

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).

2013 IL App (4th) 120171-U
NO. 4-12-0171
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
July 9, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
WILLIAM R. HIBLE,)	No. 05CF508
Defendant-Appellant.)	
)	Honorable
)	Michael D. Clary,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court vacated the trial court's *sua sponte* denial of defendant's section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2010)) and remanded for further proceedings. The petition was not ripe for adjudication at the time of denial because the State had not been properly served.
- ¶ 2 In May 2007, defendant, William R. Hible, pleaded guilty to aggravated battery (720 ILCS 5/12-4(a) (West 2004)) pursuant to a plea agreement. In June 2007, the trial court sentenced him to two years' imprisonment. Defendant was released from custody in April 2008 and discharged in April 2009. On December 23, 2011, defendant filed a *pro se* petition, naming the State as respondent, requesting his conviction be set aside on grounds of actual innocence and ineffective assistance of counsel. Defendant did not serve the State in accordance with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989) and the State did not waive service, answer, or

otherwise plead. On February 2, 2012, the trial court *sua sponte* entered a written order denying the petition as both untimely and, in the alternative, as lacking any basis for the relief requested. For the reasons that follow, we vacate the trial court's judgment and remand for further proceedings pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)).

¶ 3

I. BACKGROUND

¶ 4 In May 2007, defendant pleaded guilty to aggravated battery (720 ILCS 5/12-4(a) (West 2004)) pursuant to a fully negotiated plea agreement. In June 2007, the trial court sentenced defendant to two years' imprisonment. Defendant was released from custody in April 2008 and his sentence was discharged in April 2009.

¶ 5 On December 23, 2011, defendant, who was then incarcerated in the federal correctional institution in Pekin, Illinois, filed what he titled a "Pro Se Petition For Writ Of Error Coram Nobis, and/or ANY OTHER APPLICABLE RULE/STATUTE PERTAINING TO ACTUAL INNOCENCE CLAIM" (emphasis in original). In his petition, defendant named the State as respondent and claimed (1) he was innocent and his conviction must be vacated, (2) his trial counsel operated under a conflict of interest by also representing a codefendant, and (3) his trial counsel perpetrated a fraud on the court by allowing defendant to plead guilty despite knowing defendant was innocent.

¶ 6 As far as the record reveals, defendant did not provide the State with notice of his filing of the petition, as required by Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). A docket entry from December 23, 2011, indicates defendant's petition was received on that date. The docket entry also states, "File marked copy to State's Attorney's Office." However, the

record does not contain any proof of service showing defendant's petition was actually served on the State. There is no indication the State waived service, answered, entered an appearance, or otherwise pleaded in the trial court following the filing of defendant's petition.

¶ 7 On January 12, 2012, the trial court *sua sponte* signed a written order denying defendant's petition. The court did not make the order public on that date or otherwise indicate to the parties it had been signed. In the order, the court noted the relief sought by defendant is now provided by section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2010)). The court gave the following reasons for denying defendant's petition:

"A petition under 2-1401 must be filed within 2 years of entry of the order that is sought to be vacated. This petition was filed more than 2 years after entry and more than 2 years after the Defendant was released from custody in this case.

Even if this petition was timely filed, there is no basis to grant the relief requested. There is no claim of coercion or fraud to induce the Defendant to plead guilty. The Defendant was fully informed, properly admonished, did what he wanted and got what he bargained for with the State's Attorney and the court. The testimony at the sentencing shows there were accountability issues raised by the Defendant's conduct.

The Defendant alternatively requests that his pleading be considered a Petition for Post-Conviction Relief. It is not clearly labeled as a Petition for Post-Conviction Relief. The Defendant has

not been in custody on the case since 4/18/08.

Even if this was a proper Petition for Post-Conviction Relief and the Defendant was still in custody on this case, the allegations do not raise Constitutional violations perpetrated against the Defendant. The claims are frivolous and patently without merit.

For all of the reasons stated above the Petition filed on 12/23/11 is hereby DENIED."

On February 2, 2012, the court filed its written order, made a docket entry noting the order had been signed on January 12, 2012, and sent copies to the parties.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant asserts the circuit court erred in *sua sponte* denying his petition less than 30 days after it was filed. Before considering the merits of defendant's claim, we must ascertain whether we have jurisdiction.

¶ 11 A. Jurisdiction

¶ 12 "A reviewing court has an independent duty to consider issues of jurisdiction, regardless of whether either party has raised them." *People v. Smith*, 228 Ill. 2d 95, 104, 885 N.E.2d 1053, 1058 (2008).

¶ 13 As noted earlier, the trial court signed its written order denying defendant's petition on January 12, 2012. The court did not at that time file the order, mail it to the parties, or make a docket entry indicating it had been signed. On February 2, 2012, the order was file

stamped and the court reporter made the following docket entry: "ORDER on file. Order was signed by Judge on 1/12/12. Copy of Order mailed to deft this date. Copy to PD and State."

¶ 14 On February 21, 2012, defendant *pro se* filed in the trial court a combined notice of appeal and motion for appointment of counsel. On February 27, 2012, the trial court ordered the clerk to process defendant's appeal and appointed the office of the State Appellate Defender (OSAD) as counsel.

¶ 15 In the jurisdictional statement of its brief to this court, OSAD asserts defendant's *pro se* notice of appeal was untimely because it was filed more than 30 days after the trial court signed its written order on January 12, 2012. Rule 303(a)(1) governs appeals in civil cases and provides, in pertinent part, "[t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from." Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). OSAD argues in its brief defendant's late filing of his *pro se* notice of appeal is excused by Rule 303(d), which provides, in pertinent part, as follows:

"On motion supported by a showing of reasonable excuse for failure to file a notice of appeal on time, accompanied by the proposed notice of appeal and the filing fee, filed in the reviewing court within 30 days after expiration of the time for filing a notice of appeal, the reviewing court may grant leave to appeal and order the clerk to transmit the notice of appeal to the trial court for filing." Ill. S. Ct. R. 303(d) (eff. June 4, 2008).

Specifically, OSAD contends the trial court's delay in mailing its written order to defendant should excuse the untimely notice of appeal.

¶ 16 We find application of Rule 303(d) unnecessary because defendant's notice of appeal was timely filed. In *People ex rel. Schwartz v. Fagerholm*, 17 Ill. 2d 131, 137, 161 N.E.2d 20, 24 (1959), the Illinois Supreme Court stated, "[w]e are of the opinion that a judgment at law becomes effective when it is announced in open court, or in the absence of such pronouncement, when it is reduced to writing, approved by the judge and filed for record." In *Pappas v. Waldron*, 323 Ill. App. 3d 330, 335, 751 N.E.2d 1276, 1280 (2001), this court explained, for purposes of the 30-day time limit for filing a notice of appeal, actual notice of the trial court's order is not required so long as the order was expressed publicly, in words at the situs of the proceeding.

¶ 17 The written order in this case, although signed on January 12, 2012, was not filed or otherwise made publicly known until February 2, 2012. The order was first expressed publicly on that date when a docket entry was made indicating the order had been signed on January 12, 2012. For purposes of Rule 303(a), the order was entered on February 2, 2012, and that date is when the 30-day clock began to run. Accordingly, defendant's February 21, 2012, notice of appeal was timely filed and this court has jurisdiction over the appeal.

¶ 18 B. The Trial Court Erred in *Sua Sponte* Denying Defendant's Petition

¶ 19 Defendant asserts the trial court erred in *sua sponte* denying his section 2-1401 petition "before 30 days had elapsed after the petition had been filed." Citing *People v. Laugharn*, 233 Ill. 2d 318, 909 N.E.2d 802 (2009), defendant argues the court's order must be vacated and the case remanded for further proceedings under section 2-1401. The State declines to contest defendant's claim the order should be vacated and the case remanded for further proceedings.

¶ 20

1. *Standard of Review*

¶ 21 In *People v. Vincent*, 226 Ill. 2d 1, 12, 871 N.E.2d 17, 25 (2007), the court explained a *sua sponte* denial of the relief sought in a section 2-1401 petition is the same as a dismissal of the petition with prejudice. We review a denial of a section 2-1401 petition *de novo*. *Laugharn*, 233 Ill. 2d at 322, 909 N.E.2d at 804.

¶ 22

2. *Petitions for Relief From Judgment Under Section 2-1401*

¶ 23 "Section 2-1401 allows for relief from final judgments more than 30 days after their entry, provided the petition proves by a preponderance of evidence certain elements." *Id.*, 909 N.E.2d at 804-05. A section 2-1401 petition "must be filed not later than 2 years after the entry of the order of judgment." 735 ILCS 5/2-1401(c) (West 2010).

¶ 24

Section 2-1401(b) further provides, "[a]ll parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2010). Under Illinois Supreme Court Rule 106, petitions filed pursuant to section 2-1401 "shall be given by the same methods provided in Rule 105." Ill. S. Ct. R. 106 (eff. Aug. 1, 1985). In turn, Rule 105(b) provides notice shall be directed to the party and must be served either by summons, by prepaid certified or registered mail, or by publication. *People v. Prado*, 2012 IL App (2d) 110767, ¶ 6, 979 N.E.2d 564; see Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). "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." *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 9, 971 N.E.2d 633 (citing Ill. S. Ct. R. 105 (eff. Jan. 1, 1989)).

¶ 25

3. *The Trial Court Erred in Sua Sponte Denying Defendant's Petition Because the State Had Not Been Served*

¶ 26 In *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805, the trial court dismissed the prisoner's *pro se* petition under section 2-1401 only 7 days after the petition was filed and prior to the 30-day period for the State to answer or plead. The supreme court held the petition was not ripe for adjudication because the "circuit court's dismissal short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead." *Id.* The court vacated the dismissal and remanded for new proceedings under section 2-1401 without reaching the merits of the petition. *Id.* at 324, 909 N.E.2d at 805.

¶ 27 We note defendant misstates in his brief the relevant 30-day time period during which the responding party must answer or plead to avoid a default admission of all well-pleaded allegations in a section 2-1401 petition. Under Rule 105(a), the responding party has 30 days from *service* to file an answer or otherwise plead. Ill. S. Ct. R. 105(a) (eff. Jan.1, 1989). In this case, defendant asserts the 30-day period began when the petition was *filed*. Were that the case, the State's failure to answer or plead by January 22, 2012, would have resulted in a default admission and the petition would have been ripe for adjudication on that date. The court's February 2, 2012, order denying the petition would not have violated the *Laugharn* principles because the State would have been afforded its full opportunity to be heard. However, as we explain below, the 30-day clock had not started to run in this case because the petition was never properly served on the State.

¶ 28 In *Powell v. Lewellyn*, 2012 IL App (4th) 110168, ¶ 11, 976 N.E.2d 1106, this court found the *Laugharn* principles applicable to a petition for injunctive relief filed by an incarcerated plaintiff. The defendants in *Powell* had not been served with the petition at the time the court *sua sponte* dismissed it. *Id.* We vacated the trial court's dismissal and remanded for

further proceedings. *Id.* at ¶ 14, 976 N.E.2d 1106. In so doing, we noted that on remand the plaintiff (the petitioner in that case) could serve the defendants (the respondents) if he wanted his case heard. *Id.* "Otherwise, the trial court has the power to dismiss the case for want of prosecution after a reasonable period of time." *Id.*

¶ 29 In this case, defendant filed his petition on December 23, 2011, but as far as the record reveals, it was never properly served on the State. Although a December 23, 2011, docket entry indicates the trial court ordered a copy of defendant's petition sent to the office of the State's Attorney, the record contains no proof the petition was actually served. The State did not answer or plead at the trial level at any time following the filing of defendant's petition. The 30-day time limit for the State to answer or plead pursuant to Rule 105 never began to run.

¶ 30 We vacate the trial court's judgment denying the petition and remand for further proceedings under section 2-1401 consistent with the principles set forth in *Laugharn*, 233 Ill. 2d 318, 909 N.E.2d 802. The defendant may provide the State with proper service if he wishes to have his case heard. *Powell*, 2012 IL App (4th) 110168, ¶ 14, 976 N.E.2d 1106. Otherwise, the trial court may dismiss the case for want of prosecution after a reasonable period of time. *Id.*

¶ 31 III. CONCLUSION

¶ 32 We vacate the trial court's judgment and remand for further proceedings.

¶ 33 Vacated and remanded.