

No. 1-13-0175

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 93 CR 16210
	)	
GERALD JONES,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court erred in *sua sponte* dismissing petitioner's section 2-1401 petition before the required 30-day waiting period.
- ¶ 2 Petitioner appeals from the circuit court's *sua sponte* dismissal of his motion to vacate sentence as being void, which the court recharacterized as a section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)). He argues that this court must remand the case because the circuit judge's *sua sponte* dismissal on the merits was premature because section 2-1401 (735 ILCS 5/2-1401 (West 2012)), requires a 30-day waiting period for the State

to answer or otherwise plead. We agree and for the foregoing reasons, vacate the court's order and remand the cause to the circuit court for further proceedings.

¶ 3 Following a jury trial in 1994, petitioner was convicted of two counts of first degree murder and one count of attempt first degree murder. Petitioner was sentenced to natural life imprisonment. This court upheld his conviction on appeal. *People v. Gerald Jones*, No 1- 95-0299 (unpublished order under Supreme Court Rule 23). According to the circuit court's order, since his direct appeal, petitioner has filed at least "21 post-conviction filings" including a federal habeas corpus petition, several civil rights lawsuits and several petitions for state *mandamus* relief.

¶ 4 On July 17, 2012, petitioner filed a motion to vacate his sentence as being void wherein he argued that the trial court failed to consider a presentence investigation report at sentencing on October 12, 1994. On October 10, 2012, after several continuances, the court noted that petitioner's motion cited no "statutory authority to guide this court as to the legal form of his petition." The court noted that challenges to void orders are "routinely filed under Section 2-1401 of the Code of Civil Procedure" and indicated it would treat petitioner's motion as such. Citing the requirements of petitions filed under section 2-1401, the court dismissed the petition finding that the "[p]etitioner's allegation is entirely unsupported by any factual allegations, citations to the record, affidavits, or exhibits." According to the record, an assistant State's Attorney was not present when the petition was dismissed.

¶ 5 Petitioner filed a motion to reconsider the court's ruling arguing that the court erred when it construed his motion as a section 2-1401 petition and that his claims were valid. Without an assistant State's Attorney being present, the court denied the motion to reconsider. This appeal

followed.

¶ 6 Petitioner argues that this court should remand for further proceedings because the circuit court improperly dismissed his pleading fewer than 30 days after rechacterizing it as a section 2-1401 petition. 735 ILCS 5/2-1401 (West 2012). The State does not contest that the court dismissed the petition before the 30-day waiting period. Instead, the State claims that it is irrelevant that the petition was prematurely dismissed because there exists no set of facts that could ever be proved that would allow the petition to proceed. We note that the petitioner is not challenging the court's treatment of his pleading as a section 2-1401 petition.

¶ 7 Section 2–1401 provides a statutory procedure by which final orders, judgments, and decrees may be vacated after 30 days from their entry. *People v. Vincent*, 226 Ill.2d 1, 7 (2007). Pursuant to Illinois Supreme Court Rule 101(d) (eff. May 30, 2008), which governs section 2–1401 of the Civil Code, once a party files a petition for relief, the opposing party has 30 days to answer the petition or otherwise plead. See also *People v. Laugharn*, 233 Ill.2d 318, 323 (2009). Section 2-1401(b) requires "[a]ll parties to the petition [to] be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). We review the dismissal of a section 2–1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 8 In *People v. Laugharn*, 233 Ill.2d 318, 323 (2009), our supreme court held that the *sua sponte* dismissal of a section 2-1401 petition before the usual 30-day period for the State to answer or otherwise plead was premature and required vacature. The State's failure to answer the petition within the 30-day time frame constitutes an admission of all well-pleaded facts and renders the petition "ripe for adjudication." *Vincent*, 226 Ill. 2d at 10.

¶ 9 There is no indication from the record before us to establish that the court characterized

or treated petitioner's motion to vacate as a section 2-1401 petition prior to October 10, 2012, the date of dismissal. Therefore, the commencement of the 30-period could not have occurred prior to that date. Once the court chose to treat petitioner's motion to vacate as a section 2-1401 petition, it was required to abide by the procedural requirements of section 2-1401. (See *People v. Helgensen*, 347 Ill. App. 3d 672 (2004) (motions for void judgments can be recharacterized as postconviction petitions or motions for relief from judgment and the court is required to abide by the selected procedural requirements)). We decline the State's request to consider the merits of the petition.

¶ 10 As the circuit court prematurely dismissed petitioner's petition foregoing the 30-day waiting period as required by statute (735 ILCS 5/2-1401 (West 2012)), we vacate the judgment of the circuit court and remand for further proceedings. *Laugharn*, 233 Ill. 2d at 323.

¶ 11 Vacated and remanded for further proceedings.