FIFTH DIVISION
January 30, 2015

No. 1-13-0989

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. 11 CR 614
	)	
ANDRE MALLETTE,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Despite defective notice by mail, the circuit court could dismiss the defendant's section 2-1401 petition where the record affirmatively showed the State had actual notice of the filing more than 30 days prior to the *sua sponte* dismissal.

¶ 2 Defendant Andre Mallette appeals the circuit court's *sua sponte* dismissal of his *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)). Defendant contends this case should be remanded because the State was not properly served with notice of his petition. Because we conclude the

State had actual notice of defendant's filing so as to allow the circuit court to dismiss the petition on its own motion, we affirm.

¶ 3 Pursuant to a negotiated plea, defendant pled guilty in November 2011 to one count of being an armed habitual criminal in exchange for a sentence of seven years in prison. Defendant did not file a post-plea motion or a direct appeal.

¶ 4 On November 28, 2012, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code, asserting that the armed habitual criminal statute was unconstitutionally vague and also violated due process and the separation of powers. Defendant also contended in the petition that his sentence was disproportionate to his offense and contained an improper double enhancement and that he should only be required to serve 50 percent of his sentence. Defendant's petition was file-stamped by the clerk of the circuit court on December 11, 2012.

¶ 5 The report of proceedings for December 19, 2012, indicates that assistant Cook County State's Attorney Michael O'Malley was present in court. The entire record of that proceeding is as follows:

> "THE CLERK: Andre Mallette.
>
> THE COURT: Defendant is not present. He's in D.O.C. custody. It would be order of Court 2/6/13 for Court review."

¶ 6 The February 6, 2013, report of proceedings indicates that the circuit court dismissed defendant's petition *sua sponte*. The court filed a written order on that day finding the arguments in defendant's petition to be without merit. On February 15, 2013, defendant filed a motion for reconsideration of that ruling, which the circuit court denied.

¶ 7 On appeal, defendant contends the circuit court's *sua sponte* dismissal of his section 2-1401 petition was premature and improper because the State was not properly served with notice of his petition. Before considering that assertion in detail, we address the State's threshold argument that defendant lacks standing to complain of his own improper service of his petition. See, *e.g.*, *People v. Greco*, 204 Ill. 2d 400, 408 (2003) (standing is a threshold issue). The State contends that while defendant should be able to assert that *he* was not properly served notice of a filing, defendant should not be permitted to object to his own improper service of his petition on the State.

¶ 8 Since the parties in this case submitted their briefs, this court held that a defendant who files a section 2-1401 petition "does not have standing to raise an issue regarding the State's receipt of service." *People v. Kuhn*, 2014 IL App (3d) 130092, ¶ 16. The *Kuhn* court went on to address the sufficiency of the actual notice provided to the State, despite the defendant's service of the petition by regular mail, and affirmed the circuit court's *sua sponte* dismissal of the petition, noting that the State had appeared at two hearings on the petition. *Id*. ¶ 17. See *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 48 (agreeing with *Kuhn* on standing issue); *People v. Ocon*, 2014 IL App (1st) 120912, ¶ 35 (noting that a person may only object to improper service of process as to himself or herself, but bypassing the issue of standing and deciding case on basis of proper notice).

¶ 9 Defendant responds that even if he lacks standing to object to the service of his petition upon the State, he nevertheless has standing to challenge the fact that his petition was dismissed with prejudice. Several decisions of this court have considered whether the dismissal of a section 2-1401 petition should be done with or without prejudice. See *People v. Nitz*, 2012 IL App (2d)

091165, ¶ 13 (if defendant fails to give proper notice of his petition, dismissal with prejudice is proper because no further action would take place upon a remand for further proceedings); but see *People v. Prado*, 2012 IL App (2d) 110767, ¶ 8, following *Powell v. Lewellyn*, 2012 Il App (4th) 110168, ¶ 14 (remanding for further proceedings would serve a purpose because the defendant could promptly serve the State if he wanted his petition to be heard). However, even finding defendant has standing to raise a challenge to the dismissal of his section 2-1401 petition, our ultimate conclusion in this case renders those arguments moot.

¶ 10 Section 2-1401 allows for relief from final judgments more than 30 days but not later than 2 years after their entry. 735 ILCS 5/2-1401 (West 2012). This court's review of the dismissal of a section 2-1401 petition is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 11 All parties to a section 2-1401 petition must be notified as provided by rule. 735 ILCS 5/2-1401(b) (West 2012). The applicable rule is Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which provides that notice of the petition shall be directed to the party and must be served either by summons, by prepaid certified or registered mail, or by publication. See also Ill. S. Ct. R. 106 (eff. Aug. 1, 1985) (notice of the filing of petition under section 2-1401 shall be given by the methods provided in Rule 105). Where the State has notice and fails to answer a petition, the case is not ripe for adjudication until 30 days have passed from the time of service. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). Accordingly, a trial court may dismiss *sua sponte* a section 2-1401 petition only when more than 30 days have elapsed since the date of service. *Id*.

¶ 12 Defendant contends his petition was placed in the institutional mail at the correctional center at which he is serving his sentence, which is not a permitted method of service. He further

asserts the State lacked actual notice of his petition because the State was not represented in court on the day the petition was dismissed.

¶ 13 In the instant case, the proof of service attached to defendant's petition does not describe the method by which defendant mailed his petition. Defendant's "notice of filing and proof of service" merely states that copies of his petition were provided to the Illinois Attorney General and the Cook County State's Attorney at their business addresses, without indicating the method of delivery. It cannot be concluded from the record that the State was served by prepaid certified or registered mail, as required by Supreme Court Rule 105. Moreover, we do not accept the State's contention on appeal that notice can be presumed by the appearance of a file-stamped copy of defendant's petition in the record.

¶ 14 However, the State maintains that it had actual notice of defendant's petition more than 30 days before the circuit court dismissed the petition on February 6, 2013. The record establishes that on December 19, 2012, an assistant State's Attorney was present in court when defendant's petition was docketed for review, though the record indicates that no representative of the State was present on the day the petition was ultimately dismissed.

¶ 15 Defendant contends that *Prado* should govern our decision in this case. In that case, the proof of service indicated the defendant's section 2-1401 petition was served by regular mail, and the defendant conceded the petition was not properly served. *Prado*, 2012 IL App (2d) 110767, ¶¶ 4-5. Thus, the 30 days for the State to answer the petition had not begun, and the circuit court's *sua sponte* dismissal of the petition was therefore premature. *Id*. ¶¶ 8. The court also rejected the defendant's argument that the petition should be dismissed without prejudice, instead vacating and remanding for further proceedings. *Id*. ¶¶ 8-9. We do not find *Prado* dispositive

here, where the State had actual notice of the petition and the petition was dismissed after the 30-day period had expired. Moreover, in the two years since that case was decided, this court, seeking to apply the rule set out in *Laugharn*, has specifically addressed the issue of actual notice of a section 2-1401 petition, which was not discussed in *Prado*.

¶ 16 Indeed, the facts of this case are more comparable to those in *Ocon*, 2014 IL App (1st) 120912, ¶ 35, where this court affirmed the dismissal of a section 2-1401 petition after the expiration of the 30-day period for the State's response. In *Ocon*, an assistant State's Attorney was present in court when the instant petition was docketed and continued to another court date, thus effectuating actual notice, and the trial court's dismissal of the petition occurred after the 30-day period had passed. *Id*. ¶ 31. The court in *Ocon* held its facts were thereby distinguishable from those in *Prado* and other cases. *Id*. ¶¶ 26-31. We recently followed *Ocon* in *People v. Lake*, 2014 IL App (1st) 131542, ¶ 31, affirming the trial court's dismissal of the defendant's section 2-1401 petition because the State had actual notice of the petition via an assistant State's Attorney's presence in open court when the petition was docketed.

¶ 17 As the State acknowledges, this court has reached a different result in *People v. Carter*, 2014 IL App (1st) 122613, *appeal allowed*, No. 117709 (Ill. Sept. 24, 2014). There, the record indicated that the judge and a court reporter were present on the day the defendant's petition was docketed, and an assistant State's Attorney was present on the day the petition was dismissed. *Id*. ¶ 5-6. The court in *Carter* determined that the State's waiver of service of the defendant's section 2-1401 petition could not be presumed from the silence of an assistant State's attorney who was present in court when the petition was dismissed. *Id*. ¶ 21. The court concluded the

defendant's petition could not be properly dismissed without a showing that the petition had been served on the State or that the State had waived proper service. *Id.* ¶ 25.

¶ 18 We find the facts here more closely resemble those in *Ocon* and *Lake*, because there, as here, an assistant State's Attorney was present on the day of the petition's docketing, which was more than 30 days prior to the date of the petition's dismissal during which the State could respond to the petition. *Ocon*, 2014 IL App (1st) 120912, ¶ 31; *Lake*, 2014 IL App (1st) 131542, ¶ 31. By contrast, in *Carter*, no representative of the State was present when the petition was docketed, and an assistant State's Attorney was only present on the date the petition was dismissed. *Carter*, 2014 IL App (1st) 122613, ¶ 21.

¶ 19 In conclusion, because the State had actual notice of defendant's section 2-1401 petition by way of its presence in court on December 19, 2012, which was more than 30 days before the petition was dismissed. Thus, the dismissal of defendant's petition was not premature. See *Laugharn*, 233 Ill. 2d at 323.

¶ 20 Accordingly, the circuit court's *sua sponte* dismissal of defendant's petition is affirmed.

¶ 21 Affirmed.