

No. 1-13-1612

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 00 CR 23331
	)	
JULIO CHAVEZ,	)	Honorable
	)	Ellen Mandeltort,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE MASON delivered the judgment of the court.  
Justice Lavin and Justice Hyman concurred in the judgment.

**O R D E R**

¶ 1 **Held:** Trial court's *sua sponte* dismissal of defendant's section 2-1401 petition affirmed where the petition was ripe for adjudication because more than 30 days had elapsed between the time the State received actual notice of the petition and the dismissal.

¶ 2 Defendant Julio Chavez appeals from the circuit court of Cook County's *sua sponte* dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). Defendant contends that due to his failure to properly serve the State with notice of his petition, the trial court's *sua sponte* dismissal of the

petition was premature and improper. He thus requests that we vacate the dismissal of his petition and remand this case for further proceedings, or, in the alternative, modify the dismissal order to reflect a dismissal without prejudice. We affirm.

¶ 3 The record shows that on September 27, 2001, defendant pled guilty to predatory criminal sexual assault of a child, and was sentenced to a 20-year term of imprisonment. Defendant did not file a motion to withdraw his guilty plea or otherwise attempt to perfect an appeal of the judgment entered on his plea conviction.

¶ 4 On February 28, 2013, more than 11 years after judgment was entered on his guilty plea, defendant mailed a section 2-1401 petition seeking relief from judgment, in which he alleged that his term of mandatory supervised release (MSR) was unconstitutional and void, thereby rendering his prison sentence void. As reflected by his "Notice of Filing," defendant mailed his original petition, along with two copies, to the clerk of the circuit court in Rolling Meadows. The notice of filing does not indicate that defendant served the State with notice of his petition.

¶ 5 The record shows that defendant's petition was docketed for review with the trial court on March 12, 2013, and that Assistant State's Attorney (ASA) Kristen Piper appeared on behalf of the State that day, but did not speak during the proceedings. On that date, the trial judge to whom defendant's petition had been assigned stated that the matter regarding defendant's *pro se* 2-1401 petition would be continued to April 19, 2013. On April 19, the trial court dismissed defendant's 2-1401 petition, finding that it was untimely and that his claims lacked merit. The record shows that ASA Michael Gerber appeared on behalf of the State that day, but did not speak during the proceedings.

¶ 6 On April 15, 2013, defendant mailed a motion for default judgment on his 2-1401 petition to the clerk of the court in Rolling Meadows, as well as to the State at that same address. On April 30, 2013, the trial court struck defendant's motion for default judgment as moot in light of its prior order dismissing defendant's 2-1401 petition.

¶ 7 Defendant now appeals the trial court's *sua sponte* dismissal of his section 2-1401 petition. Defendant contends that the trial court's dismissal was premature due to his failure to properly serve the State with notice of his petition. We review the dismissal of a section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 8 Pursuant to section 2-1401 of the Code, "[a]ll parties to the petition shall be notified as provided by rule" (735 ILCS 5/2-1401 (West 2012)), and the applicable rule provides that notice of the filing of a section 2-1401 petition "shall be given by the same methods provided in Rule 105." S. Ct. R. 106 (eff. Aug 1, 1985). In turn, Rule 105 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. S. Ct. R. 105(b) (eff. Jan 1, 1989). Where the State has notice and fails to answer the petition within 30 days, it results in an admission of all well-pleaded facts, thereby rendering the petition ripe for adjudication. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009), citing *Vincent*, 226 Ill. 2d at 10. Accordingly, a trial court may dismiss *sua sponte* a section 2-1401 petition only when more than 30 days has elapsed since the date of service. *Id.*

¶ 9 Defendant does not address the merits of his petition on appeal but asserts only that due to his failure to serve the State, the petition was improperly dismissed. We question defendant's standing to pursue this issue, particularly given that the party he failed to serve asserts here that

notwithstanding the lack of service, it had actual notice of the petition. See *People v. Kuhn*, 2014 IL App (3d) 130092, ¶ 16 (finding that "defendant does not have standing to raise an issue regarding the State's receipt of service."). But even assuming defendant is entitled to raise this issue, we find that on the facts of this case, his argument fails.

¶ 10 The State contends that it had actual notice of defendant's section 2-1401 petition as of March 12, 2013, and thus the trial court's *sua sponte* dismissal more than 30 days later on April 19, 2013, was proper. The State relies on *People v. Ocon*, 2014 IL App (1st) 120912, ¶¶ 16, 31, 35, in which this court found that where it was unclear whether defendant properly served the State with his 2-1401 petition, but the record showed that a State's Attorney was present in court on the date the petition was docketed for review, the State had actual notice of the petition as of that date. This court thus held that that the trial court's *sua sponte* dismissal of the petition more than 30 days after that date was proper because the petition was ripe for adjudication at that time. *Id.*, ¶¶ 35, 41.

¶ 11 In this case, the record shows that an ASA was present in court on March 12, 2013, the date defendant's petition was docketed for review. Accordingly, pursuant to *Ocon*, the State received actual notice of defendant's petition as of that date. See also *People v. Lake*, 2014 IL App (1st) 131542, ¶ 31. We thus find that the trial court's *sua sponte* dismissal of defendant's petition on April 19, 2013, was proper because the petition was ripe for adjudication at that time given that more than 30 days had passed since the State received actual notice of the petition. *Ocon*, ¶¶ 35, 41.

¶ 12 We reject defendant's argument that we should not follow *Ocon* because the record in this case shows that the ASA who was present in court on the date his petition was docketed for review did not speak on the record. *Ocon*, however, makes no mention of whether the ASA spoke during the hearing when the petition was docketed for review. Because our analysis in *Ocon* did not hinge on whether the ASA spoke on the record at the time defendant's petition was docketed for review, defendant's attempt to distinguish *Ocon* fails.

¶ 13 We also reject defendant's contention that the mere presence of an ASA in the courtroom on the day his petition was docketed is insufficient to establish a waiver of proper service. Defendant relies on *People v. Carter*, 2014 IL App (1st) 122613, ¶¶ 21-22, and *People v. Maiden*, 2013 IL App (2d) 120016. However, in *Carter*, although an ASA was present on the date the defendant's section 2-1401 petition was dismissed *sua sponte*, the record showed that no ASA was present in court on the day the petition was docketed for review. *Carter*, 2014 IL App (1st) 122613, ¶¶ 5-6. Accordingly, *Carter* is distinguishable. Further, in *Ocon*, this court rejected the defendant's reliance on *Maiden*, which held that pursuant to section 2-301 of the Code (735 ILCS 5/2-301 (West 2012)), a party is required to explicitly waive an objection to personal jurisdiction. *Ocon*, 2014 IL App (1st) 120912, ¶¶ 36-40. We found that although section 2-301 allows a party to object to the court's personal jurisdiction over it, it does not require a party to do so, and expressly disagreed with *Maiden's* contrary holding. *Id.*, ¶¶ 38-40. We thus concluded that after the State received actual notice of the defendant's petition through the ASA's presence in court on the day the petition was docketed for review, the State was not required to object to improper service pursuant to section 2-301 or to respond to the petition. *Id.*, ¶ 41. We

adhere to our analysis as stated in *Ocon* and reiterate our disagreement with the holding in *Maiden*.

¶ 14 In the alternative, defendant argues that this court should modify his dismissal order to reflect a dismissal without prejudice. We disagree. In support of his argument, defendant relies on *People v. Nitz*, 2012 IL App (2d) 091165, ¶¶ 4, 6, in which the trial court dismissed the defendant's 2-1401 petition *sua sponte* less than 30 days after he filed it. The reviewing court reasoned that although dismissal on the merits was premature given that the 30-day period had not yet commenced or expired, dismissal without prejudice was proper due to the defendant's failure to properly serve the State. *Id.*, ¶ 13. Here, in contrast, the trial court did not dismiss defendant's petition until after the 30-day time period had expired, and thus a dismissal on the merits was proper. Accordingly, the reasoning employed in *Nitz* is inapplicable.

¶ 15 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 16 Affirmed.