

No. 1-12-2939

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 6585
)	
CURTIS SHIELDS,)	Honorable
)	Timothy J. Joyce,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Where the record affirmatively shows that notice of the defendant's section 2-1401 petition was completed by regular mail, the petition was not properly served on the State and therefore could not be dismissed by the circuit court *sua sponte*.
- ¶ 2 Defendant Curtis Shields appeals from the circuit court's *sua sponte* dismissal of his petition for relief from judgment filed under section 2-1401 of the Code of Civil Procedure (the

Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends this case should be remanded for further proceedings because the State was not served with notice of his petition and the petition was improperly dismissed. Because we agree that the circuit court erred in dismissing defendant's petition, we vacate the court's judgment and remand for further proceedings.

¶ 3 Following a jury trial in 2010, defendant was convicted of two counts of first degree murder and was sentenced to natural life imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Shields*, 2013 IL App (1st) 102739-U. The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Shields*, No. 116869 (Jan. 29, 2014).

¶ 4 During the pendency of defendant's direct appeal, he filed a section 2-1401 petition to vacate the judgment, alleging that his convictions were based on false testimony. Defendant's petition was dated February 2, 2012, and was file-stamped and docketed in the circuit court on February 14, 2012. The proof of service attached to defendant's petition states that the documents were placed "in the institutional mail at Menard Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service." The proof of service stated that the documents were mailed to Dorothy Brown, clerk of the Circuit Court of Cook County, and Anita Alvarez, the State's Attorney of Cook County, at their business addresses.

¶ 5 On July 17, 2012, the circuit court addressed defendant's section 2-1401 petition. The cover page of the transcript of proceedings for that day reflects that the judge and a court reporter were the only persons present. According to that transcript, the court stated: "Sheet 1, Curtis Shields, 2-1401 petition, order of Court 8-21-12. Mr. Shields is in the Department of Corrections."

¶ 6 The court next considered defendant's petition on August 24, 2012. The report of proceedings for that date indicates that, as with the previous court date, only the judge and a court reporter were present. In denying defendant's petition *sua sponte*, the court stated that a section 2-1401 petition is not intended to "relitigate the question of reasonable doubt." The court ordered the clerk to send defendant an order advising him of the denial of his petition. Defendant filed a *pro se* notice of appeal of that ruling on September 11, 2012.

¶ 7 On appeal, defendant contends 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, and the State did not waive proper service or appear in court to answer the petition. Defendant asserts his case should be remanded to the circuit court for further proceedings or, in the alternative, the court's order should be modified to reflect that the petition was dismissed without prejudice to allow him to file a new petition under section 2-1401.

¶ 8 This court's review of the dismissal of a section 2-1401 petition is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007). Section 2-1401 allows for relief from final judgments more than 30 days but not later than 2 years after their entry. 735 ILCS 5/2-1401 (West 2012).

¶ 9 All parties to a section 2-1401 petition must be notified as provided by rule. 735 ILCS 5/2-1401(b) (West 2012). The applicable rule is Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which provides that notice of the petition shall be directed to the party and must be served either by summons, by prepaid certified or registered mail, or by publication. See also Ill. S. Ct. R. 106 (eff. Aug. 1, 1985) (notice of the filing of petitions under section 2-1401 shall be given by the methods provided in Rule 105). Where the State fails to answer a petition, the case is not ripe for adjudication until 30 days have passed from the time of service. *People v. Laugharn*, 233 Ill.

2d 318, 323 (2009). Therefore, a trial court may *sua sponte* dismiss a section 2-1401 petition only when more than 30 days have elapsed since the date of service. *Id.*

¶ 10 In this case, the proof of service attached to defendant's petition indicated the documents were placed "in the institutional mail at Menard Correctional Center" for "mailing through the United States Postal Service." The proof of service demonstrates that defendant attempted service by regular mail. Therefore, defendant did not properly serve the State with notice of his section 2-1401 petition under one of the methods set out in Rule 105.

¶ 11 We will not presume, as the State suggests, that service of defendant's 2-1401 petition *may have* properly been made by registered or certified mail because the prison mail system permits those types of mail. The unrefuted record establishes that defendant attempted service upon the State in this case via regular mail, which is not one of the three means of notification allowed by Rule 105. Because a case involving a section 2-1401 petition is only ripe for adjudication when 30 days have passed since the date of service, the circuit court could not dismiss the petition *sua sponte* where service was never completed. See *Laugharn*, 233 Ill. 2d at 323.

¶ 12 The State nevertheless contends this court should affirm the dismissal of defendant's petition because it did not object to the service as defective or claim that a copy of defendant's petition was not received. The State points out that defendant seeks additional review of his petition based on his own deficient service. The State further contends that if this case were remanded, the petition would "languish forever on the docket" without a requirement that the State address it.

¶ 13 This court recently addressed these circumstances in *People v. Carter*, 2014 IL App (1st) 122613. There, the circuit court dismissed *sua sponte* the defendant's section 2-1401 petition with no input from the State, although a prosecutor was present in court at the time of dismissal. *Id.* at ¶ 15-16. This court determined the defendant's petition could not be properly dismissed without a showing that service was achieved or that the State had waived proper service. *Id.* at ¶ 25. The court held the correct remedy was to vacate the dismissal of the defendant's petition and remand for further proceedings. *Id.* at ¶ 26, citing *People v. Prado*, 2012 IL App (2d) 110767.

¶ 14 Upon remand, the prosecutor will have the opportunity to indicate on the record whether notice of the petition had been served and whether the State intended to affirmatively waive the required service. *Carter*, 2014 IL App (1st) 122613, at ¶ 24; see also *Powell v. Lewellyn*, 2012 IL (4th) 100168, ¶ 24 (case will not remain stagnant on court's docket because the defendant can have the State served on remand in order to continue with proceedings).

¶ 15 We also note that since the parties submitted their briefs in this case, the Third District held that a defendant lacked standing to raise the issue of his own improper service of notice of his section 2-1401 petition via regular mail. *People v. Kuhn*, 2014 IL App (3d) 130092 (August 5, 2014), at ¶ 16. We do not find that case comparable to the facts here. In *Kuhn*, the State appeared at two hearings on motions to withdraw the defendant's guilty plea after the defendant's section 2-1401 petition had been file-stamped. The Third District held that the "notice provided to the State was sufficient to allow the State to determine how it wanted to proceed" and the State did not file a responsive pleading or object to the improper service after its representative had participated in two court proceedings. *Id.* at ¶ 17. Here, there is no indication in the record that the State was informed that defendant had filed a section 2-1401 petition.

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¶ 16 Accordingly, the circuit court's order dismissing defendant's petition is vacated, and this case is remanded for further proceedings.

¶ 17 Judgment vacated; cause remanded for further proceedings.