

No. 1-13-2977

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. 12 CR 9359
)	
MARK WARREN,)	Honorable
)	William O'Brien,
Defendant-Appellant.)	Judge Presiding.

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

O R D E R

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

¶ 2 Defendant Mark Warren, *pro se*, appeals the circuit court's *sua sponte* dismissal of his petition for relief from judgment filed under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends that the circuit court's dismissal of his petition was premature because that action occurred before the expiration of the

30-day period in which the State could respond to the petition. We vacate the dismissal of defendant's petition and remand for further proceedings.

¶ 3 Following a bench trial in 2012, defendant was convicted of burglary and sentenced as a Class X offender to 18 years in prison due to his 11 previous felony convictions. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Warren*, 2015 IL App (1st) 130952-U, ¶ 22.

¶ 4 While that appeal was pending, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Code. In his petition, defendant challenged the constitutionality of the statute under which his Class X sentence was imposed, namely section 5-5-3(c)(8) of the Illinois Code of Corrections (730 ILCS 5/5-5-3(c)(8) (West 2010)). Defendant argued that Public Act 80-1099, one of the acts underlying that statute, violated the single-subject rule which prohibits unrelated legislative provisions in a single bill and, thus, the sentencing statute was void in its entirety. Defendant attached to his petition a certificate of service addressed to the Clerk of the Circuit Court of Cook County and the State's Attorney of Cook County stating that he had placed his petition in the institutional mail on July 8, 2013, for mailing to those persons through the United States Postal Service.

¶ 5 On August 5, 2013, the circuit court reviewed defendant's section 2-1401 petition and denied it *sua sponte*. The cover page of the report of proceedings for that date indicates that an assistant State's Attorney was present when the court entered its ruling; however, the record does not reflect that the attorney addressed the court, was addressed by the court, or took any action when the case was called. In denying the petition *sua sponte*, the court rejected defendant's claim

that the statute under which he was sentenced was unconstitutional, noting that the statute had been redrafted and found to be constitutional.

¶ 6 Defendant filed a timely notice of appeal from this ruling, and counsel was appointed to represent him. However, this court subsequently allowed defendant's motion to proceed *pro se* and relieved appointed counsel from further representing defendant in this case.

¶ 7 On appeal, defendant contends that this court should reverse the circuit court's dismissal of his petition and remand his cause for further proceedings on his petition. He asserts that this disposition is warranted because the circuit court ruled on his petition less than 30 days after its filing and before the State could respond to the claims contained in the petition.

¶ 8 Section 2-1401 sets out a statutory procedure by which a final order or judgment may be vacated when at least 30 days, but no more than 2 years, have elapsed since its entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Once a party has filed a petition for relief under section 2-1401, the opposing party has 30 days to answer the petition or otherwise plead. Ill. S. Ct. Rule 101(d) (eff. May 30, 2008); *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). The supreme court has held that responsive pleadings "are no more required in section 2-1401 proceedings than they are in any other civil action" and recognized that a court may enter judgment on the pleadings or a dismissal notwithstanding the absence of a responsive pleading. *Vincent*, 226 Ill. 2d at 9-10. However, a petition filed under section 2-1401 is not ripe for adjudication until expiration of the 30-day period to answer or plead, and the trial court may not properly dispose of the petition *sua sponte* until 30 days have passed from the date the petition was served on the State. *Laugharn*, 233 Ill. 2d at 323. Our review of the *sua sponte* dismissal of defendant's section 2-1401 petition is *de novo*. *Id.* at 322.

¶ 9 The record filed on appeal shows that defendant placed his section 2-1401 petition in the prison mail system on July 8, 2013, and the circuit court denied the petition *sua sponte* on August 5, 2013. Because fewer than 30 days passed between the time defendant filed his petition and the court's ruling, the court's action was premature and requires vacatur of the dismissal order and remandment of the case for further proceedings. *Id.* at 323-24.

¶ 10 We reached the same conclusion in *People v. Clemons*, 2011 IL App (1st) 102329, ¶ 17, and *People v. Gray*, 2011 IL App (1st) 091689, ¶ 22. In both of those cases, a representative of the State was present at the hearing when the court dismissed the defendant's section 2-1401 petition before the 30-day period had elapsed, but did not speak or make any filing relating to the defendant's petition. *Clemons*, 2011 IL App (1st) 102329, ¶ 17; *Gray*, 2011 IL App (1st) 091689, ¶ 20. Relying on *Laugharn*, this court found that the State was thereby prevented from having the entire 30-day period in which to answer or otherwise plead, and vacated the premature dismissal of the defendant's section 2-1401 petition and remanded for further proceedings. *Clemons*, 2011 IL App (1st) 102329, ¶ 17; *Gray*, 2011 IL App (1st) 091689, ¶ 22.

¶ 11 The State argues, nevertheless, that the proper disposition is to dismiss defendant's petition without prejudice, citing *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 15. In *Nitz*, the Second District affirmed the dismissal of the defendant's section 2-1401 petition less than 30 days after its filing but modified the court's order to reflect that dismissal was without prejudice. *Id.* That holding turned on the fact that the defendant did not provide notice of the filing of the petition by the means prescribed in Rule 105(b) and that a remand for further proceedings would be meaningless. *Id.* ¶ 12.

¶ 12 Other districts that have considered this matter have disagreed with *Nitz* and found that the proper remedy following a premature dismissal of a defendant's unserved petition is to vacate and remand for further proceedings on the existing petition. See, e.g., *People v. Miller*, 2012 IL App (5th) 110201, ¶ 18; *People v. Prado*, 2012 IL App (2d) 110767, ¶¶ 6-9; *Powell v. Lewellyn*, 2012 IL App (4th) 110168, ¶ 14. In doing so, the reviewing courts noted that a remand would not be meaningless if a defendant has the ability on remand to properly serve the State with notice of his section 2-1401 petition, and the trial court can dismiss the case after a reasonable period of time for want of prosecution if service is adequately made. See *Miller*, 2012 IL App (5th) 110201, ¶¶ 16-18; *Prado*, 2012 IL App (2d) 110767, ¶ 9; *Powell*, 2012 IL App (4th) 110168, ¶ 14. We find the reasoning in those cases persuasive, and accordingly, we vacate the order of the circuit court of Cook County dismissing defendant's petition and remand for further proceedings.

¶ 13 Vacated and remanded.