

No. 1-11-2795

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 83 C1 0568
)	
GREGORY NASH,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court, *sua sponte*, properly dismissed defendant's petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), on the merits where more than 30 days elapsed between the date defendant's proof of service indicated he mailed the petition and when the court dismissed the petition. Affirmed.
- ¶ 2 Defendant Gregory Nash appeals from the *sua sponte* dismissal of his *pro se* petition for relief under section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2010). On appeal, defendant contends that the cause must be remanded because the dismissal was premature according to the supreme court decision in *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). He does not argue that the petition has substantive merit.

¶ 3 A jury convicted defendant of attempted murder and various related offenses in 1983; he is currently serving concurrent prison terms of 60 years for attempted murder and 15 years for armed robbery. Defendant challenged the convictions in a direct appeal (*People v. Nash*, No. 84-2747 (1985) (unpublished order under Supreme Court Rule 23)) and a postconviction petition *People v. Nash*, No. 1-05-2072 (2006) (unpublished order under Supreme Court Rule 23).

¶ 4 As pertinent to the section 2-1401 petition before us on appeal, the record contains a "Notice of Filing and Proof of Service," showing that defendant mailed the petition on March 28, 2011. This document certified that defendant served the Clerk of the Circuit Court ("Clerk") and the Office of the State's Attorney with his section 2-1401 petition. The petition was not filed stamped upon receipt by the Clerk. Moreover, there is no notation on the Clerk's Memorandum of Orders ("Half Sheet") indicating the filing date.

¶ 5 The earliest notation to the petition on the Half Sheet is April 27, 2011, which is the date defendant's petition was set for a hearing. On May 26, 2011, the trial court *sua sponte* dismissed defendant's petition, 29 days after the petition was docketed and set for hearing.

¶ 6 In the instant appeal, defendant contends that because the trial court dismissed the petition just 29 days after it was filed, this court should vacate the dismissal because it was prior to the expiration of the 30-day period for the State to answer or otherwise plead. The State responds that defendant's argument fails because the 30-day period begins on the date of service, and not the date the petition is docketed, the date defendant uses to support his claim. Because defendant argues this court must review his claim of premature dismissal of his section 2-1401 petition based upon the date of filing, while the State argues we must look to the date of service, we will review this claim *de novo*, as it involves interpretation of Supreme Court Rule 105 (eff. Jan. 1, 1989). See *People v. Bauman*, 2012 IL App (2d) 110544, ¶ 20. We further note that

review of the dismissal of a section 2-1401 petition is also *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 7 "Illinois Supreme Court rules are interpreted under the same principles that govern the interpretation of statutes." *In re W.R.*, 2012 IL App (3d) 110179, ¶ 15; citing *People v. Santiago*, 236 Ill. 2d 417, 428 (2010). When interpreting a rule, "[w]e begin with the language of the rule, which must be given its plain and ordinary meaning." *Santiago*, 236 Ill. 2d at 428.

¶ 8 The Illinois Supreme Court held in *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009), that dismissal of a section 2-1401 petition before the expiration of the 30-day period to answer or otherwise plead was "premature" and required vacatur. The court went on to explain the notice requirements under section 2-1401 and the corresponding Supreme Court Rules. Section 2-1401 provides that "[a]ll parties to the petition shall be notified as provided by rule." The rule referred to in section 2-1401 is Rule 106 (eff. July 1, 1985) which provides that notice of the filing of a section 2-1401 petition shall be given by the same methods provided for in Rule 105. Under Rule 105, the notice shall be directed to opposing parties and must be served either by summons, by prepaid certified or registered mail, or by publication. Ill. S. Ct. R. 105(b); see also *People v. Prado*, 2012 IL App (2d) 110767, ¶ 6. "The notice must state that a judgment by default may be taken against the party unless he files an answer or otherwise files an appearance within 30 days *after service*." (Emphasis added.) *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 9; citing Ill. S. Ct. R. 105 (eff. Jan. 1, 1989).

¶ 9 The court in *Vincent* "expressly framed the issued with respect to a 'properly served section 2-1401 petition.'" *Nitz*, 2012 IL App (2d) 091165, ¶ 12; quoting *Vincent*, 226 Ill. 2d at 5. While *Laugharn* explained that the defendant's petition was not "ripe for adjudication" because only seven days passed since it was filed, our supreme court went on to set forth the notice requirements under Rule 105, which provides the State must file an answer or otherwise file an

appearance within 30 days *after service*. *Laugharn*, 233 Ill. 2d at 323; see also *Nitz*, 2012 IL App (2d) 091165, ¶ 12 (explaining that although the *Laugharn* court did not express that the State had been served, "the discussion indicate[d] that it had, because the court noted that the 30-day period for filing an answer does not begin to run until service has occurred." Therefore, as a matter of interpretation, we determine whether the trial court *sua sponte* dismissed defendant's section 2-1401 petition prematurely by looking to the date of service. See Ill. S. Ct. R. 105(a); *Laugharn*, 233 Ill. 2d at 323-24; and *People v. Gray*, 2011 IL App (1st) 091689, ¶ 19.

¶ 10 Here, the record does not provide a date of filing. It provides the date the petition was first docketed for a hearing. However, according to defendant's "Notice of Filing and Proof of Service," he mailed the section 2-1401 petition on March 28, 2011. The record does not indicate when the State received the notice but this court can reasonably assume the service date was at a point in time after defendant mailed the petition, but prior to the date the petition was docketed with the trial court. Therefore, more than 30 days elapsed before the trial court *sua sponte* dismissed defendant's petition on the merits, and the trial court's dismissal was not premature. See *Vincent*, 226 Ill. 2d at 9 (if the State "does not answer the petition, this constitutes an admission of all well-pleaded facts," and "the trial court may decide the case on the pleadings, affidavits, exhibits and supporting material before it, including the record of the prior proceedings.").

¶ 11 Defendant's citation to *People v. Clemons*, 2011 IL App (1st) 102329, is unavailing because while in that case this court concluded the defendant's section 2-1401 petition was prematurely dismissed before the 30-day period, we did not indicate whether we applied the date the defendant mailed the petition or the date it was filed, both of which were less than 30 days from the date of dismissal. *Id.* at ¶¶ 5-6, 15. *People v. Gray*, 2011 IL App (1st) 091689, ¶ 20, is

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similarly distinguishable because while our opinion provided the date the petition was filed, it did not indicate the date of service of the defendant's petition.

¶ 12 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 13 Affirmed.