

No. 1-13-1294

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. 91 CR 16312
)	
PERCY MYRICK,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 *Held:* The circuit court erred in dismissing *sua sponte* the defendant's section 2-1401 petition less than 30 days after the petition was filed with the court.

¶ 2 Defendant Percy Myrick appeals the circuit court's *sua sponte* dismissal of his 2013 *pro se* petition for relief from judgment filed under section 2-1401(f) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401(f) (West 2012)). On appeal, defendant contends the circuit court's dismissal of his petition was premature because the State had not been properly served with notice of its filing. We vacate and remand for further proceedings on defendant's petition.

¶ 3 Following a bench trial in 1992, defendant was convicted of the first-degree murder of six-month-old Oasby Gilliam. The evidence at trial established that defendant was left with the child in the apartment of his girlfriend and her roommate, who was the child's mother. The child died of multiple injuries due to blunt force trauma. Defendant was sentenced to 45 years in prison. On direct appeal, this court affirmed. *People v. Myrick*, 274 Ill. App. 3d 983, 990 (1995).

¶ 4 In 2000, defendant filed a *pro se* petition for *habeas corpus* relief in which he challenged the imposition of the period of mandatory supervised release (MSR) to follow his sentence. The circuit court construed defendant's filing as a petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2000)) and found the petition to be without merit. On appeal, this court affirmed. *People v. Myrick*, No. 1-01-0427 (2002) (unpublished summary order under Supreme Court Rule 23).

¶ 5 In 2005, defendant filed a *pro se* petition for *mandamus* relief in which he again challenged the imposition of MSR in his case and asked that his 45-year sentence be reduced by 3 years to incorporate the MSR period. The circuit court denied that petition, and this court affirmed on appeal. *People v. Myrick*, No. 1-05-2162 (2006) (unpublished summary order under Supreme Court Rule 23).

¶ 6 In 2013, defendant prepared a *pro se* petition "for Relief of Judgment Order [and] Sentence," citing section 2-1401(f) of the Code. In the petition, defendant contended that in imposing sentence, the trial court did not inform him he would be required to serve a three-year term of MSR following his prison sentence. He further asserted the imposition of a MSR term violated his due process rights and usurped the authority of the judicial branch to impose sentence, citing *Earley v. Murray*, 451 F.3d 71 (2nd Cir. 2006), and *Hill v. U.S. ex rel. Wampler*,

288 U.S. 460 (1936). Defendant asked that his sentence be modified to include a 42-year prison term followed by 3 years of MSR.

¶ 7 Attached to defendant's *pro se* petition was a certificate of service in which defendant had handwritten the names of Dorothy Brown, clerk of the Circuit Court of Cook County, and the Office of the Cook County State's Attorney, with the address of 2650 South California Avenue in Chicago, IL 60608, and stated that he had mailed a copy of his petition to those parties through the United States Postal Service. The following page was titled "Summons" and stated "to the above named respondents" as follows:

"[Defendant] has commenced an action against you pursuant to 735 ILCS 5/2-1401, you are summoned to file an answer or otherwise appear in this case pursuant to *Dealer Management Systems, Inc., v. Design Automotive Group, Inc.*, [355 Ill. App. 3d 419] (2005) within 30 days after service of this petition.

If you fail to do so, a judgment by default may be entered against you for the relief sought in this petition."

¶ 8 The certificate of service of defendant's petition stated it was prepared on February 14, 2013. Defendant's petition was file-stamped by the clerk of the circuit court on March 6, 2013. The half-sheet in the record indicates that on March 13, 2013, the case was continued to the next day, by order of court.

¶ 9 On March 14, 2013, the circuit court, acting *sua sponte*, denied defendant's section 2-1401 petition as being without merit. The cover page of the report of proceedings for that date indicates that an assistant State's Attorney was present in court; however, the record does not

reflect that attorney addressed the court, was addressed by the court, or took any action when the case was called.

¶ 10 Defendant now appeals the circuit court's dismissal of his petition. This court reviews *de novo* the dismissal of a petition brought under section 2-1401 of the Code. *People v. Laugharn*, 233 Ill. 2d 318, 322 (2009).

¶ 11 Defendant correctly observes that he failed to properly serve the State with notice of his filing of the section 2-1401 petition. Notice of the filing of a section 2-1401 petition may be served by summons, certified or registered mail, or by publication pursuant to Illinois Supreme Court Rule 105(b) (eff. Jan. 1, 1989). *Laugharn*, 233 Ill. 2d at 323. Here, defendant improperly served notice of his petition by regular mail. Absent proper service of notice, defendant asserts that the dismissal of his petition was premature and that reversal is required under *People v. Carter*, 2014 IL App (1st) 122613, ¶ 25, *appeal allowed*, No. 117709 (Sept. 24, 2014).

¶ 12 In *Carter*, the defendant sent, by regular mail, a section 2-1401 petition. *Id.* ¶ 14. After the defendant's petition was docketed on the trial call, the circuit court continued the case to a date on which the court dismissed the petition *sua sponte*. *Id.* ¶¶ 5-6. The cover page of the report of proceedings for that date indicated an assistant State's Attorney was present; however, the record did not establish that the State addressed the court. *Id.* ¶ 21. On appeal, this court refused to presume that the prosecutor's silent presence on the date of the petition's dismissal constituted an acknowledgement of service of the petition and a waiver of the State's right to respond. *Id.* ¶¶ 21-23. This court concluded that a section 2-1401 petition cannot be dismissed without service or "an affirmative showing that proper service was waived by the prosecution,"

and noted there was no evidence that the State was properly served with notice of the defendant's petition. *Id.* ¶ 25.

¶ 13 The factual scenario here mirrors *Carter*. Here, as in *Carter*, the defendant served notice of his section 2-1401 petition by regular mail. The cover page of the report of the proceedings for the day on which the petition was dismissed reflects that an assistant State's Attorney was present but did not address the court. The court dismissed the petition *sua sponte*. Accordingly, the result in *Carter* may be applied here.

¶ 14 Authority contrary to *Carter*, however, has not allowed relief for a defendant's improper service of a section 2-1401 petition, reasoning that a defendant lacks standing to raise the issue of defective service on behalf of the State (*People v. Kuhn*, 2014 IL App (3d) 130092) or that the State was deemed to have had *actual* notice of the defendant's filing (*People v. Lake*, 2014 IL App (1st) 131542; *People v. Ocon*, 2014 IL App (1st) 120912). In addition, the Fourth District expressly declined to follow *Carter* in *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 50, which affirmed the trial court's *sua sponte* dismissal after 30 days had elapsed, despite the defendant's defective service by regular mail.

¶ 15 All of these cases, however, are distinguishable because they concerned a dismissal of the defendants' section 2-1401 petitions *after* 30 days had passed. A case involving a section 2-1401 petition is not ripe for adjudication until the 30-day period for the State's response has expired. *Laugharn*, 233 Ill. 2d at 323.

¶ 16 The instant appeal involves a dismissal in fewer than 30 days. Therefore, pursuant to *Laugharn*, the circuit court acted before the end of the period in which the State could respond to

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the petition. Accordingly, the circuit court's order dismissing defendant's petition is vacated, and this cause is remanded to the circuit court for further proceedings.

¶ 17 Vacated and remanded.