

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).

2015 IL App (4th) 130751-U

NO. 4-13-0751

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 24, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
SEAN D. ELLIS,)	No. 09CF176
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was denied due process when the State moved to dismiss his *pro se* petition filed under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) and failed to provide him notice of the motion, and when the trial court considered the State's motion in dismissing the petition.

¶ 2 In August 2013, the trial court dismissed the *pro se* petition filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). Defendant, Sean D. Ellis, appeals the dismissal, arguing he was denied due process when the State moved to dismiss his petition and failed to give him notice of that motion, and the trial court dismissed the petition after considering the State's motion and before giving him a meaningful opportunity to respond. We agree with defendant and reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In October 2009, defendant was convicted of unlawful possession of a stolen or converted motor vehicle (625 ILCS 5/4-103(a)(1) (West 2008)), a Class 2 felony, and subject to Class X sentencing due to his criminal history (730 ILCS 5/5-3(c)(8) (West 2008)). The trial court sentenced him to 25 years' imprisonment. Defendant appealed, and this court affirmed. *People v. Ellis*, 2011 IL App (4th) 100407-U. In June 2012, defendant filed a *pro se* postconviction petition, which the trial court dismissed as frivolous and patently without merit. Defendant appealed, and this court affirmed. *People v. Ellis*, 2014 IL App (4th) 120667-U.

¶ 5 On July 17, 2013, defendant filed his *pro se* section 2-1401 petition for relief from judgment. Defendant's arguments included challenges to his arrest warrant, the information, the indictment, and his Class X sentence. On August 15, 2013, defendant placed a petition for default judgment into the prison mail system. He alleged he was entitled to judgment because the State had not responded to his petition within 30 days.

¶ 6 On August 19, 2013, the State filed a motion to dismiss defendant's section 2-1401 petition. The State mounted both procedural and substantive challenges to the petition. The State argued defendant failed to present specific factual allegations showing a meritorious defense or claim, failed to show the instant claim could not have been brought in earlier proceedings, and failed to show he exercised due diligence in making his claim. The State further addressed specific claims asserted by defendant, asking the trial court to take judicial notice of the record to contradict arguments made by defendant.

¶ 7 The State, however, failed to serve defendant, who was acting *pro se*, with a copy of its motion to dismiss. The "Proof of Service" attached to the State's motion shows the State delivered a copy of the motion to the public defender's office.

¶ 8 On August 22, 2013, three days after the State filed its motion, the trial court entered a written order dismissing the petition. The court found "[t]he State's motion to dismiss correctly states the purpose of a [section] 2-1401 petition" and concluded the defendant lacked the necessary elements of a section 2-1401 claim. The trial court further found the State correct as to the substantive issues: "As to the substantive issues raised by the defendant, again, the State's analysis is correct. The defendant's petition fails to state any cognizable violation of his rights." The court found the petition frivolous and patently without merit and dismissed it.

¶ 9 Defendant filed a timely notice of appeal. Defendant alleged the State had not filed or mailed a response to his section 2-1401 petition.

¶ 10 II. ANALYSIS

¶ 11 Section 2-1401 provides "a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days." *People v. Vincent*, 226 Ill. 2d 1, 7, 871 N.E.2d 17, 22 (2007) (citing 735 ILCS 5/2-1401 (West 2002)). A petition filed under section 2-1401 seeks relief from a final judgment to correct errors of fact occurring in the prosecution of a cause that were unknown to the petitioner and the court when judgment was entered. *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000). To obtain relief under section 2-1401, a petitioner must establish not only the errors of fact, but also diligence in discovering the error and in presenting the petition. See *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22.

¶ 12 Proceedings under section 2-1401 are subject to the usual civil-practice rules. *Id.* at 8, 871 N.E.2d at 23. Petitions filed under section 2-1401 "are essentially complaints inviting responsive pleadings." *Id.* The State may answer the petition, move to dismiss it, or ignore it. See generally *People v. Laugharn*, 233 Ill. 2d 318, 323, 909 N.E.2d 802, 805 (2009). If the State

fails to answer the petition, all well-pleaded facts are deemed admitted, rendering the petition ripe for adjudication. *Vincent*, 226 Ill. 2d at 9-10, 871 N.E.2d at 24. Just as trial courts may dismiss actions on the pleadings, trial courts may *sua sponte* dismiss section 2-1401 petitions with no responsive pleadings. *Id.* at 12, 871 N.E.2d at 25. Dismissals of section 2-1401 petitions are reviewed *de novo*. *Laugharn*, 233 Ill. 2d at 322, 909 N.E.2d at 804.

¶ 13 An individual's right to procedural due process is guaranteed by the United States and Illinois constitutions. See U.S. Const., amend. XIV, § 1; Ill. Const. 1970 art. I, § 2. This right entitles an individual to "the opportunity to be heard at a meaningful time and in a meaningful manner." *In re D.W.*, 214 Ill. 2d 289, 316, 827 N.E.2d 466, 484 (2005). "Due process is a flexible concept"; not all circumstances call for the same type of procedure. *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 201, 909 N.E.2d 783, 796 (2009). However, the fundamental right to the opportunity to be heard " 'has little reality or worth unless one is informed that the matter is pending.' " *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 28, 6 N.E.3d 162 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 399 U.S. 306, 314 (1950)). A petitioner's claim of the denial of due process is reviewed *de novo*. *In re Shirley M.*, 368 Ill. App. 3d 1187, 1190, 860 N.E.2d 353, 356 (2006).

¶ 14 On appeal, defendant argues, when the trial court considered the State's motion to dismiss and dismissed his section 2-1401 petition without giving him notice, he was denied due process. Defendant acknowledges a court may *sua sponte* dismiss a section 2-1401 petition but contends once the State moved to dismiss his petition, due process required he receive notice of the petition and a meaningful opportunity to respond before the court could act on the State's motion. In support, defendant primarily relies on two cases: *Marneigh v. Lane*, 87 Ill. App. 3d

852, 409 N.E.2d 319 (1980), and *People v. Gaines*, 335 Ill. App. 3d 292, 780 N.E.2d 822 (2002).

In *Marneigh*, the Fifth District found the inmate petitioner was denied due process when the State moved to dismiss the petitioner's *mandamus* petition without giving him notice of the motion to dismiss and the opportunity to respond. *Marneigh*, 87 Ill. App. 3d at 854, 409 N.E.2d at 320. In *Gaines*, the Fifth District held the petitioner's due process rights were violated when the trial court dismissed his section 2-1401 petition after hearing a motion by the State and not providing the petitioner time to respond. *Gaines*, 335 Ill. App. 3d at 296, 780 N.E.2d at 825.

¶ 15 The State argues the dismissal is proper under *Vincent*. The State emphasizes a section 2-1401 petitioner has no right to notice or a hearing before a *sua sponte* dismissal of his petition, and "[n]o authority requires a different result when it is the State which files such a motion." The State contends, to hold otherwise, would be contrary to the reasoning in *Vincent* and *Vincent's* abrogation of *Gaines*.

¶ 16 By asserting due process permits the procedure used in this case, the State essentially advocates the process of allowing clandestine motions to dismiss section 2-1401 petitions and subsequent dismissals based on those motions. Neither the holdings in *Vincent* nor its analysis authorize this process.

¶ 17 *Vincent's* holding only authorizes dismissals in section 2-1401 cases when no responsive pleading has been filed. The *Vincent* court held a trial court may properly dismiss a section 2-1401 petition *sua sponte* without (1) a responsive pleading, (2) notice of the impending ruling, and, (3) the opportunity to address the court before the ruling. *Vincent*, 226 Ill. 2d at 14, 871 N.E.2d at 26. In contrast, this case was not dismissed *sua sponte*; it was dismissed after the trial court received an improperly served responsive pleading, considered that pleading, and cited

the motion in its dismissal order. This distinction is significant. The absence of a responsive pleading to a section 2-1401 petition renders well-pleaded facts true. *Id.* at 10, 871 N.E.2d at 24. In the case of *sua sponte* dismissals without responsive pleadings, the complaint is judged on its face, resulting in no unfairness to the petitioner. The integrity of the proceedings is undermined, however, if the State responds with either an answer or a motion to dismiss, and the opposing party is not provided the opportunity to respond. The essence of the case changed from one in which the court views the factual allegations in the complaint as admitted, to one where the factual allegations may be disputed.

¶ 18 Contrary to the State's argument, *Vincent's* abrogation of *Gaines* does not extend to the Fifth District's decision the section 2-1401 petitioner was entitled to due process after the State filed a responsive pleading. In *Gaines*, the defendant filed a section 2-1401 petition alleging his codefendant provided false statements to the police. The trial court appointed counsel for defendant, and the State filed a "motion to reconsider," which the court treated like a motion to dismiss. *Gaines*, 335 Ill. App. 3d at 293, 780 N.E.2d at 823. In its motion, the State did not ask for a dispositive ruling, but argued, in effect, defendant's petition failed on the merits. See *Gaines*, 335 Ill. App. 3d at 294, 780 N.E.2d at 823. The trial court heard the motion the day it was filed. Defendant's counsel argued he had received no notice of the motion, but the hearing proceeded. *Id.* The court dismissed the petition, finding, "[b]ased on the State's representations about [the codefendant's] testimony," the statements were not newly discovered. *Id.* at 295, 780 N.E.2d at 824.

¶ 19 In resolving the case, the *Gaines* court initially rejected the State's argument the trial court could treat the section 2-1401 petition as a petition under the Post-Conviction Hearing

Act (725 ILCS 5/122-2.1(a)(2) (West 2000)) and summarily dismiss it. *Gaines*, 335 Ill. App. 3d at 295, 780 N.E.2d at 824-25. The court held "the summary dismissal procedure is applicable to postconviction petitions, not section 2-1401 petitions." *Gaines*, 335 Ill. App. 3d at 296, 780 N.E.2d at 825. The court also held summary dismissal was improper because the State responded to the motion and the procedure used in the case was "seriously flawed." *Gaines*, 335 Ill. App. 3d at 296, 780 N.E.2d at 825 ("We believe basic notions of fairness dictate that the defendant be afforded notice of, and an opportunity to respond to, any motion or responsive pleading by the State.").

¶ 20 In *Vincent*, our supreme court listed *Gaines* as an example of a decision in which the appellate court barred *sua sponte* dispositions of section 2-1401 petitions. In just one sentence, *Vincent* reports the *Gaines* court so held upon "reasoning that a petitioner must be given notice and the opportunity to respond (in the absence of any responsive pleading) before the trial court may rule." *Vincent*, 226 Ill. 2d at 6, 871 N.E.2d at 21. We are troubled by this summary of *Gaines* as the facts in *Gaines* show a responsive pleading was filed. See *Gaines*, 335 Ill. App. 3d at 296, 780 N.E.2d at 825. In fact, the *Gaines* court, after rejecting the State's argument the summary-dismissal procedures applied to section 2-1401 petitions, stated the summary dismissal would nevertheless have been inappropriate because a responsive pleading had been filed and the court considered it. See *Gaines*, 335 Ill. App. 3d at 296, 780 N.E.2d at 825 (citing *People v. Gaultney*, 174 Ill. 2d 410, 419-20, 675 N.E.2d 102, 107 (1996)). There was thus no "absence of any responsive pleading," as *Vincent* indicates. See *Vincent*, 226 Ill. 2d at 6, 871 N.E.2d at 21. The one sentence in *Vincent* also demonstrates the *Vincent* court addressed only that part of *Gaines* that rejected the State's request to treat the section 2-1401 petition as a

postconviction petition and affirm the "summary dismissal." The *Vincent* court did not address, much less reject, the part of *Gaines* that considered the fairness of the procedure that followed a *responsive pleading*.

¶ 21 For similar reasons, we reject the State's argument *Hennings v. Chandler*, 229 Ill. 2d 18, 32, 890 N.E.2d 920, 928 (2008), shows *Vincent* abrogates *Gaines* to permit the process used in this case. *Hennings*, involving a *habeas corpus* petition, does not examine *Gaines*. *Hennings*, without citation, simply states the *Gaines* court held a circuit court commits reversible error by dismissing a section 2-1401 petition without giving the defendant notice and an opportunity to respond to the circuit court's action, and *Vincent*'s holding contradicts that finding. *Hennings*, 229 Ill. 2d at 32, 890 N.E.2d at 928. *Hennings*, however, does not involve a situation where a responsive pleading was filed and ruled upon when no notice was provided.

¶ 22 Moreover, *Vincent*'s rationale does not authorize the dismissal of this section 2-1401 petition, which is "essentially [a] complaint[.]" *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23. *Vincent* observes section 2-1401 petitions are governed by the rules of civil procedure. *Id.* Complaints may be dismissed absent a responsive pleading. See *id.* at 10, 871 N.E.2d at 24 (citing *Mitchell v. Norman James Construction Co.*, 291 Ill. App. 3d 927, 932, 684 N.E.2d 872, 877 (1997)). It is well established, however, due process does not allow a court to grant a motion to dismiss a *complaint* without allowing the opposing party notice and a meaningful opportunity to be heard. See, e.g., *Berg v. Mid-America Industrial, Inc.*, 293 Ill. App. 3d 731, 735, 688 N.E.2d 699, 702 (1997) ("It would be unjust, unfair, and inequitable to allow the dismissal order to stand because, from the foregoing litany of events, it is unclear that plaintiffs received proper notice of the [hearing in which the trial court granted the motion to dismiss.]");

