

2018 IL App (1st) 161355-U

No. 1-16-1355

August 21, 2018

Second Division

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 20237
)	
PRESTON COOPER,)	Honorable
)	James N. Karahalios,
Defendant-Appellant.)	Judge, presiding.

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

ORDER

¶ 1 *Held:* The circuit court erred in *sua sponte* dismissing defendant's section 2-1401 petition before the required 30-day waiting period. Defendant's mittimus to be corrected.

¶ 2 Defendant appeals from the circuit court's *sua sponte* dismissal of his petition for relief from judgment (735 ILCS 5/2-1401 (West 2016)). He argues the circuit court erred in dismissing his petition because it was not yet ripe for adjudication, as the 30-day waiting period for the State to answer or otherwise plead had not expired. Further, defendant argues this court should correct

his mittimus to reflect a single count of first degree murder, rather than the two counts currently listed. We agree with defendant.

¶ 3 Following a jury trial in 2008, defendant was convicted of two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2006)) and concealment of a homicidal death (720 ILCS 5/9-3.1(a) (West 2006)), for shooting Jesse Beskow to death and concealing the homicide. The court merged the murder convictions, sentenced defendant to 50 years' imprisonment on one murder count (25 years plus a 25-year sentencing enhancement for discharging a firearm) and a consecutive 3-year term on the concealment count. This court upheld his convictions and sentences on appeal. *People v. Cooper*, 2014 IL App (1st) 100320-U.

¶ 4 On April 21, 2016, defendant filed a *pro se* petition for relief pursuant to Section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2016)). Defendant's petition alleged one of the State's witnesses lied on the stand, and another recanted her testimony. Affidavits from these witnesses were attached to the petition.

¶ 5 The circuit court dismissed the petition as untimely on April 28, 2016. The parties agree the dismissal was *sua sponte* and not in open court. Defendant asserts this dismissal was premature and must be vacated. The State correctly agrees.

¶ 6 ANALYSIS

¶ 7 A circuit court may *sua sponte* dismiss a section 2-1401 petition without notice or an opportunity to be heard when it does not, as a matter of law, warrant relief. *People v. Vincent*, 226 Ill. 2d 1, 9-10 (2007). However, *sua sponte* dismissal is only appropriate if the petition is "ripe for adjudication." *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009).

¶ 8 Pursuant to Illinois Supreme Court Rule 106, service of a section 2-1401 petition must comply with Illinois Supreme Court Rule 105. *Id.* Rule 105 states that, once a party files a petition for relief, the opposing party has 30 days to answer the petition or otherwise plead. *Id.* Section 2-1401(b) requires “[a]ll parties to the petition be notified as provided by rule.” 735 ILCS 5/2-1401(b) (West 2016). Accordingly, a court cannot *sua sponte* dismiss a defendant’s section 2-1401 petition until the State has had 30 days to respond. *Laugharn*, 233 Ill. 2d at 323.

¶ 9 The only exceptions to the 30-day requirement are when a responsive pleading was filed by the State or an 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. *People v. Dalton*, 2017 IL App (3d) 150213, ¶ 35. If the record does not affirmatively state when the petition was served on the State, the 30-day responding period is calculated from the date of filing. See *People v. Carter*, 2015 IL 117709, ¶ 24. We review the dismissal of a section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 10 Here, defendant and the State agree the trial court erred in failing to wait 30 days after the filing of the petition before ruling on it. The record does not show when defendant mailed his *pro se* petition or when the State received notice of it. However, a date stamp on the petition shows it was filed on April 21, 2016, with the Cook County Clerk’s office. Thus, the 30-day period began on April 21, 2016. See *Carter*, 2015 IL 117709, ¶ 24.

¶ 11 The circuit court dismissed the petition as untimely seven days later, on April 28, 2016. There are no records of any proceeding in which the court dismissed the petition, and nothing shows the State waived the 30-day timing requirement. Therefore, fewer than 30 days passed between the filing of the petition on April 21, 2016, and the circuit court’s *sua sponte* dismissal

on April 28, 2016. We agree with the parties that the circuit court dismissed the petition before it was ripe for adjudication. Accordingly, we vacate the circuit court's judgment and remand for further proceedings. See *Laugharn*, 233 Ill. 2d at 323-24 (vacating and remanding where the circuit court *sua sponte* dismissed a Section 2-1401 petition before the conclusion of the 30-day period).

¶ 12 Next, defendant argues his mittimus should be corrected to accurately reflect that he was convicted of one count of first-degree murder - - not two counts. The State correctly concedes that the mittimus should be corrected to reflect defendant was sentenced on one count of first degree murder.

¶ 13 The jury found defendant guilty of two counts of first degree murder – one count alleging intentional murder (Count 5) and the other alleging he knew his conduct created a strong probability of death or great bodily harm (Count 6).¹ Where, as here, only one person was murdered and multiple murder convictions are obtained arising out of that same single act, sentence must be imposed on the most serious charge. *People v. Cardona*, 158 Ill. 2d 403, 411 (1994). The court shall merge the two first degree murder convictions and sentence defendant to 50 years' imprisonment on one murder count.

¶ 14 However, the mittimus reflects convictions and 50-year sentences on both first degree murder counts. The mittimus does accurately state that the court merged the two murder counts. Nevertheless, merged counts do not typically appear on a mittimus as they may cause confusion. Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), this court may correct the mittimus without remanding the cause to the trial court. *People v. Brown*, 2015 IL App (1st)

¹ The jury also found defendant guilty of concealment of a homicidal death. The mittimus correctly reflects the court's three-year sentence for this offense.

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132046, ¶ 68. Therefore, because there is ambiguity in the mittimus, we order the mittimus to be corrected by striking reference to the conviction and sentence on Count 6 for knowing murder, the less serious of the two murder offenses. See *Cardona*, 158 Ill. 2d at 412 (intentional murder is a more serious offense than knowing murder).

¶ 15

CONCLUSION

¶ 16 For the reasons explained above, we vacate the judgment of the circuit court dismissing the section 2-1401 petition, remand for further proceedings, and order that the defendant's mittimus be corrected.

¶ 17 Vacated, remanded, and mittimus corrected.