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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Stephenson County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07-CF-94
	)	
PHILLIP M. SHIPP,	)	Honorable
	)	Michael P. Bald,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices Hutchinson and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court was entitled to grant the State's motion to dismiss defendant's section 2-1401 petition even though defendant had not been notified of the motion or the hearing

¶ 2 Defendant, Phillip M. Shipp, appeals from the trial court's order granting the State's motion to dismiss his petition for relief from judgment, filed under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). He contends that the dismissal was improper because he did not receive notice of the State's motion. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 6, 2011, defendant filed a section 2-1401 petition, alleging that his conviction of possession of one gram or more but less than 15 grams of cocaine with intent to deliver within 1,000 feet of a church was void because the statute underlying the offense (720 ILCS 570/407(b)(1) (West 2006)) was unconstitutional.

¶ 5 On October 3, 2011, the State moved to dismiss the petition on the basis that defendant failed to cite any authority for his claim and that it was insufficient to state a cause of action. On October 6, 2011, a hearing was held, and the State chose to stand on the motion without presenting argument. There is nothing in the record to indicate that defendant was given notice of the motion or of the hearing. The court found that defendant had not provided grounds to support his claim and dismissed the petition.

¶ 6 On October 12, 2011, the court sent defendant a letter, advising him that the petition had been dismissed. Defendant did not move for a rehearing and he appeals.

¶ 7 II. ANALYSIS

¶ 8 Defendant contends that we must reverse and remand because he did not receive notice of the State's motion and of the October 6, 2011, hearing, as required by Illinois Supreme Court Rule 104(b) (eff. Jan. 1, 1970). He does not contend that the trial court erred in its determination on the merits. The State contends that, because the court may *sua sponte* dismiss a section 2-1401 petition on the merits without notice, it could also grant the State's motion to dismiss without notice.

¶ 9 “Section 2-1401 provides a comprehensive civil procedure that allows for the vacatur of a final judgment older than 30 days.” *People v. Prado*, 2012 IL App (2d) 110767, ¶ 6. “ ‘The petition must be filed not later than two years following the entry of judgment, excluding time during which the petitioner is under a legal disability or duress or the ground for relief is fraudulently concealed.’ ”

*Id.* (quoting *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 9). “While the petition must be filed in the same proceeding in which the judgment was entered, it is not a continuation of that proceeding.”

*Id.* “ ‘All parties to the petition shall be notified as provided by rule.’ ” *Id.* (quoting *Nitz*, 201 IL App (2d) 091165, ¶ 9; see 735 ILCS 5/2-1401(b) (West 2008). “[B]ecause the trial court dismissed the petition based on the pleading alone, our review is *de novo*.” *Id.*

¶ 10 In *People v. Vincent*, 226 Ill. 2d 1, 11-19 (2007), our supreme court held that a trial court may properly dismiss a section 2-1401 petition on the merits *sua sponte* and without notice or an opportunity to be heard. The court noted that such a ruling may properly be characterized as either a grant of judgment on the pleadings in favor of the State or a dismissal of the petition with prejudice for failure to state a cause of action. *Id.* at 12. The court further observed that, in the case of such a dismissal, the defendant’s opportunity to be heard has not been compromised. The defendant had access to the courts, as his petition was filed and considered by the judge. *Id.* at 13. Further, the defendant is not deprived of the ability to bring a meritorious claim, because adequate procedural safeguards exist to prevent erroneous *sua sponte* dismissals. *Id.* For example, the defendant may file a motion for rehearing or bring an appeal with a *de novo* review of the merits. *Id.*

¶ 11 Here, the trial court dismissed the petition. Under *Vincent*, it was permissible for the trial court to do so without notice and an opportunity to be heard. Defendant argues that *Vincent* is distinguishable because *Vincent* dealt only with a *sua sponte* dismissal, while here the State first filed a motion to dismiss that was not properly served. But that distinction is meaningless. The failure to serve did not render the trial court’s order void, and defendant has not asserted that service would have affected the outcome. Thus, there would be nothing to be gained by remanding for notice and a new hearing.

¶ 12 “ ‘A party may attack a judgment as void only when jurisdiction is totally wanting.’ ” *GMB Financial Group, Inc. v. Marzano*, 385 Ill. App. 3d 978, 982-83 (2008) (quoting *Larson v. Pedersen*, 349 Ill. App. 3d 203, 207 (2004)). Illinois Supreme Court Rule 104(d) (eff. Jan 1, 1970) specifically provides that the failure to serve copies under the rule does not impair the jurisdiction of the court over the parties. We have also specifically held that the failure to provide notice under Rule 104(b) renders a trial court’s order voidable, not void. *Marzano*, 385 Ill. App. 3d at 982-83. “Because the challenged order is voidable, not void, ‘the determining factor is not the absence of notice but whether there was any harm or prejudice to the nonmoving party.’ ” *Id.* (quoting *In re Rehabilitation of American Mutual Reinsurance Co.*, 238 Ill. App. 3d 1, 11 (1992)). “Prejudice, moreover, must be real or ‘actual,’ not just possible.” *Id.* at 984.

¶ 13 Here, because a purely legal issue was presented, there was no need for the parties to present evidence. Defendant has made no argument as to how he would have provided the court with any information that would have changed the outcome of the proceedings and he has not made any arguments on appeal related to his claim that section 407(b)(1) is unconstitutional. That alone is fatal to his claim. See *id.* Accordingly, he has not shown prejudice based on the lack of notice and opportunity to be heard.

¶ 14 III. CONCLUSION

¶ 15 The trial court could dismiss the petition on the merits without notice. Accordingly, the judgment of the circuit court of Stephenson County is affirmed.

¶ 16 Affirmed.