

2014 IL App (1st) 123233-U

No. 1-12-3233

Fifth Division
June 27, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of Cook County.
)	
Plaintiff-Appellee,)	
)	No. 92 CR 24548
v.)	
)	
PAUL LEE,)	The Honorable
)	Neera Lall Walsh,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's improper service of the State does not require us to vacate the trial court's *sua sponte* dismissal of defendant's section 2-

1401 petition, since the State had actual notice of the filing of the petition and waived personal jurisdiction.

¶ 2 Defendant Paul Lee was convicted by a jury of first-degree murder, aggravated criminal sexual assault and aggravated kidnapping, and sentenced to a term of natural life for the murder and concurrent 30-year terms for the aggravated criminal sexual assault and aggravated kidnapping. On direct appeal, this court affirmed his convictions and sentences. *People v. Lee*, No. 1-94-2604 (1996) (unpublished order pursuant to Supreme Court Rule 23). Since his direct appeal, defendant has filed several collateral attacks on his convictions and sentences.

¶ 3 This current appeal concerns a petition for relief from judgment filed on July 25, 2012, pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). Section 2-1401 permits relief from final orders and judgments, and provides that: "All parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). On September 24, 2012, the trial court issued an order *sua sponte* dismissing defendant's petition.

¶ 4 On this appeal from the trial court's dismissal, defendant raises a purely procedural question. Defendant's sole claim on this appeal is that the trial court erred in *sua sponte* dismissing his petition because he failed to serve the State properly with his petition. Defendant does not challenge the dismissal on its

merits, and thus we will consider only the procedural question which has been presented to us. For the following reasons, we do not find defendant's claim persuasive.

¶ 5

BACKGROUND

¶ 6

Since we are not asked to consider the merits of defendant's petition, we recite here only the procedural facts at issue.

¶ 7

On July 25, 2002, defendant filed a *pro se* "petition for relief from judgment," pursuant to section 2-1401. In the petition, defendant argued that his sentence of natural life was void because, although "[a]t sentencing, the trial judge stated that the life sentence was imposed because of ' singularly brutal crimes *** [and] the public must be protected,' " the trial court "made absolutely no determination that the 'manner' in which the murder was committed was brutal or heinous indicative of wanton cruelty."

¶ 8

The petition was accompanied by a "Notice of Filing," which was signed by defendant and sworn to before a notary public on July 11, 2012. The document stated:

"NOTICE OF FILING

To: Clerk of Court
Criminal Division
2650 S. California Ave.
Chicago, IL 60608

To: Anita Alvarez
State's Attorney
500 Richard J. Daley Plaza
Chicago, IL 60602

PLEASE TAKE NOTE that on the 11th day of July 2012, I have filed, through the U.S. Mail, with the above named parties, the attached PETITION FOR RELIEF FROM JUDGMENT, with the required number of copies.

AFFIDAVIT OF SERVICE

I, Paul Lee, being first duly sworn on oath deposes and avers that he caused the above stated document in the above stated amounts, to be served upon the above listed parties by placing the same in the U.S. Mail Box at the Pontiac Correctional Center in Pontiac, IL 61764, for delivery as first class U.S. Mail."

¶ 9 The appellate record contains a form "Notification of Motion," by the clerk of the circuit court, stating that a *pro se* petition for relief of judgment had been received on July 17, 2012, that it had been entered in the computer on July 25, 2012, and that it had been placed on the call before Judge Hennelly for August 1, 2012.

¶ 10 The half-sheet also indicates that the "Petition – Relief of Judgment" was filed on July 25, 2012, and placed on the call before Judge Hennelly for August 1, 2012. The half-sheet entry for August 1, 2012, before Judge Hennelly states: "PP [squiggly line] NP Transfer to Chief Judge for Supp Call 8-02-12." In its brief, the State argues that this entry means "People Present, Defendant Not Present" and that the matter was transferred to the chief judge for the supplemental call the next day. The State argues in its brief that the squiggly line that best resembles a capital "U" is the triangular symbol for defendant. It is

on the basis of this August 1st entry of "PP" that the State argues in its brief that it had actual notice of defendant's petition. In addition, at oral argument before this court, defendant agreed that "PP" meant "People Present" and that the half-sheets are court records.

¶ 11 The half-sheet entry for August 2, 2012 before Judge Biebel states: "J. Walsh 8-3-12." The next half-sheet entry is on August 3, 2012, before Judge Walsh and it states: "Pro Se P.C. Successive Petition 01C 9-24-12." The following half-sheet entry is on September 24, 2012, and reflects Judge Walsh's dismissal of the petition.

¶ 12 The original appellate record contained only two transcripts for proceedings concerning this 2-1401 petition: August 3, 2012; and September 24, 2012. However, after the appellate briefs were submitted, we granted the State's motion to supplement the record with the transcript of proceedings on August 2, 2012.

¶ 13 The transcript for August 2, 2012, states in its entirety:

"THE COURT: Paul Lee. This is a supplemental case?

UNIDENTIFIED STATE'S ATTORNEY (ASA): Yes. It's a post conviction matter transferred from Judge Hennelly. Can we please send this to the supplemental call?

THE CLERK: Judge Walsh.

THE COURT: Judge Walsh. What date?

ASA: We can go to tomorrow, please.

THE COURT: 8-3."

¶ 14 The cover sheets for the transcripts on both August 3, 2012, and September 24, 2012, state the names of the trial judge and the court reporter but do not reflect the presence of any attorneys. The August 3 transcript states in its entirety:

"THE CLERK: Paul Lee.

THE COURT: This appears to be a new post-conviction matter also. It was previously assigned to Judge Hennelly and it was transferred by the Chief Judge to my call for today's date. It appears also that it is a successive petition. I'll give it that same date of 9-24."

¶ 15 The transcript of September 24, 2012, contains only an announcement by the trial court that it was issuing a written order denying the petition. The transcript contains no statements by counsel and no indication that counsel was present.

¶ 16 Thus, two months after the petition was originally filed, the trial court issued a written order dismissing the petition *sua sponte* on September 24, 2012. The written order stated in relevant part:

"In the instant matter, petitioner challenges the sentence of this court as void *ab initio* based on an alleged erroneous imposition of a term of natural life imprisonment. Here, petitioner's claim is barred by the doctrine of *res judicata*. Petitioner has already raised this challenge to his sentence of natural life imprisonment in his initial petition for post-conviction relief that he filed on April 18, 1997. The trial court summarily dismissed his petition for postconviction relief and petitioner filed an appeal of the decision of the trial court. On January 13, 1999, the Appellate Court affirmed the trial court's order. See *People v. Lee*, No. 1-97-2746 (1st District 1999) (unpublished order pursuant to Supreme Court Rule 23). Because the court has already ruled on this issue, it is barred by *res judicata* and precluded from consideration."

¶ 17 As previously noted, defendant does not dispute the trial court's grounds for dismissing his petition, quoted above, and challenges the dismissal only on a procedural ground.

¶ 18 A notice of appeal was filed on October 18, 2012. This appeal followed.

¶ 19 ANALYSIS

¶ 20 On this appeal from the trial court's dismissal of his section 2-1401 petition, defendant raises only a procedural issue. Defendant's sole claim is that

the trial court erred in *sua sponte* dismissing his petition because he failed to serve the State properly with his petition.

¶ 21

I. Standard of Review

¶ 22

We review the dismissal of a section 2-1401 petition *de novo*. *People v. Laugharn*, 233 Ill. 2d 318, 322 (2009) (citing *People v. Vincent*, 226 Ill. 2d 1, 18 (2007)). Section 2-1401 permits relief from final judgments, which are older than 30 days but were entered less than 2 years ago. 735 ILCS 5/2-1401(a), (c) (West 2012); *Laugharn*, 233 Ill. 2d at 322. "To obtain relief under section 2-1401, the defendant 'must affirmatively set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.' " *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003) (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). However, where, as in this case, a petitioner seeks to vacate a final judgment as being void, the allegations of voidness substitute for and negate the need to allege due diligence. *Vincent*, 226 Ill. 2d at 8 n.2. "[A]n action brought under section 2-1401 is a civil proceeding and, according to this court's longstanding precedent, is subject to the usual rules of civil practice, even when it is used to challenge a criminal conviction or sentence." *Vincent*, 226 Ill. 2d at 6.

¶ 23

II. The Rules Governing Proper Service

¶ 24

Section 2-1401 provides that: "All parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012); *Laugharn*, 233 Ill. 2d at 323 ("Section 2-1401 requires that notice be given as provided by rule"). Illinois Supreme Court Rule 106 provides that "[n]otice of the filing of a petition under section 2-1401 *** shall be given by the same methods provided in Rule 105 for the giving of notice." Ill. S. Ct. R. 106 (eff. Aug. 1, 1985); *Laugharn*, 233 Ill. 2d at 323 ("Rule 106 governs the methods of notice to be used for petitions filed pursuant to section 2-1401").

¶ 25

Supreme Court Rule 105(b) provides for several methods of service including "[b]y prepaid certified or registered mail addressed to the party, return receipt requested." Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). However, the method chosen by defendant, which was regular First Class U.S. mail, is not one of the listed methods. Since the State did not receive proper service, defendant claims that the trial court's *sua sponte* dismissal was "premature," pursuant to the supreme court's decision in *Laugharn*, which we discuss below.

¶ 26

III. The *Laugharn* Decision

¶ 27

In *Laugharn*, our supreme court held that a trial court may dismiss a 2-1401 petition *sua sponte*, so long as the dismissal occurs after the 30-day period of time in which the State has to respond. *Laugharn*, 233 Ill. 2d at 323. Rule

105(a) allows for a 30-day response period, stating: "a judgment by default may be taken against [the State] for the new or additional relief unless [the State] files an answer or otherwise files an appearance in the office of the clerk of the court within 30 days after service." Ill. S. Ct. R. 105(a) (eff. Jan. 1, 1989); *Laugharn*, 233 Ill. 2d at 323. "[T]he State's failure to answer the petition within the time allotted for doing so result[s] in 'an admission of all well-pleaded facts,' which render[s] the petition 'ripe for adjudication.'" *Laugharn*, 233 Ill. 2d at 323 (quoting *Vincent*, 226 Ill. 2d at 10).

¶ 28 Thus, the supreme court affirmed the *sua sponte* dismissal in *Vincent* which occurred after the expiration of the State's 30-day response period, but vacated the *sua sponte* dismissal in *Laugharn* which occurred only seven days after the petition was filed. *Laugharn*, 233 Ill. 2d at 323 (discussing *Vincent*, 226 Ill. 2d at 5, 10). Our supreme court held in *Laugharn*: "The circuit court's *sua sponte* dismissal of defendant's petition before the conclusion of the usual 30-day period to answer or otherwise plead was premature and requires *vacatur* of the dismissal order." *Laugharn*, 233 Ill. 2d at 323.

¶ 29 IV. The Parties' Arguments

¶ 30 In the case at bar, the trial court did dismiss the petition *sua sponte* more than 30 days after it was filed, as *Laugharn* requires. *Laugharn*, 233 Ill. 2d at 323. However, defendant argues that the dismissal was premature because the

improper service meant that the 30-day period never began to run. Our case is different in this respect from both *Laugharn* and *Vincent*, because in both of these supreme court decisions, there was no issue of improper service. *Laugharn*, 233 Ill. 2d at 320-21 (there is no mention of improper service in the supreme court's recitation of the facts); *Vincent*, 226 Ill. 2d at 5 (our supreme court expressly acknowledged that the State had been "properly served" with defendant's section 2-1401 petition).

¶ 31 In response, the State argues that the record shows that the State had actual notice, and that this actual notice caused the 30-day period to start to run. However, both parties acknowledge that there is a split in the appellate courts on the issue of whether actual notice is sufficient, with *People v. Ocon*, 2014 IL App (1st) 120912, holding that actual notice is sufficient and *People v. Maiden*, 2013 IL App (2d) 120016, holding that actual notice is not sufficient. In addition, since the filing of the parties' briefs, a different division of the first district issued *People v. Carter*, 2014 IL App (1st) 122613, which discussed *Ocon* with approval but distinguished it because, in *Carter*, the State lacked actual notice until the day of dismissal, whereas in *Ocon*, the State had actual notice for over 30 days prior to dismissal. *Carter*, 2014 IL App (1st) 122613, ¶¶ 20, 21 ("Nothing indicates that the prosecutor had any knowledge of, and

could therefore knowingly waive, service of the petition [prior to the dismissal]. ").

¶ 32

V. Actual Notice

¶ 33

Before we consider the split in authority about whether actual notice is sufficient, we must first consider defendant's claim that the State did not even have actual notice. The State claims in its appellate brief that "PP" on the half-sheet stands for "People Present." Defendant did not dispute in its brief that "PP" stands for "People Present," and at oral argument he expressly agreed both that "PP" stood for "People Present" and that the half-sheet is a court record. However, in his brief, he argued that, since we do not know whether the assistant State's attorney (ASA) who was "present" was the same ASA who was assigned to the case, it cannot be said that the State had actual notice. In other words, defendant is arguing that, for there to be actual notice, it is the prosecutor who is assigned the case that must have actual notice, and that notice to the office itself is insufficient. Defendant cites no case for this novel proposition, and we do not find it persuasive.

¶ 34

If defendant had satisfied Supreme Court Rule 105 and mailed his petition by certified mail to the State's Attorney's Office (Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989)), the petition may not have been received in the first instance by the ASA who eventually handled the case. We do not find any difference

for the purposes of actual notice, if the petition was first received by a staff person who opens the mail or by an ASA in a courtroom.

¶ 35 Thus, the State asserts, and defendant concedes that "PP" in the half-sheet stands for "People Present." With this entry, the appellate record demonstrates that the State had actual notice. *Ocon*, 2014 IL App (1st) 120912, ¶ 35 ("We agree with the State that it received actual notice of the filing of defendant's section 2-1401 petition through the court appearance of an assistant State's attorney").

¶ 36 In addition, after the filing of the parties' briefs, the State moved to supplement the record with the transcript of the proceedings on August 2, 2012. The defense did not object to the State's motion to supplement the record, and we granted it. This transcript leaves no doubt that an ASA was present and that the State had actual notice.

¶ 37 Since the record demonstrates that the State did, in fact, have actual notice, we will now consider the *Ocon/Maiden* split in authority over what significance this actual notice has.

¶ 38 VI. The Split in Authority

¶ 39 In *Ocon*, the State maintained on appeal that it waived any objection to the lack of jurisdiction and submitted to the court's jurisdiction by remaining silent during the proceedings. *Ocon*, 2014 IL App (1st) 120912, ¶ 4 (the State

argued on appeal that, "because it had an opportunity to object to improper service but declined to do so, it waived any objection to improper service and submitted to the court's jurisdiction"). In *Maiden*, "the State informed the [trial] court that it was not going to file anything and told the court that, under *Vincent*, the court could rule *sua sponte* on the petition." *Maiden*, 2013 IL App (2d) 120016, ¶ 5. In the case at bar, like *Ocon*, the State maintains that it waived in the trial court any objection to the lack of personal jurisdiction.

¶ 40 In *Maiden*, the Second District held that actual notice to the State was insufficient because, although the State had appeared in court on the matter and 30 days had elapsed since the State's appearance, the State had not formally waived its right to proper service. *Maiden*, 2013 IL App (2d) 120016, ¶ 27. Since the State had not formally waived its right to proper service, the *Maiden* court held that its 30-day period for a response had never begun to run. *Maiden*, 2013 IL App (2d) 120016, ¶ 27.

¶ 41 By contrast, in *Ocon*, the First District held that a formal waiver by the State was not required. The *Ocon* court acknowledged the *Maiden* opinion but explicitly stated "[w]e disagree with this interpretation of section 2-1301." *Ocon*, 2014 IL App (1st) 120912, ¶ 39. The *Ocon* court observed that, although section 2-301 of the Code of Civil Procedure (735 ILCS 5/2-301 (West 2012)) permits a party to object to personal jurisdiction at any time prior to filing a

responsive pleading or substantive motion, nothing in section 2-1301 requires a party to affirmatively file a formal waiver of jurisdiction and only the party who was allegedly not served has standing to object to a lack of service. *Ocon*, 2014 IL App (1st) 120912, ¶¶ 34, 40. We find these observations persuasive, and thus find dispositive the actual notice and the subsequent lapse of 30 days in the case at bar.

¶ 42 We find *Ocon's* standing argument persuasive, even though in *Laugharn*, the supreme court permitted the defendant to challenge the dismissal of her petition on the ground that the *State's* time to respond had not yet run. *Laugharn*, 233 Ill. 2d at 323. The defendant was allowed to argue that the trial court's *sua sponte* dismissal after only seven days "deprived the State of the time it was entitled to answer or otherwise plead." *Laugharn*, 233 Ill. 2d at 323. In other words, the defendant was allowed to raise the State's right to a full 30-days to respond; and our supreme court reversed on that basis. *Laugharn*, 233 Ill. 2d at 323.

¶ 43 However, our case is different from *Laugharn*, in that there was no issue that the *Laugharn* defendant had properly served the State, whereas in our case defendant is seeking to benefit from his own malfeasance in improperly serving the State. This, he cannot do. *People v. Carter*, 208 Ill. 2d 309, 319 (2003) (a defendant may not seek "to proceed in one manner and then later contend on

appeal that the course of action was in error"); *People v. Johnson*, 119 Ill. 2d 119, 135 (1987) (a defendant should not "benefit from an alleged error" which was due to "his own conduct").

¶ 44 Defendant also cites in support *People v. Prado*, 2012 IL App (2d) 110767, and *Powell v. Llewellyn*, 2012 IL App (4th) 110168. However, neither case discusses the issue before us, which is whether actual notice is sufficient.

¶ 45 In *Prado*, the defendant, like defendant in our case, mailed his 2-1401 petition to the State by regular mail, and thus failed to comply with Rule 105. *Prado*, 2012 IL App (2d) 110767, ¶ 1. In *Prado*, the appellate court vacated the trial court's dismissal and remanded for further proceedings, which is the action that defendant in the case at bar asks us to take. *Prado*, 2012 IL App (2d) 110767, ¶ 1. However, *Prado* is readily distinguishable from the case at bar because, first, there is no indication in *Prado* that the State had actual notice. Second, there was a question in *Prado* about whether the trial court had dismissed the case before the 30-day period had expired, since the *Prado* petition was file-stamped as received by the clerk of the circuit court on June 10, 2011, and the trial court dismissed the petition *sua sponte* on July 7, 2011, less than 30 days later. *Prado*, 2012 IL App (2d) 110767, ¶ 3. Since *Prado* is different from our case in these two key respects, we do not find it instructive.

¶ 46 Similar to *Prado*, *Powell* is also not helpful. In *Powell*, the plaintiff filed a *pro se* petition for injunctive relief on February 1, 2011, and the trial court dismissed it *sua sponte* only two weeks later on February 14, 2011. *Powell*, 2012 IL App (4th) 110168, ¶¶ 3, 6. Again, this is distinguishable from our case where the dismissal occurred two months later, not two weeks later. In addition, the appellate court in *Powell* gave the following reason for vacating the dismissal: "this case is not ripe for adjudication because defendants were *never* notified." (Emphasis added.) *Powell*, 2012 IL App (4th) 110168, ¶ 11. By contrast, in the case at bar, the State was notified. If anything, *Powell* lends some support to our conclusion that actual notice is different from "never" being notified. *Powell*, 2012 IL App (4th) 110168, ¶ 11.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we conclude that there is no need to vacate the trial court's *sua sponte* dismissal, since the State had actual notice and 30 days elapsed since the date of that actual notice, and defendant cannot benefit from his own malfeasance in improperly serving the State.

¶ 49 Affirmed.