2015 IL App (1st) 132590-U

SIXTH DIVISION
July 24, 2015

No. 1-13-2590

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 2565
	)	
LARRY HOLLINGSWORTH,	)	Honorable
	)	Evelyn B. Clay,
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*: 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 Larry Hollingsworth 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 2012 bench trial, defendant was convicted of criminal sexual assault, aggravated criminal sexual abuse, and sexual relations within families. The trial court sentenced defendant to 12 years on the criminal sexual assault count and to concurrent 5-year terms on the remaining counts. On appeal, this court vacated defendant's aggravated criminal sexual abuse and sexual relations within families convictions pursuant to the one-act, one-crime rule, and affirmed his conviction and sentence for criminal sexual assault. *People v. Hollingsworth*, 2014 IL App (1st) 122271-U.

¶ 4 Defendant placed the instant section 2-1401 petition, which he labeled "Motion to vacate void judgment" and "Motion for judicial notice," in the institutional mail at Danville. The notice of filing indicated that it was to be sent to the circuit court, State's Attorney's office, and "Honorable Judge," all at 2650 South California Avenue, Chicago, IL, 60608, and that the form was notarized on April 30, 2013. The petition contains stamps from the circuit court indicating that it was received on May 10, 2013, and filed on May 17, 2013. A copy of an envelope was attached to the petition, which was addressed to "Circuit Clerk" and stamped "05/07/2013 US Postage." In the petition, defendant alleged that his conviction for criminal sexual assault was void because it was based on a defective information containing "improper language of sexual penetration." Defendant further contended that "the factor" used to obtain his conviction was barred by *People v. Kolton*, 219 Ill. 2d 353 (2006), and thus he was not proven guilty beyond a reasonable doubt, and that the court, the State, and his attorney conspired against him.

¶ 5 On May 24, 2013, the court held a hearing where it indicated for the record that defendant's section 2-1401 petition had been docketed on May 17, 2013, and continued the matter. On June 17, 2013, the court denied defendant's section 2-1401 petition in the presence of the State. The court prepared a written order finding defendant's claims meritless.

¶ 6 On appeal, defendant contends that the circuit court prematurely dismissed his petition for relief from judgment because the State was never properly served with the petition. The State responds that defendant has no standing to raise his opponent's objection to improper service, and defendant should not be rewarded with appellate relief based on his own failure to properly serve the State.

¶ 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, 18 (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, defendant failed to perfect service on the State in accordance with Rule 105 when

he mailed his petition by regular mail. 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 Defendant's attempt to show *Kuhn* was wrongly decided is unavailing. Defendant contends in his reply brief that the *Kuhn* court erred in holding that a section 2-1401 petitioner does not have standing to object to improper service on the State because the reliance on the propriety of the service is only for the purpose of establishing whether and when the 30-day period for the opposing party to answer or otherwise plead in response to the petition began. Defendant maintains that the actual error, *i.e.*, the premature dismissal of the petition by the circuit court, is one that a petitioner has standing to challenge. See *Laugharn*, 233 Ill. 2d at 323-24 (remanding the cause to the circuit court where its dismissal of the defendant's petition only seven days after its filing short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead). However, as the Fourth District has held:

> "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.

¶ 11 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. See also *People v. Saterfield*, 2015 IL App (1st) 132355, ¶¶ 23, 27 (following *Alexander* and finding, despite the defendant's claim that he was not basing his appeal on defective notice or service upon the State but rather because the 30-day period had not yet expired, that he was attempting to use his own error of improper notice or service as a means to circumvent the well established rule that a defendant may not create an error and then use it as the basis for appeal); *People v. Donley*, 2015 IL App (4th) 130223, ¶¶ 33-34 (following *Alexander*).

¶ 12 In following *Alexander* and its progeny, we 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); *People v. Prado*, 2012 IL App (2d) 110767, ¶¶ 12-14 (vacating the trial court's dismissal as premature and remanding the cause for further proceedings where the defendant

failed to comply with Rule 105 by improperly mailing his section 2-1401 petition to the State via regular mail); *Powell v. Lewellyn*, 2012 IL App (4th) 110168, ¶ 11 (applying *Laugharn* principles to motion for injunctive relief and concluding that any dismissal on merits is premature until State is either properly served or waives any objection to defective 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.

¶ 13 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 contend 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 implicitly conceded by defendant, who does not contest the dismissal 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, finding that defendant failed to advance a claim or defense which would entitle him to relief under section 2-1401. Instead, defendant advanced claims that his conviction was void due to a defective information, and that he was not proven guilty of criminal sexual assault beyond a reasonable doubt, despite mentioning in his petition that "[t]he evidence adduced at trial showed a possible touching or fondling [of the victim's] vaginal area." We agree with the circuit court's reasoning, and likewise find defendant's petition without merit.

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

¶ 15 Affirmed.