2017 IL App (1st) 122929-UB

FOURTH DIVISION
April 6, 2017

No. 1-12-2929

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. 92 CR 1527
	)	
LAWRENCE RHODEN,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.[*]
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Dismissal of section 2-1401 petition reversed, and matter remanded for further proceedings where the petition was prematurely dismissed.

¶ 2 Defendant Lawrence Rhoden appeals the *sua sponte* dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) by the circuit court of Cook County. He maintains that the dismissal was

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[*]Justice Palmer delivered the original judgment in this case. Following Justice Palmer's retirement from the court, Justice Burke has been substituted as the authoring judge.

premature because the petition was not properly served on the State. In the alternative, he maintains that the court erred in dismissing his petition less than 30 days after it was filed. On October 31, 2014, this court issued an order vacating the circuit court's judgment and remanding the case for further proceedings. *People v. Rhoden*, 2014 IL App (1st) 122929-U. We have since vacated that decision pursuant to the supreme court's order directing us to reconsider in light of its decision in *People v. Matthews*, 2016 IL 118114. *People v. Rhoden*, No. 118620 (Jan. 25, 2017) (supervisory order). After considering the supreme court's decision in *Matthews*, we find that a different result is not warranted in this case.

¶ 3 Defendant is currently serving the sentence of natural life imprisonment that was imposed on his 1992 bench convictions for the first degree murder of his common-law wife and her 13-year-old son. That judgment was affirmed on direct appeal. *People v. Rhoden*, No. 1-93-0484 (1995) (unpublished order under Supreme Court Rule 23). This court also affirmed defendant's numerous unsuccessful collateral pleadings, which included, *inter alia*, post-conviction petitions and section 2-1401 petitions for relief from judgment. *People v. Rhoden*, Nos. 1-97-0523 (1997), 1-98-2948 (1999), 1-99-0207 (2000), 1-00-2496 (2001), 1-05-2079 (2006), 1-07-2150 (2009), 1-07-2568 (2009) (unpublished orders under Supreme Court Rule 23).

¶ 4 In November 2011, defendant filed a *pro se* section 2-1401 petition. The proof/certificate of service relating to that petition reflects that on November 1, 2011, defendant placed it in the prison mail system, properly addressed to the clerk of the circuit court and the State for mailing through the "United States Postal Service." The petition was file stamped November 4, 2011, and docketed on November 15, 2011.

¶ 5 Defendant alleged in this petition that the probable cause determination in the "*Gerstein*[1] court" was void because subject matter jurisdiction was never acquired where the State chose to charge him with a felony by complaint in the municipal court, which did not have jurisdiction to adjudicate a felony. Defendant also alleged that the "indictment" was void for failure to obtain it within 48 hours of his arrest and present it to him. He claimed that his appellate counsel was ineffective for failing to argue that his post-conviction judge was biased. Defendant further complained of this court's decisions in his prior appeals as well as the circuit court's prior orders denying him relief. He requested immediate release from custody, and a new trial.

¶ 6 As part of his petition defendant included a request for admission of facts by the State, and also filed a motion for substitution of judge. Defendant subsequently filed additional requests for admission of facts and asked that they be incorporated into his petition for relief from judgment. On January 23, 2012, the circuit court denied defendant's motion for the State to admit facts, and defendant appealed that order. This court subsequently allowed defendant's request to dismiss that appeal. *People v. Rhoden*, No. 1-12-0794 (2012) (dispositional order).

¶ 7 In August 2012, defendant filed a *pro se* "addendum to supplemental petition for relief from judgment," which "augments the issues raised in his previously filed *pro se* petition and in his supplemental petition." The proof/certificate of service indicates that on August 6, 2012, defendant placed a copy of this addendum in the prison mail system properly addressed to the clerk of the circuit court and the State through the "United States Postal Service." The addendum

[1] A *Gerstein* hearing, mandated by the Fourth Amendment, affords a defendant arrested without a warrant a prompt judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. *People v. Galan*, 229 Ill. 2d 484, 506 (2008).

was received in the circuit court on August 10, 2012, and on August 21, 2012, it was entered into the computer system and file stamped.

¶ 8 In the addendum, defendant alleged that the trial court was under the erroneous belief that it had no alternative but to sentence him to natural life imprisonment, and failed to adhere to the statutory sentencing requirements. He further alleged that the legislature, in requiring mandatory natural life imprisonment, stripped the judiciary of its sentencing discretion in violation of the separation of powers. He maintained that the sentencing statute, Ill. Rev. Stat., 1972 Supp., ch. 38, sec. 1005-8-1(c), as written, precludes consideration of mitigating factors, and that his sentence of natural life imprisonment was therefore unconstitutional and void.

¶ 9 On August 28, 2012, the circuit court, with the State present, denied defendant's 2-1401 petition. In doing so, the court solely referenced defendant's addendum claim that his sentence was unconstitutional, and noted that this issue had been resolved by the supreme court. Accordingly, the court found defendant's petition without merit.

¶ 10 Defendant then filed a notice of appeal from the order of "December 16, 1992," which is the date of his conviction. After the State noted this discrepancy in its response brief, we allowed defendant leave to file an amended notice of appeal, in which he indicated that he is appealing the August 28, 2012, denial of his section 2-1401 petition.

¶ 11 In this court, defendant contends that the circuit court's *sua sponte* dismissal of his section 2-1401 petition was premature because the petition was not properly served on the State. He maintains that he sent both the petition and addendum through regular mail, but that service cannot be effectuated in that manner under Supreme Court Rule 105(b) (eff. Jan. 1, 1989). In the

alternative, defendant claims that the *sua sponte* dismissal was erroneous because it was entered less than 30 days after the petition was filed with the court.

¶ 12 The State responds that this court has no jurisdiction to consider either of these arguments. The State maintains that defendant abandoned his original section 2-1401 petition filed in November 2011, because he never obtained a ruling on it, and instead, filed a notice of appeal. The State further maintains that defendant did not request leave of court to file an addendum to his petition, that the record is incomplete because it does not contain the supplemental petition which was ostensibly the basis for the addendum, and that the addendum did not restart a 30-day response period for the State.

¶ 13 Initially, we note that, as amended, defendant is appealing the *sua sponte* dismissal order entered on August 28, 2012, where the circuit court solely addressed the contentions in the addendum and made no reference to the original petition or the "supplemental petition" noted therein. In doing so, defendant assumes that the dismissal pertained to both the original petition and to the addendum which he asked the court to incorporate therein.

¶ 14 The State responds that defendant abandoned the original petition when he filed notice of appeal in 2012, prior to a ruling on his section 2-1401 petition, and there is no indication in the record that the circuit court ever saw that petition, much less dismissed it. The State points out that failure to rule on a motion does not constitute a denial of the motion (*Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622, 628 (2008)) and that defendant's failure to bring his petition to the attention of the court constituted an abandonment. Defendant replies that his original appeal referred only to the admission of facts and that he should not be faulted for the

circuit court's failure to address the original petition when he asked the court to incorporate the addendum into it.

¶ 15 The record shows that defendant clearly indicated in the addendum that he was augmenting the issues raised in his original and "supplemental" petitions, and, as such, was not abandoning them with the filing of the notice of appeal in 2012. *Cf. People v. Pinkonsly*, 207 Ill. 2d 555, 566-67 (2003) (where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn); *Tunca v. Painter*, 2012 IL App (1st) 093384, ¶¶ 28-29 (where amended complaint does not incorporate, reallege or otherwise refer to the counts in the original complaint, it is abandoned for purposes of trial and review). Through this action, we find that defendant did not abandon his prior filings (*Childs v. Pinnacle Health Care, LLC*, 399 Ill. App. 3d 167, 176 (2010); *Silver Fox Limousine v. City of Chicago*, 306 Ill. App. 3d 103, 105-06 (1999)), and we reject the State's jurisdictional challenge based on that assertion.

¶ 16 The State, however, further contends that defendant never obtained leave of court to file his addendum or supplemental pleadings, and, accordingly, it did not create a new 30-day response time. There is no indication in the record that defendant sought leave to file any of the pleadings mailed to the circuit court after his initial section 2-1401 petition was filed. However, under the reasoning expressed in *People v. Tidwell*, 236 Ill. 2d 150, 160 (2010), and *People v. Collier*, 387 Ill. App. 3d 630, 635-36 (2008), regarding leave to file successive post-conviction petitions, we believe that in ruling on the addendum before it, the circuit court implicitly allowed defendant leave to file it.

¶ 17 The dispositive issue, however, is whether the petition was ripe for adjudication. Defendant contends that his section 2-1401 petition was prematurely dismissed because the State was not properly served, and the 30-day period for the State to respond did not commence because he placed his petition in the regular mail. Our review is *de novo*. *People v. Nitz*, 2012 IL App (2d) 091165, ¶ 9.

¶ 18 Section 2-1401 establishes a comprehensive procedure for allowing the vacatur of final judgments more than 30 days after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Once the 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). Service of a petition under section 2-1401 must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which mandates service either by summons, prepaid certified or registered mail, or publication. *Matthews*, 2016 IL 118114, ¶ 8.

¶ 19 The certificate/proof of service attached to defendant's original 2-1401 petition reflects that he placed this petition in the prison mail system on November 1, 2011, to the clerk of the circuit court and the State through the "United States Postal Service," *i.e.* regular mail. When he subsequently filed the addendum at issue on August 6, 2012, he followed the same procedure. Neither the section 2-1401 petition nor the addendum were sent by registered or certified mail, as required by the rule, nor by publication or summons. The court then *sua sponte* dismissed defendant's petition on August 28, 2012.

¶ 20 In our prior order, we found that the circuit court prematurely dismissed defendant's petition where the State received actual notice of the petition on the same day the petition was dismissed. *Rhoden*, 2014 IL App (1st) 122929-U, ¶ 25. We reasoned that under the holding of

People v. Ocon, 2014 IL App (1st) 120912, although defendant did not comply with the service requirements of Rule 105, the State had actual notice of the petition where the record showed that an assistant State's Attorney was present in court when the petition was docketed. *Id.* ¶¶ 21, 23. We thus found that the court prematurely dismissed defendant's petition where less than 30 days passed between when the State received actual notice of the petition and when the petition was dismissed. *Rhoden*, 2014 IL App (1st) 122929-U, ¶ 25. We now reconsider that finding in light of the supreme court's holding in *Matthews*.

¶ 21 In *Matthews*, as here, defendant mailed his section 2-1401 petition via regular mail and the court *sua sponte* dismissed the petition on the merits. *Matthews*, 2016 IL 118114, ¶ 4. On appeal, defendant argued that the dismissal was premature because he never properly served the State and thus the 30-day period for the State to file a response had not yet expired. *Id.* ¶ 5. The supreme court found that defendant was estopped from challenging the circuit court's order based on his own failure to properly serve the State and that he lacked standing to challenge the validity of the dismissal based upon lack of personal jurisdiction. *Id.* ¶ 23. The court further observed that by filing the certificate of service, "defendant asked the court to proceed as through the State had been adequately notified of the proceedings." *Id.* ¶ 14.

¶ 22 In this case, defendant mailed the addendum to his original petition on August 6, 2012. On August 28, 2012, without the State filing a response, the circuit court *sua sponte* dismissed his petition. In *Vincent*, the supreme court held that a trial court may *sua sponte* dismiss a section 2-1401 petition, and the State's failure to answer a defendant's petition amounts to an admission of all well-pleaded facts. *Vincent*, 226 Ill. 2d at 9-14. The court further held that the State's failure to answer the petition renders the case ripe for adjudication. *Vincent*, 226 Ill. 2d at 9-10.

In *Laugharn*, our supreme court qualified the holding in *Vincent*, finding that a trial court may only properly *sua sponte* dismiss a section 2-1401 petition 30 days from the date of service. *Laugharn*, 233 Ill. 2d at 323-24. Therefore, in accordance with *Vincent* and *Laugharn*, we look to the date of service to determine whether the trial court properly *sua sponte* dismissed defendant's section 2-1401 petition.

¶ 23 In our prior order, we determined that the 30-day period for the State to respond began running from the date that the ASA was present in court and the State received actual notice of the petition. Under the reasoning of *Matthews*, we find that the 30-day period began running from the date defendant filed the certificate of service and "asked the court to proceed as through the State had been adequately notified of the proceedings." *Id.* ¶ 14. Here, defendant mailed the certificate of service with the addendum on August 6, 2012, it was received in the circuit court on August 10, 2012, and on August 21, 2012, it was entered into the computer system and file stamped. The court then *sua sponte* dismissed the petition on August 28, 2012, less than 30 days after the date of service.[2]

¶ 24 The only exceptions to the 30-day requirement are a responsive pleading filed by the State (*People v. Zimmerman*, 2016 IL App (2d) 130350, ¶ 16) or an express indication on the record of the State's intent to waive the time allotted for a response and consent to the trial court's early decision on the merits—silence will not suffice (see, *e.g.*, *People v. Gray*, 2011 IL App

[2] This court has recognized that the filing date of a section 2-1401 petition is the date it is received by the circuit court clerk. See *Wilson v. Brant*, 374 Ill. App. 3d 306, 310-311 (2007) (citing *Wilkins v. Dellenback*, 149 Ill. App. 3d 549 (1986) and *Kelly v. Mazzie*, 207 Ill. App. 3d 251 (1990)); but *cf.*, *People v. Aldridge*, 219 Ill. App. 3d 520, 522-23 (1991) (declining to apply the reasoning in *Kelly* and *Wilkins*, instead finding the date of mailing was the service date for defendant's motion to reduce his sentence). In this case, it is immaterial whether we consider the date of filing to be the date of mailing or the date the petition was received by the circuit court clerk because either date is less than 30 days from the date of the circuit court's dismissal.

(1st) 091689, ¶ 22). By contrast, in *Matthews*, the circuit court entered its order dismissing defendant's section 2-1401 petition more than 30 days after the date of service. *Matthews*, 2016 IL 118114, ¶ 4. Thus, the concerns regarding timeliness that are present in this case were not present in *Matthews*.

¶ 25 In light of *Matthews*, we find that the State received notice of defendant's petition when it was received by the circuit court on August 10, 2012, rather than when the record shows that an assistant State's Attorney was present in court on August 28, 2012, and the State received actual notice of the petition. This distinction, however, does not change the result in this case because, as discussed, fewer than 30 days elapsed between the date of service and when the petition was dismissed by the circuit court. Therefore, because the court's dismissal in this case was premature and the record makes clear that neither of the two exceptions to the 30-day requirement were present, we must reverse the circuit court's dismissal.

¶ 26 In light of the forgoing, we reverse the dismissal of defendant's section 2-1401 petition as premature, and remand for further proceedings.

¶ 27 Reversed and remanded.