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2015 IL App (3d) 130699-U

Order filed August 4, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0699
v.	)	Circuit No. 09-CF-898
	)	
DENNIS C. BROWN,	)	Honorable
	)	Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices Carter and Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The court's dismissal of the defendant's section 2-1401 petition should be limited to a dismissal for lack of personal jurisdiction only.

¶ 2 The defendant, Dennis C. Brown, filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), which he served upon the State by regular mail. The State filed a combined motion to dismiss the petition, based on lack of jurisdiction, failure to diligently serve the petition, failure to state a claim, and untimeliness. The court granted the motion to dismiss, on multiple grounds. On appeal, the

defendant argues that the court should have dismissed the petition for only lack of jurisdiction. The defendant also claims that a \$178 collections fee should be vacated. We modify the judgment in part and vacate the judgment in part.

¶ 3

### FACTS

¶ 4

The defendant was charged by indictment with home invasion (720 ILCS 5/12-11(a)(1) (West 2008)), residential burglary (720 ILCS 5/19-3(a) (West 2008)), and unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). The defendant entered into a plea agreement, wherein he pled guilty to residential burglary and received a sentence of 15 years' imprisonment, in addition to various fines and fees, including a \$178 fee for "COLLECTIONS." The court accepted the plea on September 8, 2009. The defendant did not file a direct appeal.

¶ 5

On June 21, 2013, the defendant filed a petition for relief from judgment under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)). The petition raised two claims: (1) the court failed to properly admonish the defendant of his appeal rights under Illinois Supreme Court Rules 604(d) (eff. July 1, 2006) and 605(b) (eff. Oct. 1, 2001); and (2) the defendant was unaware that his guilty plea included a two-year term of mandatory supervised release.

¶ 6

On July 21, 2013, the State filed a limited appearance and objection to the court's jurisdiction under section 2-301 of the Code (735 ILCS 5/2-301 (West 2012)), arguing that the defendant had not properly served his section 2-1401 petition, as it was served through regular mail. On the same date, the State filed a combined motion to dismiss the defendant's petition. 735 ILCS 5/2-619.1 (West 2012). The motion asserted that the defendant's section 2-1401 petition should be dismissed on four grounds: (1) lack of jurisdiction for insufficient service; (2) failure to exercise reasonable diligence in obtaining service under Illinois Supreme Court Rule 103(b) (eff. July 1, 2007)); (3) failure to state a cause of action under section 2-615 of the Code

(735 ILCS 5/2-615 (West 2012)); and (4) untimeliness of the petition under section 2-619(a)(5) of the Code (735 ILCS 5/2-619(a)(5) (West 2012)).

¶ 7 On August 23, 2013, the trial court filed a written order dismissing the petition for: (1) failure to properly serve the petition; (2) failure to state a cause of action; and (3) violation of the two-year statute of limitations for section 2-1401 petitions. The order did not clarify whether it was dismissing the petition with or without prejudice.

¶ 8 ANALYSIS

¶ 9 On appeal, the defendant raises two claims: (1) this court should modify the trial court's judgment to state that the defendant's section 2-1401 petition was dismissed only for lack of jurisdiction and not on the merits; and (2) we should vacate the \$178 collection fee because it was not authorized by statute.

¶ 10 The parties agree that the defendant failed to properly serve his section 2-1401 petition. Service of a section 2-1401 petition is governed by the requirements of Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). Ill. S. Ct. R. 106 (eff. Aug. 1, 1985). Rule 105 provides that service may be effected by summons, certified or registered mail, or by publication. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). Here, the defendant served the petition on the State by regular mail. Service was therefore insufficient, and the court lacked personal jurisdiction over the State. See *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 18 (personal jurisdiction may be established either by sufficient service or by a party's submission to jurisdiction).

¶ 11 "[W]hen faced with a motion combining an objection to personal jurisdiction and a section 2-615 motion to dismiss for failure to state a cause of action, the trial court must address the jurisdictional issue first." *Ryburn v. People*, 349 Ill. App. 3d 990, 994 (2004). In the present case, the court dismissed the defendant's petition for failing to properly serve the State. After

finding there was no personal jurisdiction over the State, the court had no power to dismiss the petition on the merits. *Id.* at 993. A dismissal on jurisdictional grounds is not *res judicata* on the merits of the petition. *Id.* at 994. We modify the court's order to reflect that the defendant's section 2-1401 petition was dismissed on jurisdictional grounds only and not on the merits of the petition.

¶ 12 The State argues that the defendant lacks standing to raise this argument on appeal, citing *People v. Kuhn*, 2014 IL App (3d) 130092. In *Kuhn*, the court *sua sponte* dismissed the defendant's section 2-1401 petition. On appeal, the defendant urged the court to vacate the dismissal because, due to the defendant's improper service, the court lacked personal jurisdiction over the State. This court held that the defendant lacked standing to raise the jurisdiction issue "on behalf of the State." *Id.* ¶ 15.

¶ 13 We find *Kuhn* distinguishable. Unlike the situation presented in *Kuhn*, in the present case it was *the State* that first raised the issue of its personal jurisdiction. The defendant is therefore not raising an objection on behalf of the State. Rather, he is challenging the court's response to the issues raised in the State's combined motion to dismiss. The procedural posture is thus distinguishable from that in *Kuhn*. We find that the defendant has standing to raise this issue on appeal.

¶ 14 Our decision in this case is unaffected by the pending proceedings in *People v. Carter*, 2014 IL App (1st) 122613, *appeal allowed*, No. 117709 (Sept. 24, 2014). The issue in *Carter* involves the trial court's authority to *sua sponte* dismiss a section 2-1401 petition for improper service. In the present case, the court's dismissal resulted from the State's motion to dismiss.

¶ 15 The State concedes that the \$178 fee for "COLLECTIONS" should be vacated. We accept the State's concession and order the \$178 fee vacated.

¶ 16

## CONCLUSION

¶ 17

The judgment of the circuit court of Will County is modified in part and vacated in part.

¶ 18

Modified in part and vacated in part.