2015 IL App (1st) 132778-U

SIXTH DIVISION
May 22, 2015

No. 1-13-2778

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 802
	)	
DARRYL JOHNSON,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall 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 Darryl Johnson 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 The record shows that defendant and his codefendants, who are not parties to this appeal, were charged by indictment with various offenses, including delivery of a controlled substance within 1,000 feet of a school on August 11, 2005 (Count 5). Following a plea conference in 2007, defendant entered a plea of guilty to Count 5 and the State nol-prossed the remaining counts. The trial court then sentenced defendant, a Class X offender, to 20 years' imprisonment. Although defendant did not file a post-plea motion, or otherwise attempt to appeal the judgment entered on his plea conviction, he later made several unsuccessful collateral attacks on his conviction, including one post-conviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)), and three petitions for relief from judgment under the Code. See *People v. Johnson*, Nos. 2012 IL App (1st) 103047-U; 2013 IL App (1st) 110659-U (unpublished orders under Supreme Court Rule 23); 1-11-3453 (2013) (dispositional order).

¶ 4 On January 22, 2013, defendant placed the instant section 2-1401 petition in the institutional mail at Dixon. The notice of filing indicated that it was to be sent to the clerk of the circuit court and the State's Attorney's office, both at 2650 South California Avenue, Chicago, IL, 60608. The document contains stamps from the circuit court indicating that it was received on January 28, 2013, and filed on February 25, 2013. In the petition, defendant alleged that his conviction on Count 5 of the indictment was void because the State erred in charging him with Count 13, *i.e.*, delivery of a controlled substance on September 6, 2005, which was nol-prossed at the time of his plea. In support of this claim, defendant attached an affidavit from his wife, who attested that defendant was home in bed with a toothache the entire day of September 6, 2005. Defendant also claimed in his petition that his sentence should be reduced by three years because the trial court failed to impose the statutorily mandated three-year term of mandatory supervised release (MSR). In addition to the aforementioned affidavit, defendant attached to his

petition transcripts from his plea and grand jury proceedings, as well as a subpoena demanding video surveillance, police reports, and grand jury testimony related to the case at bar.

¶ 5 The case first appeared on the court's call on March 5, 2013, but was continued to March 8 because the court file was not in the courtroom. On March 8, the only entry of record is the court's denial of defendant's "*pro se* motion for summons/subpoena." On April 2, 2013, defendant filed a motion seeking the common law record pertaining to his plea, which the trial court denied on April 9.

¶ 6 On April 26, 2013, defendant placed the same section 2-1401 petition filed on February 25, 2013, along with the aforementioned attachments and a newly executed verification affidavit, in the institutional mail at Dixon and again addressed it to the clerk of the circuit court and State's Attorney's office. These documents were received in the clerk's office on May 8, 2013, and filed on May 20, 2013. On May 28, 2013, the court continued the matter to July 2, 2013. On that date, the State was present, but the court file was not, so the matter was continued to July 18. On July 18, 2013, the circuit court denied defendant's section 2-1401 petition in the presence of the State and defense counsel. The court prepared a written order finding defendant's claims meritless. In the order, the court referred to defendant's section 2-1401 petition filed on February 25, 2013, and noted that it had been denied on March 8, 2013.

¶ 7 On appeal, defendant contends that the circuit court's *sua sponte* dismissal of his section 2-1401 petition was premature where he did not properly serve the petition on the State. The State responds, in part, that defendant has no standing to raise his opponent's objection to improper service, and defendant should not be permitted to obtain an advantage from his own failure to properly serve the State.

¶ 8 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).

¶ 9 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.

¶ 10 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.

¶ 11 Defendant's attempt to distinguish *Kuhn* from the case at bar is unavailing. Defendant contends in his brief that "*Kuhn* differs substantially from this case in that, in *Kuhn*, the State

appeared at two hearings, and thus demonstrated actual notice of the filing by participating in the proceedings in some fashion." [Internal quotation and citation omitted.] In so arguing, defendant fails to recognize that the *Kuhn* court specifically held, as quoted above, that a defendant does not have standing to raise an issue regarding the State's receipt of service. *Kuhn*, 2014 IL App (3d) 130092, ¶ 16. It was only after the *Kuhn* court held that the defendant lacked standing that it declared, in the alternative, that his argument also failed because the State had actual notice of the petition, which provided it time to file a responsive pleading or object to the noncompliant service. *Id*., ¶ 17. Despite defendant's contentions to the contrary, *Kuhn* does not turn on the issue of actual notice. Therefore, because we find similarly to *Kuhn* that defendant had no standing to challenge the State's receipt of service, defendant's argument that the State lacked actual notice of his petition is of no consequence.

¶ 12 We further find defendant's reliance on *People v. Carter*, 2014 IL App (1st) 122613, *appeal granted*, No. 117709 (Sept. 24, 2014), and *People v. Prado*, 2012 IL App (2d) 110767, unpersuasive, and decline to follow those cases. 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. *Carter* 2014 IL App (1st) 122613, ¶ 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. In *Prado*, the defendant mailed his section 2-1401 petition to the State by regular mail and thus failed to comply with Rule 105. The *Prado* court vacated the trial court's

dismissal and remanded the cause for further proceedings, noting that if "the State wish[ed] to make the disposition of cases such as this one more efficient, the best course would be to waive an objection to the defective service," allowing the matter to proceed normally through an adjudication on the merits. *Prado*, 2012 IL App (2d) 110767, ¶¶ 12-14; see also *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 the above cases 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 effectively 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, rejecting his claim that his guilty plea, conviction, and sentence were void where defendant never challenged the voluntariness of the plea, filed a motion to withdraw the plea, or otherwise attempted to perfect a direct appeal. Additionally, the trial court duly admonished defendant before he accepted his plea, and defendant acknowledged his understanding and attested to the facts as presented by the State.

Furthermore, the circuit court held that the record directly refuted defendant's claim that he was not admonished regarding the MSR term attached to his sentence. 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.