FIFTH DIVISION
December 4, 2015

No. 1-13-1749



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 99 CR 6047 |
| | ) | |
| DARRYL WILLIAMS, | ) | Honorable |
| | ) | Rosemary Grant Higgins, |
| Defendant-Appellant. | ) | Judge Presiding. |

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PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Gordon and Palmer concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant may not challenge the trial court's *sua sponte* dismissal of his *pro se* petition for postjudgment relief as premature based upon his own failure to properly serve the State.

¶ 2 Defendant Darryl Williams appeals from the trial court's dismissal of his *pro se* petition for postjudgment relief filed pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant initially contended that his mandatory term of supervised release (MSR) was imposed by the Illinois Department of Corrections (IDOC), and therefore violated due process. Defendant has since conceded that this

issue has been decided in the State's favor in *People v. McChriston,* 2014 IL 115310. He now solely contends that his failure to properly serve the State rendered his petition not ripe for adjudication under *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009).

¶ 3 Defendant and his codefendant, Deborah McKinzie, were charged by indictment with the first-degree murder of Marsol Chambers. At a jury trial, the evidence established that Chambers, McKinzie, and defendant attended a party at a Chicago apartment on December 19, 1998. Following multiple fights, everyone was "kicked out" of the apartment. As the partygoers left through the apartment's courtyard, McKinzie continued to fight with one of Chambers' friends until another woman pushed McKinzie away. McKinzie walked over to defendant, her boyfriend. He handed her a gun and told her to "shoot that bitch, shoot that bitch." As everyone in the courtyard began to run, McKinzie fired. Chambers was hit and later died of her injuries.

¶ 4 The jury found defendant guilty of first-degree murder. The trial court sentenced him to 30 years' incarceration. The court did not mention an MSR term in its oral pronouncement or in the written sentencing order. Subsequently, the IDOC informed defendant that a three-year term of MSR would follow his sentence.

¶ 5 This court affirmed defendant's conviction on direct appeal. *People v. Williams*, No. 1-01-1980 (2003) (unpublished order under Illinois Supreme Court Rule 23). This court also affirmed the dismissal of defendant's subsequent postconviction petition. *People v. Williams*, No. 1-08-3576 (2010) (unpublished decision under Illinois Supreme Court Rule 23).

¶ 6 Defendant placed a *pro se* section 2-1401 petition in the institutional mail at Western Correctional Center on January 16, 2013. The certificate of service indicates that the petition was to be mailed "through the United States Postal Service," and does not indicate that it would be

sent by certified mail. The motion was received by the clerk of the circuit court, criminal division on January 23, 2013. The petition was filed on February 7, 2013. In the petition, defendant solely alleged that IDOC's imposition of his three-year MSR term was void, because only the trial court has the power to impose sentences.

¶ 7 On April 16, 2013, the trial court considered the petition. The transcript reflects that an assistant state's attorney was present for the State. The court clerk indicated that the case "was up on 2/7 but *** it was not on the call for 2/7 so I think this just fell off the call."[1] The trial court dismissed the petition *sua sponte*. The assistant state's attorney did not speak on the record. Defendant appeals.

¶ 8 Following defendant's concession to the substantial merits underlying his claim, he contends solely that the trial court's *sua sponte* dismissal of his petition was premature because the State was never properly served. He relies primarily on *People v. Carter*, 2014 IL App (1st) 122613, *petition for leave to appeal granted*, No. 117709 (Sept. 24, 2014), for the proposition that where there is not an affirmative showing of actual notice to the State on the record, a trial court's *sua sponte* dismissal of a petition for relief from judgment is premature regardless of the time elapsed since filing.

¶ 9 The State responds that *Carter* was wrongly decided, and defendant should not be rewarded for his error in improperly serving the State, citing *People v. Alexander*, 2014 IL App (4th) 130132. The State also responds that defendant lacks standing to challenge the service of another party, citing *People v. Kuhn*, 2014 IL App (3d) 130092.

[1]The record does not contain a report of proceedings for February 7, 2013, nor does it contain a half-sheet entry for any date between February 2, 2012, and May 14, 2013.

¶ 10 Section 2-1401 provides a procedure for vacating final judgments more than 30 days but less than 2 years after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Once a party has filed a petition pursuant to section 2-1401, the opposing party has 30 days to respond. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). We review the dismissal of a section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 11 Service of the petition 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. The rule does not provide for service by regular mail. *Carter*, 2014 IL App (1st) 122613, ¶¶ 13-14.

¶ 12 In *Laugharn*, the supreme court explained the procedure for the dismissal of a section 2-1401 petition. In that case, the defendant filed a *pro se* section 2-1401 petition eight years after his conviction. *Laugharn*, 233 Ill. 2d at 320-21. Seven court days later, the circuit court *sua sponte* dismissed the petition as untimely. *Id.* at 321. On appeal, the court concluded that the circuit court's *sua sponte* dismissal of the petition was not ripe for adjudication because it was dismissed prior to the expiration of the 30-day period for a response. *Id.* at 323. It explained that the dismissal "short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead." *Id.* The court further held that although circuit courts may dismiss section 2-1401 petitions *sua sponte*, they may not do so prior to the expiration of the State's 30-day response period. *Id.*

¶ 13 Defendant relies on *People v. Carter*, 2014 IL App (1st) 122613. In *Carter*, the circuit court *sua sponte* dismissed the defendant's section 2-1401 petition without input from the State, although an assistant state's attorney was present in court at the time of dismissal. *Id.*, ¶ 15-16. A

panel of the First District reasoned that because *Laugharn* demands that a reviewing court base its determination as to whether the circuit court prematurely dismissed a section 2-1401 petition by looking at the date of service, a proper dismissal cannot be achieved without service or an affirmative showing that proper service was waived. *Id.*, ¶ 25. The court declined to assume that the State had knowledge of the petition and waived service simply because a prosecutor was shown as present in court on the cover page of the transcript. *Id.*, ¶ 21.

¶ 14 In *People v. Alexander*, 2014 IL App (4th) 130132, the Fourth District also addressed the question of improper service of a section 2-1401 petition. In *Alexander*, the defendant mailed his section 2-1401 petition through prison mail and the circuit clerk filed the defendant's petition one week later. *Id.*, ¶ 45. After more than 30 days, the trial court denied the defendant's petition, finding it to be frivolous. *Id.* On appeal, the defendant argued that his petition was not ripe for adjudication because he had not properly served the State. *Id.*, ¶ 44. The reviewing court noted that according to *Laugharn*, the primary purpose of the 30-day period was to provide the State with time to make its position known. *Id.*, ¶ 46, citing *Laugharn*, 233 Ill. 2d at 323. It affirmed the dismissal, holding that the defendant could not wield his own failure to properly serve the State as a sword on appeal. *Id.*

¶ 15 This court's Third District came to a similar conclusion in *People v. Kuhn*, 2014 IL App (3d) 130092. In that case, the defendant filed a section 2-1401 petition relying on the prison mail for service and the trial court denied the petition more than 30 days later. *Id.*, ¶¶ 4-5. On appeal, the defendant argued that his improper service to the State rendered the trial court's determination premature. *Id.*, ¶ 14. Noting that a party may not object to the improper service of

another, the appellate court ruled that the defendant had no standing to challenge the improper service to the State, and affirmed the circuit court. *Id.*, ¶¶ 15-16.

¶ 16 We find *Alexander* and *Kuhn* more persuasive than *Carter*. *Laugharn* described the procedure for dismissing a properly served petition, therefore that case does not clearly control where a petition was improperly served. *People v. Saterfield*, 2015 IL App (1st) 132355, ¶ 26; see also *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 12. The circuit clerk filed defendant's petition on February 7, 2013. Consequently, the trial court "was well within its authority to conclude that 30 days after service had passed" when it dismissed the petition 37 days later on April 16, 2013. See *Saterfield*, 2015 IL App (1st) 132355, ¶ 28. Any error that arose resulted directly from defendant's failure to follow the requirements of Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). We decline to reward defendant for his own failure to properly follow the supreme court rules.

¶ 17 It is important to also note that defendant has conceded his sole substantive claim on appeal. Defendant's argument that an IDOC-imposed MSR term is unconstitutional has already been rejected by the Illinois Supreme Court in *McChriston*, 2014 IL 115310, ¶¶ 24-31. Moreover, the United States Supreme Court has denied a writ of *certiorari* in *McChriston v. Illinois*, 135 S. Ct. 59 (Oct. 6, 2014). Effectively, defendant asks this court to remand his case so that the State can formally waive service and 30 days may run before the trial court, bound by *McChriston*, denies his petition once more. Given that defendant has conceded his substantive claim is meritless, a remand would be a waste of judicial resources. See *Saterfield*, 2015 IL App (1st) 132355, ¶ 25; *Alexander*, 2014 IL App (4th) 130132, ¶¶ 50-51.

¶ 18 We hold that defendant may not challenge his own improper service of the State on appeal when a claim is meritless and where a remand would be a waste of judicial resources. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 19 Affirmed.