FIFTH DIVISION
March 6, 2015

No. 1-13-1091

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. 92 CR 26057
	)	
JOSEPH DIXON,	)	Honorable
	)	Joseph G. Kazmierski, JR.,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 ***Held:*** *Sua sponte* dismissal of section 2-1401 petition affirmed over defendant's contention that it was prematurely dismissed because the petition was not properly served on the State.

¶ 2 Defendant Joseph Dixon appeals the *sua sponte* dismissal of 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)) by the circuit court of Cook County. He contends that the dismissal on the merits was premature because the petition was not properly served on the State.

¶ 3 This court previously affirmed the judgment entered on defendant's 1995 jury convictions for first degree murder and armed robbery, and the respective, concurrent sentences of 100 (an extended term) and 30 years' imprisonment. *People v. Dixon*, No. 1-95-2166 (1999) (unpublished order under Supreme Court Rule 23). This court also affirmed the dismissals of the series of post-conviction and section 2-1401 petitions, which defendant filed between April, 2000, and October 2010. *People v. Dixon*, Nos. 1-01-0454 (2002), 1-01-3352 (2002), 1-03-1022 (2004), 1-04-1286 (2005), 1-07-0171 (2009) (unpublished orders under Supreme Court Rule 23); 2012 IL App (1st) 110045-U.

¶ 4 On October 30, 2012, defendant filed the instant *pro se* section 2-1401 petition, alleging that the State failed to prove his guilt beyond a reasonable doubt, that his 100-year sentence is excessive, and that the statute under which he was sentenced was unconstitutional. In his proof or certificate of service, defendant indicated that he mailed his petition to the State by placing the documents in the institutional mail at Menard Correctional Center, properly addressed to the State for mailing through the United States Postal Service.

¶ 5 On November 6, 2012, the court stated on the record that the petition was before it for the first time and continued it for review. On December 11, 2012, the matter appeared before the court a second time, and the court noted that the petition was still under review. On January 11, 2013, the court stated that it was still reviewing the petition, and continued the matter once again. The record does not reflect the State's presence in the courtroom on any of these dates. When the case was called on February 4, 2013, however, the record shows that an Assistant State's Attorney (ASA) was present when the court noted that it was waiting for a relevant appellate

court decision and entered a further continuance. Then, on February 22, 2013, with the State present, the court announced that it was entering an order dismissing defendant's petition for relief from judgment and had set forth its reasons in a written order.

¶ 6 In that order, the court outlined the facts of the case, and noted that this was defendant's third motion for relief from judgment. The court further noted that defendant filed his section 2-1401 petition almost 17 years after the court entered judgment of conviction, and had asserted that he was not foreclosed from doing so because the judgment against him is void. The court then examined his claims and found that they were unfounded, frivolous and entirely without merit. The court dismissed defendant's petition and imposed fees against him based on the frivolous filing.

¶ 7 On appeal, defendant contends that the *sua sponte* dismissal of his petition on the merits was premature because the petition was not properly served on the State. He requests that the dismissal be reversed, the matter be remanded for further proceedings, and that this court vacate the fees imposed against him. The State responds that this court should affirm the dismissal of defendant's meritless petition because it had actual notice of the petition, and it would be an egregious waste of judicial resources to reward defendant's failure to follow the rules of service with any sort of remand. Our review is *de novo*. *People v. Nitz*, 2012 IL App (2d) 091165, ¶9.

¶ 8 Section 2-1401 of the Code establishes a comprehensive procedure for allowing the vacatur of final judgments more than 30 days after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). 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).

¶ 9 Service of a petition under section 2-1401 must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which mandates service either by summons, prepaid certified or registered mail, or publication. *People v. Prado*, 2012 IL App (2d) 110767, ¶6, citing Ill. S. Ct. R. 105(b). 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. In construing the sufficiency of notice, courts do not focus on whether the notice is formally and technically correct, but whether the object and intent of the law were substantially attained thereby. *Ocon*, 2014 IL App (1st) 120912, ¶23.

¶ 10 Relying on *Laugharn*, defendant claims that his petition was not ripe for adjudication because he did not properly serve the State pursuant to Rule 105, the State was not present when the petition was docketed, and the State had not waived any objection to the defective service. However, as this court noted in *People v. Lake*, 2014 IL App (1st) 131542, ¶22, neither *Vincent* or *Laugharn,* addressed the question of proper service on the State or considered whether the State may waive improper service by failing to object and whether defendant may challenge his own error as a basis for remand.

¶ 11 The record in this case shows that defendant did not properly effectuate service under Rule 105(b) when he sent his petition through regular mail. The record also shows that the State was not present when the petition was originally docketed, or on the following two court dates. However, on February 4, 2013, an ASA was present when the court continued the matter for review, and was also present on February 22, 2013, when the court dismissed the petition.

¶ 12 In *Ocon*, 2014 IL App (1st) 120912, ¶35, this court held that the State had actual notice of the filing of the section 2-1401 petition where the record showed that an ASA was present in

court when the petition was docketed. This court concluded that once the State appeared before the court, it could object to improper service, but chose not to do so, and when the 30 day period passed, the petition was ripe for adjudication for the circuit court to dismiss it *sua sponte*. Ocon, 2014 IL App (1s) 120912, ¶¶35, 41. Here, analogously, the record shows that an ASA was present in court on February 4, 2013, as well as February 22, 2013, when the petition was dismissed. Thus, the State had actual notice of the petition, but chose not to object, and thereby waived any objection to improper service. *Ocon*, 2014 IL App (1st) 120912, ¶41. Under these circumstances, we find no error in the *sua sponte* dismissal of defendant's petition even though it was entered short of 30 days after the State had actual notice of the petition.

¶ 13 We find support for our conclusion in the well-reasoned decision entered by the Fourth District in *People v. Alexander*, 2014 IL App (4th) 130132. In that case, defendant also primarily relied on *Vincent* and *Laugharn*, to assert that the court's dismissal of his petition was premature because his petition was not yet ripe for adjudication based on improper service. *Alexander*, 2014 IL App (4t) 130132, ¶44. The Fourth District found that the flaw in defendant's argument was that under *Laugharn*, the primary purpose of the 30-day period is to afford the State sufficient time to respond to defendant's claims seeking relief from judgment before a trial court may *sua sponte* consider the petition. *Alexander*, 2014 IL App (4t) 130132, ¶46. However, the same court found that the 30-day period does not provide a sword for defendant to wield once the 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 own *failure* to comply with Rule 105. (Emphasis in original.) *Alexander*, 2014 IL App (4th) 130132, ¶46. The court thus concluded that defendant should not

be able to incorrectly serve a party and then rely on that incorrect service to seek reversal. *Alexander*, 2014 IL App (4th) 130132, ¶47. We find no meaningful differences in this case and reach the same conclusion.

¶ 14 Notwithstanding, here, as in *Lake*, 2014 IL App (1st) 131542, ¶27, defendant relies heavily on *People v. Carter*, 2014 IL App (1st) 122613, appeal allowed No. 117709 (Sept. 24, 2014), to support his opposing claim. In *Carter*, 2014 IL App (1st) 122613, ¶25, a division of this court reversed the circuit court's *sua sponte* dismissal of defendant's section 2-1401 petition and remanded for further proceedings based on defendant's failure to properly serve the State. In *Carter*, the court held, contrary to *Ocon*, that it cannot assume that the State had knowledge of the petition and waived service simply because the prosecutor was shown on the cover page of the transcript of the proceedings as present in court at the time the case was called. *Carter*, 2014 IL App (1st) 122613, ¶21. The same court rejected the State's judicial economy argument that it find the State waived service and affirm the trial court's decision, noting that judicial economy is better served when the prosecutor affirmatively spreads of record whether the petition has been served, and if not, whether the State intends on waiving the required service. *Carter*, 2014 IL App (1st) 122613, ¶24. Because *Laugharn* and *Vincent* demand that it base its determination as to whether the circuit court prematurely dismissed a section 2-1401 petition by looking at the date of service, the court in *Carter*, 2014 IL App (1st) 122613, ¶25, concluded that a proper dismissal, either with or without prejudice, cannot be achieved without service or an affirmative showing that proper service was waived by the prosecution.

¶ 15 In *Alexander*, 2014 IL App (4th) 130132, ¶50, the Fourth District also held that *Carter* was wrongly decided because the supreme court decisions in *Vincent* and *Laugharn* did not mandate such a result. Since the State did not contest the deficient service, had taken the position that defendant's petition is frivolous, and represented that it will take the same position if the case is remanded to the trial court, the court found no reason to remand the case to repeat these moves and representations. *Alexander*, 2014 IL App (4th) 130132, ¶50.

¶ 16 We agree, and likewise find no reason to remand the case at bar so that defendant can properly serve the State, or the State can waive service, the State can respond by repeating its position that defendant's petition is frivolous, and the trial court can repeat its denial of defendant's petition as frivolous. *Alexander*, 2014 IL App (4th) 130132, ¶50. We also agree that such a remand would be a waste of judicial resources, contrary to the supreme court's favor of the efficient expenditure of judicial resources. *Alexander*, 2014 IL App (4th) 130132, ¶51.

¶ 17 Defendant asserts in his reply brief that he has not waived any substantive argument that his petition is not frivolous. Defendant, however, has presented no argument on how his petition is not frivolous, and we therefore find that he has waived this issue for review. *People v. Phillips*, 215 Ill. 2d 554, 565 (2005); Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2014).

¶ 18 In light of the foregoing, we affirm the *sua sponte* dismissal of defendant's section 2-1401 petition by the circuit court of Cook County.

¶ 19 Affirmed.