

No. 1-13-1010

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. 06 CR 8512
)	
MOSES PHILLIPS,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

O R D E R

¶ 1 *Held:* Circuit court's *sua sponte* dismissal of defendant's section 2-1401 petition affirmed despite defendant's failure to properly serve the petition on the State.

¶ 2 Defendant Moses Phillips appeals from a circuit court order dismissing his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends that the circuit court's *sua sponte* dismissal of his petition was premature because defendant failed to properly serve the State. We affirm.

¶ 3 Following a 2009 jury trial, defendant was convicted of the first degree murder of 10-year-old Siretha White and two counts of attempted murder for shooting at Kevin Davis and Jamar Jenkins. The jury also found that, during the commission of the offense, defendant personally discharged a firearm that proximately caused White's death. Defendant was sentenced to 50 years in prison for the murder and an additional 25 years for the enhancing factor that defendant personally discharged a firearm. This court affirmed that judgment on direct appeal. *People v. Phillips*, No. 1-09-1948 (2011) (unpublished order under Illinois Supreme Court Rule 23).

¶ 4 On September 26, 2012, defendant placed the instant section 2-1401 petition in the institutional mail at Menard. The proof/certificate of service portion of the document indicated that it was to be sent to "Clerk Dorothy Brown, 2650 So. California, Room 526, Chicago, IL., 60608." In the mailing affidavit portion, defendant stated "I am an [*sic*] layman of the law, so I would like you to send copies to the proper parties and I request a stamped file copy for my file." The document contains stamps from the circuit court indicating it was received on October 12, 2012, and filed on October 16, 2012. In the petition, defendant alleged that his fourth amendment rights were violated by his warrantless arrest, his trial counsel rendered ineffective assistance by failing to file a motion to quash his warrantless arrest and failure to call certain alibi witnesses, and the State failed to prove him guilty beyond a reasonable doubt.

¶ 5 On October 23, 2012, the court held a hearing where it indicated for the record that defendant's section 2-1401 petition had been docketed, and continued the matter. On November 20, 2012, the court again continued the matter. On January 4, 2013, assistant State's Attorney William Bruce appeared in court on the case and identified himself for the record. On January

11, 2013, the case was before the court and continued. On February 1, 2013, the court issued an order *sua sponte* dismissing defendant's petition with prejudice.

¶ 6 On appeal, defendant contends that the trial court erred in *sua sponte* dismissing his section 2-1401 petition because he did not perfect service on the State. The State responds, in part, that defendant lacks standing to challenge lack of notice to a party other than himself, and that he should not be permitted to reap the benefits of his own invited error.

¶ 7 A *sua sponte* denial of a section 2-1401 petition for relief from judgment is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 13 (2007).

¶ 8 Section 2-1401 allows for final judgments to be vacated more than 30 days after their entry. *Id.* at 7. Once a section 2-1401 petition has been filed, the opposing party has 30 days to answer or otherwise plead in response to the petition. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985), provides that service of a section 2-1401 petition must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which requires service either by summons, prepaid certified or registered mail, or publication. The purpose is to notify a party of pending litigation in order to secure his presence. *People v. Ocon*, 2014 IL App (1st) 120912, ¶ 23.

¶ 9 In assessing whether defendant has standing to make an objection as to improper service on behalf of the State, we find *People v. Kuhn*, 2014 IL App (3d) 130092, instructive. The *Kuhn* 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." *Id.*, ¶ 16. See also *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 48 (agreeing with *Kuhn* on the issue of standing); *Ocon*, 2014 IL App (1st) 120912, ¶¶ 34-35 (stating that a person may only object to improper service of process as to himself, but bypassing the issue of standing and deciding case on basis of actual notice). In the

instant case, it is undisputed that defendant failed to perfect service on the State in accordance with Rule 105. In accordance with *Kuhn* and *Alexander*, we find that defendant lacked standing to challenge the imperfect service of his section 2-1401 petition on the State.

¶ 10 We further find unpersuasive defendant's argument that even if the State's appearance at the January 4, 2013, status hearing constituted waiver of proper service, the court's dismissal of his petition was premature where the date of the State's appearance triggered its 30-day period for it to respond, and the court *sua sponte* dismissed the petition prior to the expiration of the 30-day period in violation of *Laugharn*, 233 Ill. 2d at 318.

¶ 11 The record shows that defendant's section 2-1401 petition was filed on October 16, 2012, but service was not perfected on the State. Nevertheless, the State first appeared on January 4, 2013, for a status hearing. Less than 30 days later, on February 1, 2013, the trial court dismissed the petition. The State was not present when the dismissal was announced.

¶ 12 As explained in *Laugharn*, the primary purpose of the 30-day waiting period is to afford the State sufficient time to respond to a defendant's claims before a trial court *sua sponte* considers the petition (*Laugharn*, 233 Ill. 2d at 323), *i.e.*, the State must be allowed time to indicate its position (*Alexander*, 2014 IL App (4th) 130132, ¶ 46).

"However, the 30-day period does not provide a sword for a petitioner to wield once a court-as in this case-does not find in his favor, especially given that, under defendant's interpretation, the basis of his claim on appeal is his *failure* to comply with Rule 105. If we were to accept defendant's rationale, a prisoner who uses regular mail to effect service upon the State will-upon appeal-be rewarded with a second bite of the apple if the court denies his petition on the merits. Indeed, no practical reason would exist to comply with the provisions of Rule 105 because to do so would foreclose that avenue

of review, which effectively empowers a prisoner to persist in filing frivolous claims."

(Emphasis in original.) *Alexander*, 2014 IL App (4th) 130132, ¶ 46.

¶ 13 Here, defendant seeks to benefit from his failure to follow the filing requirements of Rule 105. We decline to allow him to do so, and follow *Alexander*, 2014 IL App (4th) 130132, ¶ 47, which refused to reward the defendant for his knowing failure to comply with Rule 105. In doing so, we similarly decline to follow a contrary decision in *People v. Carter*, 2014 IL App (1st) 122613, *appeal granted*, No. 117709 (Sept. 24, 2014), which was relied upon by defendant. In *Carter*, this court considered whether a prisoner's defective service of a section 2-1401 petition prevented a trial court from *sua sponte* considering the petition after 30 days had passed. *Id.*, ¶ 8. The *Carter* court reversed the circuit court's *sua sponte* dismissal and remanded the cause for further proceedings, reasoning that because *Laugharn* and *Vincent* demanded that this court base its determination as to whether the circuit court prematurely *sua sponte* dismissed a section 2-1401 petition by looking at the date of service, it followed that proper dismissal, either with or without prejudice, cannot be achieved without service or an affirmative showing that the State waived service. *Id.*, ¶ 25; see also *People v. Maiden*, 2013 IL App (2d) 120016, ¶ 27 (holding that the State's appearance in court in response to an improperly served petition for relief from judgment did not constitute a waiver of proper service). Like the fourth district's conclusion in *Alexander*, 2014 IL App (4th) 130132, ¶ 50, we disagree with *Carter* that the supreme court's decisions in *Laugharn* and *Vincent* mandate such a result.

¶ 14 It is significant to note that allowing defendant to benefit from his failure to serve the State would be a waste of judicial resources where defendant does not even contest that his petition has merit. See *Ocon*, 2014 IL App (1st) 120912, ¶ 42 (noting that remand would be a waste of judicial resources where the defendant's petition lacked merit). As argued by the State in

its brief, the fact that defendant's petition had no merit is effectively conceded by defendant, who contests the dismissal here on appeal solely on a timeliness basis and not on any substantive grounds. Because defendant has presented no argument on how his petition is meritorious, we find that he has waived this issue for review. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); see *People v. Smith*, 2015 IL 116572, ¶ 22 (stating that points not argued in an appellant's opening brief are waived). Moreover, the circuit court concluded defendant's petition was without merit, specifically finding that even if defendant's arrest violated his constitutional rights, the error had no impact on the outcome of his trial where no evidence introduced against him at trial came to the State through his arrest, defendant was provided effective assistance of counsel where counsel made a strategic decision to forgo developing an alibi defense, and his sufficiency of the evidence argument was improperly raised in a section 2-1401 motion. We agree with the circuit court's reasoning, and likewise find defendant's petition without merit.

¶ 15 For the foregoing reasons, we affirm the circuit court's *sua sponte* dismissal of defendant's section 2-1401 petition.

¶ 16 Affirmed.