indistinguishable from *Clemons* and *Gray*. Moreover, unlike in *People v. Vincent*, 226 Ill. 2d 1, 10 (2007), where the State's failure to answer allowed the circuit court to address the merits of the defendant's section 2-1401 petition, the circuit court in this case short-circuited the proceedings by dismissing the petition prior to the expiration of the 30-day period. See *Clemons*, 2011 IL App (1st) 102329 at ¶ 14. We thus find that the State's silence during the proceeding at bar did not amount to waiver of its right to respond to the allegations in defendant's petition.

¶ 12 Therefore, we vacate the judgment of the circuit court and remand the cause for further proceedings.

¶ 13 Judgment vacated; cause remanded.