

2014 IL App (2d) 121129-U
No. 2-12-1129
Order filed March 19, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 94-CF-610
)	
JAMES E. BLACK,)	Honorable
)	Timothy Q. Sheldon,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in *sua sponte* dismissing on the merits defendant's improperly served section 2-1401 petition; rather than modify the judgment to a dismissal without prejudice, which would be premature, we simply vacated the dismissal and remanded for further proceedings, specifically for proper service or for a proper dismissal for want of prosecution or for failure to exercise reasonable diligence in obtaining service.

¶ 2 Defendant, James E. Black, appeals the trial court's *sua sponte* dismissal on the merits of his petition for relief from judgment filed under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). Applying *People v. Prado*, 2012 IL App (2d) 110767, we vacate and remand for further proceedings.

¶ 3

I. BACKGROUND

¶ 4 On November 9, 1995, defendant pleaded guilty to the offense of home invasion (720 ILCS 5/12-11(a)(1) (West 1994)). He was sentenced to a 40-year extended term of incarceration, which was reduced to 34 years after defendant moved to reconsider the sentence. On June 14, 2012, defendant filed a petition for relief from judgment under section 2-1401, arguing that he was improperly sentenced in excess of the maximum term authorized. According to his proof of service, defendant mailed his petition to the trial court but did not serve the State's Attorney. The State did not respond and, on September 4, 2012, the trial court dismissed the petition on the merits. Defendant's motion to reconsider was denied, and he appeals.

¶ 5

II. ANALYSIS

¶ 6 Defendant argues that, because the petition was not properly served, under *Prado* the dismissal was premature and the cause must be remanded for further proceedings. The State agrees that the petition was not properly served, but argues that we should apply *People v. Nitz*, 2012 IL App (2d) 091165, and modify the judgment to show that it was without prejudice. We apply *Prado*. Thus, we vacate the dismissal and remand for further proceedings.

¶ 7 “Section 2-1401 provides a comprehensive civil procedure that allows for the vacatur of a final judgment older than 30 days.” *Prado*, 2012 IL App (2d) 110767, ¶ 6. “The petition must be filed not later than two years following the entry of judgment, excluding time during which the petitioner is under a legal disability or duress or the ground for relief is fraudulently concealed.” *Id.* (quoting *Nitz*, 2012 IL App (2d) 091165, ¶ 9). “While the petition must be filed in the same proceeding in which the judgment was entered, it is not a continuation of that proceeding.” *Id.*; see 735 ILCS 5/2-1401(b) (West 2012). “The petition must be supported by affidavit or other appropriate showing as to matters not contained in the record.” *Nitz*, 2012 IL

App (2d) 091165, ¶ 9 (citing 735 ILCS 5/2-1401(b) (West 2008)). “All parties to the petition shall be notified as provided by rule.” *Id.* (citing 735 ILCS 5/2-1401(b) (West 2008)). “The rule referred to in section 2-1401(b) is Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985), which provides that notice of the filing of a section 2-1401 petition shall be given by the same methods provided in Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989) for giving notice of additional relief to parties in default.” *Id.* “Under Rule 105, the notice shall be directed to the party and must be served either by summons, by prepaid certified or registered mail, or by publication.” *Prado*, 2012 IL App (2d) 110767, ¶ 6 (citing Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989)). “The notice must state that a judgment by default may be taken against the party unless he files an answer or otherwise files an appearance within 30 days after service.” *Nitz*, 2012 IL App (2d) 091165, ¶ 9 (citing Ill. S. Ct. R. 105 (eff. Jan. 1, 1989)). “[B]ecause the trial court dismissed the petition based on the pleading alone, our review is *de novo*.” *Id.*

¶ 8 In *Nitz*, the defendant’s proof of service showed that he mailed his section 2-1401 petition to the circuit clerk for filing, but there was no proof of service on the State. *Id.* ¶ 5. The trial court *sua sponte* dismissed the petition on the merits. *Id.* ¶ 6. A panel of this court reasoned that the dismissal was proper, because a failure to give notice results in a deficient pleading. *Id.* ¶ 13. However, dismissal on the merits was premature, because the 30 days for the State to answer had not yet commenced. *Id.* ¶ 12. The panel then determined that a remand for further proceedings would be meaningless, reasoning that no further proceedings would occur, because the State would never answer or move to dismiss, and the court would be unable to take action while the case remained on its docket permanently. *Id.* Thus, the panel concluded that the appropriate action was to dismiss without prejudice for a deficiency in complying with

section 2-1401. *Id.* ¶ 13. Accordingly, it affirmed the dismissal, but modified the order to reflect that the dismissal was without prejudice. *Id.* ¶ 15.

¶ 9 In *Prado*, however, we agreed with *Nitz* that a dismissal on the merits for improper service was premature, but disagreed that a dismissal without prejudice was the proper disposition. Instead, we retreated from that portion of *Nitz* and agreed with a recent Fourth District opinion, which noted that remanding for further proceedings would not be meaningless or result in the case being permanently set on the trial court’s docket. *Powell v. Lewellyn*, 2012 IL App (4th) 110168, ¶ 14. In particular, we noted that, “[c]ontrary to the determination in *Nitz*, if defendant wishes to have his case heard, he can promptly serve the State.” *Prado*, 2012 IL App (2d) 110767, ¶ 9. “Otherwise, the trial court has the power to dismiss the case for want of prosecution, after a reasonable period of time.” *Id.* “Further, the action may be dismissed under Illinois Supreme Court Rule 103(b) (eff. July 1, 2007) if defendant fails to exercise reasonable diligence in serving the State.” *Id.* “In any event, an immediate, *sua sponte* dismissal, even without prejudice, is premature.” *Id.* Thus, we held that the appropriate disposition is to vacate and remand for further proceedings. *Id.* The Fifth District has also followed the rule established in *Lewellyn*. *People v. Miller*, 2012 IL App (5th) 110201, ¶¶ 13-18.

¶ 10 We see no reason to retreat from the rule set in *Prado* and to return to the view in *Nitz*, especially given that the rule is now followed not only in this district, but in others as well. Accordingly, we apply *Prado*.

¶ 11 Here, the trial court’s *sua sponte* dismissal of the petition was premature. Under *Prado*, the appropriate action is to vacate and remand for further proceedings.

¶ 12

III. CONCLUSION

¶ 13 *Prado* applies. Accordingly, we vacate the judgment of the circuit court of Kane County and remand for further proceedings.

¶ 14 Vacated in part.