THIRD DIVISION
October 14, 2015

No. 1-14-0299

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. 07 CR 13564
	)	
DARIUS HARRIS,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Dismissal of defendant's section 2-1401 petition affirmed over his claim that the *sua sponte* dismissal was premature because the State was not properly served.

¶ 2 Defendant Darius Harris appeals from an order of the circuit court of Cook County dismissing *sua sponte* his petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(West 2012)). He solely contends that his petition should be remanded for further proceedings because the State was never properly served with the petition, and therefore, the court's *sua sponte* dismissal was premature.

¶ 3 The record shows that defendant was charged with six counts each of aggravated criminal sexual assault and aggravated kidnapping, two counts each of criminal sexual assault and kidnapping, and one count of unlawful restraint. On April 22, 2009, defendant pleaded guilty to two counts of aggravated criminal sexual assault and was sentenced to consecutive prison terms of 10 years and 9 years, for an aggregate sentence of 19 years' imprisonment.

¶ 4 In May 2009, defendant filed a timely motion to withdraw his guilty plea which was denied by the trial court. On appeal, this court entered an order for an agreed summary disposition reversing the trial court's denial of defendant's motion and remanding the cause for new proceedings on defendant's motion to withdraw his plea because defense counsel had not filed a certificate as required by Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Harris*, No. 1-09-2209 (2010) (dispositional order).

¶ 5 On remand, defendant filed an amended motion to withdraw his guilty plea contending that the trial court failed to admonish him that he was required to serve a three-year term of mandatory supervised release following his imprisonment in violation of *People v. Whitfield*, 217 Ill. 2d 177 (2005). On March 22, 2012, the trial court vacated defendant's nine-year sentence and issued an amended mittimus reducing his consecutive prison terms to 10 years and 6 years, for

an aggregate sentence of 16 years' imprisonment. Defendant subsequently filed a *pro se* motion for reconsideration of that ruling, a *pro se* motion for further reduction of his sentence, and a *pro se* petition for a writ of *habeas corpus*, all of which were denied by the trial court.

¶ 6 On August 23, 2012, defendant filed a *pro se* motion to vacate judgment contending that one of the counts on which he was sentenced had been nol-prossed, and thus, he was serving a sentence on a charge that had been dismissed in violation of his right to due process. Defendant also alleged that the trial court failed to properly admonish him in accordance with Supreme Court Rule 402 (eff. July 1, 1997), that the record was devoid of any aggravating and mitigating factors, that there was no factual basis to support his guilty plea, that the State misled him into believing that he would face an extended sentence if he proceeded with a trial, and that defense counsel rendered ineffective assistance by relaying the State's misleading information to him. The trial court denied defendant's motion, and on appeal, this court allowed the State Appellate Defender to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed that judgment. *People v. Harris*, 2013 IL App (1st) 123488-U.

¶ 7 On August 15, 2013, defendant placed the instant *pro se* 2-1401 petition for relief from judgment in the institutional mail at the Big Muddy River Correctional Center. Defendant's certificate of service indicates that he mailed his petition through the United States Postal Service to the clerk of the circuit court. There is no indication that defendant mailed his petition to the State's Attorney's Office. Defendant's petition was stamped "Received" by the clerk of the circuit court on August 20, 2013, and stamped "Filed" on August 29, 2013.

¶ 8 In his petition, defendant again alleged that one of the counts on which he was sentenced had been nol-prossed, and thus, he was serving a sentence on a charge that had been dismissed in violation of his right to due process. Defendant also alleged that his sentence was void because it did not comply with the sentencing provisions stated in the aggravated criminal sexual assault statute (720 ILCS 5/12-14 (West 2004)), and that trial counsel rendered ineffective assistance in handling his motion to withdraw his guilty plea.

¶ 9 Defendant's petition first appeared on the circuit court's docket on September 6, 2013, and was continued on October 11, 2013, and October 18, 2013. The record does not reflect the presence of an assistant State's Attorney on any of these dates. On November 22, 2013, an assistant State's Attorney was present in court, and the following colloquy occurred:

> "THE COURT: This is a 2-1401 petition. State, are you on Mr. Harris? This appears to be from your special remedies unit. Because it's a ruling on a 2-1401 and those are usually done at post-conviction.
>
> [ASSISTANT STATE'S ATTORNEY]: I am not on Mr. Harris.
>
> THE COURT: Could you contact your office to figure out who is on Darius Harris."

The court then continued defendant's petition for another date.

¶ 10 The record further shows that on December 6, 2013, an assistant State's Attorney was present, but did not speak, and the court again continued defendant's petition to another date. On December 13, 2013, the circuit court found that defendant's allegations challenging his conviction and sentence were without merit, and that his ineffective assistance of counsel claim

was not cognizable under section 2-1401. Consequently, the court concluded that defendant failed to assert a valid claim under section 2-1401 and denied his petition. The record does not show that the State was present in court when that ruling was entered.

¶ 11 On appeal, defendant raises no substantive issues regarding the claims made in his petition. Rather, he solely contends that his petition should be remanded for further proceedings because he never served the State with the petition, and therefore, the circuit court's *sua sponte* dismissal was premature.

¶ 12 The State responds that defendant's petition was insufficient because it was untimely filed more than four years after his conviction, and he did not allege that his failure to comply with section 2-1401's two-year limit was due to legal disability, duress or fraudulent concealment. The State also points out that defendant admits that he did not mail his petition to the State, and that he should not be permitted to benefit from his own failure to properly serve the State. The State also argues that defendant may only object to improper service on behalf of himself, and that he lacks standing to object to improper service on the State.

¶ 13 Initially, we observe that by solely challenging the *sua sponte* dismissal of his petition as premature, defendant has forfeited any challenge to the actual merits of his petition. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 14 As pertinent to this appeal, section 2-1401(b) of the Code provides that "[a]ll parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). Illinois Supreme Court Rules 105 and 106 (Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989), R. 106 (eff. Aug. 1, 1985)) provide that notice of the filing of the petition shall be directed to the party and must be

served either by summons, prepaid certified or registered mail, or publication (*People v. Alexander*, 2014 IL App (4th) 130132, ¶ 35). Where the State fails to answer the petition within the 30-day period, it is deemed to admit all well-pleaded facts, and the petition is ripe for adjudication. *People v. Vincent*, 226 Ill. 2d 1, 9-10 (2007). The trial court may then deny the petition if it determines that the allegations contained in the petition do not provide a legal basis for relief under section 2-1401. *Id*. at 12. We review *de novo* the trial court's denial of a petition brought under section 2-1401. *Alexander*, 2014 IL App (4th) 130132, ¶ 36.

¶ 15 In this case, defendant admits that he never mailed his petition to the State. Because he did not serve the State via one of the methods provided for in Rule 105, he contends that his petition was not ripe for adjudication and his cause must be remanded. In support of his contention, defendant cites *People v. Carter*, 2014 IL App (1st) 122613, ¶¶ 25-26, *appeal allowed*, No. 117709 (Sept. 24, 2014), where the second division of this appellate court found that the *sua sponte* dismissal of the defendant's petition on the merits was premature in the absence of a showing that the State was properly served.

¶ 16 The State acknowledges the pending status of *Carter* before the supreme court and also calls our attention to other appellate courts, which have considered the same argument raised by defendant and have declined to follow *Carter*. In *People v. Lake*, 2014 IL App (1st) 131542, ¶ 23, another division of this court noted the numerous appeals in which this issue has been raised and the resulting division created among the districts of the appellate court and within the divisions of the First District regarding the consequences of defendant's failure to properly serve his section 2-1401 petition on the State. See, e.g., *People v. Kuhn*, 2014 IL App (3d) 130092;

People v. Maiden, 2013 IL App (2d) 120016; *People v. Miller*, 2012 IL App (5th) 110201; *People v. Nitz*, 2012 IL App (2d) 091165; *People v. Prado*, 2012 IL App (2d) 110767.

¶ 17 The State also contends that equitable doctrines preclude defendant from benefitting from his own injected error, *i.e.*, "[d]efendant may not be heard to complain of errors which he injected into his own trial." *People v. Scott*, 148 Ill. 2d 479, 531 (1992). This principle has been espoused by reviewing courts that have departed from *Carter* and declined to reward defendant for his failure to comply with Rule 105. See, e.g., *Alexander*, 2014 IL App (4th) 130132, ¶¶ 47-49, *Kuhn*, 2014 IL App (3d) 130092, ¶ 17.

¶ 18 In both *Alexander* and *Kuhn*, defendant sent his petition to the State by regular mail in contrast with the requirements of Rule 105. In *Kuhn*, the court noted that a party may object to improper service only on behalf of himself, and, therefore, defendant lacked standing to challenge the State's lack of notice. *Kuhn*, 2014 IL App (3d) 130092, ¶ 16. Similarly, in *Alexander*, the Fourth District appellate court did not believe defendant should benefit from his failure to comply with Rule 105 by being awarded a "second bite of the apple." *Alexander*, 2014 IL App (4th) 130132, ¶ 46. The court, therefore, declined to follow *Carter*, finding that *Vincent* and *Laugharn* did not mandate the result reached by the court in *Carter* (*Id.*, ¶ 50), and the Fourth District recently repeated that reasoning in *People v. Donley*, 2015 IL App (4th) 130223, ¶¶ 32-34. We agree with the reasoning expressed in *Kuhn*, *Alexander*, and *Donley*, and, likewise, decline to follow *Carter*.

¶ 19 In addition, we note that the court in *Lake* (*Lake*, 2014 IL App (1st) 131542, ¶ 24) referenced its previous decision in *People v. Ocon*, 2014 IL App (1st) 120912, ¶ 34, where it

observed the principle that "a party may object to personal jurisdiction or improper service of process only on behalf of himself or herself." (Internal quotation marks omitted.) As in *Ocon*, *Lake*, and the cases discussed above, defendant here is attempting to challenge the improper service of his petition on the State by relying on his own error to vacate the dismissal of his petition. Again, we adhere to our prior decisions and find that defendant is precluded from objecting to improper service on behalf of the State.

¶ 20 Moreover, where, as here, the State does not contest the deficient service and contends that defendant's petition is frivolous, we find no reason or good purpose for remanding the case so that defendant can properly serve the State or the State can waive service, the State can respond by repeating its position that defendant's petition is frivolous, and the court can repeat its denial of defendant's petition. *Alexander*, 2014 IL App (4th) 130132, ¶ 50.

¶ 21 For the reasons stated, we affirm the *sua sponte* dismissal of defendant's petition for relief from judgment by the circuit court of Cook County.

¶ 22 Affirmed.