THIRD DIVISION
November 25, 2015

No. 1-14-0338

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 16086
	)	
ROMARR GIPSON,	)	Honorable
	)	Brian Flaherty,
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*: The circuit court's *sua sponte* dismissal of defendant's section 2-1401 petition is affirmed despite defendant's failure to properly serve the petition on the State.

¶ 2 Defendant Romarr Gipson appeals from the circuit court's order dismissing his 2013 *pro se* petition for relief from judgment 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 *sua sponte* dismissal of his petition was premature because the State was not properly served with notice of the petition. We affirm.

¶ 3 Defendant was charged with offenses arising from a shooting in 2006. Although defendant was 15 years old at the time of those crimes, he was tried as an adult under the statute requiring automatic transfer of his case (705 ILCS 405/5-130 (West 2006)). Defendant was initially found unfit to stand trial but was returned to fitness in 2009.

¶ 4 Following a bench trial in 2010, defendant was convicted of two counts of attempted murder and sentenced to two consecutive terms of 26 years in prison. On direct appeal, this court reversed and remanded for a retrospective fitness hearing because the evidence was not sufficient to support a determination that defendant was fit to stand trial. *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 38. Moreover, while acknowledging the seriousness of the offense, this court held that defendant's 52-year sentence violated the proportionate penalty clause because, as applied to defendant's case, the trial court lacked any discretion in sentencing. *Id*. ¶ 65.

¶ 5 During the pendency of that appeal, defendant prepared a *pro se* petition for relief from judgment pursuant to section 2-1401, challenging his sentencing in adult court for crimes he committed as a juvenile. Defendant placed that petition in the institutional mail at Stateville Correctional Center on April 25, 2013. The petition was file-stamped by the clerk of the Cook County circuit court on May 20, 2013. On June 7, 2013, the circuit court addressed the petition, stating it could be treated either as a section 2-1401 filing or as a post-conviction petition, and continued the proceedings.

¶ 6 On August 9, 2013, an assistant State's Attorney and an assistant public defender were present; however, only the public defender addressed the court. The assistant public defender informed the court that he had reviewed defendant's document and would pass it along to the appropriate unit. The court then continued the case. On September 27, 2013, the circuit court

dismissed defendant's petition *sua sponte*, stating it had "ruled on all these matters." On that date, an assistant State's Attorney was present but did not address the court.

¶ 7 On appeal, defendant contends that because he did not comply with one of the enumerated methods for serving the State with notice of his petition, his petition was not ripe for adjudication and the circuit court erred in dismissing the filing *sua sponte*. He argues the circuit court's dismissal of the petition should be vacated and the case remanded for further proceedings.

¶ 8 The State responds that defendant lacks standing to raise the issue of notice on behalf of another party. The State further asserts the circuit court's dismissal of the petition should be affirmed because the State had actual notice of the proceedings due to the presence of the assistant State's Attorney in court on August 9, 2013, and September 27, 2013.

¶ 9 We initially observe that defendant on appeal does not make any substantive arguments as to the claims made in his petition; rather, he only contends the *sua sponte* dismissal of his petition was premature. Therefore, defendant has forfeited any challenge to the merits of his petition. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 10 Section 2-1401 allows for final judgments to be vacated more than 30 days, but within 2 years, after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). 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). When 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. *Vincent*, 226 Ill. 2d at 9-10. After the 30-day period, the circuit court may deny the petition if it determines the allegations therein do not provide a legal basis for relief

under section 2-1401. *Id.* at 12. The circuit court's *sua sponte* dismissal of a section 2-1401 petition for relief from judgment is reviewed *de novo*. *Id.* at 11.

¶ 11 Pursuant to Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985), service of a section 2-1401 petition must be made by the means set out in Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which requires service by summons, prepaid certified or registered mail, or publication. Here, the record on appeal indicates defendant provided notice of his petition via regular mail. Therefore, defendant did not properly serve the State with notice by one of the means allowed by Supreme Court Rule 105. Defendant acknowledges on appeal that he failed to provide service under one of the permitted methods.

¶ 12 When considering whether defendant has standing to object to his own improper service, we agree with the reasoning in *People v. Kuhn*, 2014 IL App (3d) 130092, and *People v. Alexander*, 2014 IL App (4th) 130132. In each of those cases, this court held the defendant's act of sending a section 2-1401 petition by regular mail does not permit the defendant to later object to improper service. *Kuhn*, 2014 IL App (3d) 130092, ¶ 16; *Alexander*, 2014 IL App (4th) 130132, ¶ 48. Furthermore, the record reflects that an assistant State's Attorney was present in court on August 9 and on September 27, when the petition was dismissed. The State therefore can be deemed to have received actual notice of the petition via the prosecutor's presence because the State was not deprived of the opportunity to respond. *People v. Saterfield*, 2015 IL App (1st) 132355, ¶ 22; *People v. Lake*, 2014 IL App (1st) 131542, ¶ 31; *People v. Ocon*, 2014 IL App (1st) 120912, ¶¶ 31, 35.

¶ 13 In asserting his petition was not ripe for adjudication, defendant argues that the dispositive case is *People v. Carter*, 2014 IL App (1st) 122613, ¶ 25, *appeal allowed*, No. 117709 (Sept. 24, 2014). In *Carter*, a different division of this appellate court held the *sua sponte*

dismissal of the defendant's petition on the merits was premature in the absence of service on the State or an affirmative showing that the State waived service. *Id*. However, we agree with *Kuhn*, *Alexander* and similar cases that have declined to follow *Carter* and have instead affirmed the *sua sponte* dismissals. Moreover, defendant's does not contest the petition's merit on appeal.

¶ 14 Accordingly, for the reasons stated above, we affirm the *sua sponte* dismissal of defendant's section 2-1401 petition.

¶ 15 Affirmed.