FOURTH DIVISION
July 16, 2015

No. 1-13-1471



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. 94 CR 21185 |
| | ) | |
| TERRANCE WILLIS, | ) | Honorable |
| | ) | Kenneth J. Wadas, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's *sua sponte* dismissal of defendant's section 2-1401 petition was premature where the State was not properly served with the petition and nothing in the record shows that the State had actual notice of the petition or waived any objection to the improper service. Because the dismissal was premature and the cause must be remanded for further proceedings we decline to reach the merits of defendant's arguments in the petition.

¶ 2 Defendant Terrance Willis appeals the trial court'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)) challenging the addition of a three-year term of mandatory supervised release (MSR) by the Illinois Department of Corrections (DOC) because it was not part of the trial court's sentencing order. We vacate the dismissal and remand for further proceedings on defendant's petition.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, defendant was convicted in 1995 of two counts of attempt first-degree murder and one count of armed violence. He was sentenced to consecutive prison terms of 40 and 10 years for the two attempt murder convictions and a concurrent 30-year prison term for armed violence. Neither the transcript of the sentencing hearing nor the written sentencing order mentioned a term of MSR. Defendant appealed, and this court affirmed the trial court's judgment. *People v. Willis*, 299 Ill. App. 3d 1008 (1998).

¶ 5 In January 1999, defendant filed a *pro se* petition for postconviction relief, which the trial court dismissed summarily. On appeal, this court held that two of the claims in the petition, an ineffective assistance of counsel claim pertaining to his right to testify and a claim pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), were sufficient to require a hearing. *People v. Willis*, No. 1-99-1909 (2001) (unpublished order under Supreme Court Rule 23). Our supreme court, in the exercise of its supervisory authority, directed this court to vacate its judgment and reconsider its decision in light of *People v. De la Paz*, 204 Ill. 2d 226 (2003). Pursuant to that supervisory order, this court determined defendant's *Apprendi* claim had no merit, as *Apprendi*

did not apply retroactively. This court reaffirmed its prior ruling that the trial court's dismissal of defendant's ineffective assistance of counsel claim was error, and remanded the cause for further proceedings on the petition as a whole. The postconviction proceeding advanced to the second stage, counsel was appointed, a hearing was held, and the court granted the State's motion to dismiss. On appeal, this court affirmed the dismissal order. *People v. Willis*, No. 1-06-1549 (2008) (unpublished order under Supreme Court Rule 23).

¶ 6 Subsequently, defendant filed a *pro se* "Petition for Relief from Void Judgment" pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401(f) (West 2012)). The petition challenged the addition of a three-year term[1] of MSR to his sentence because the trial court had not admonished defendant he would be required to serve a period of MSR which he claims was improperly added to his sentence by DOC. The petition was accompanied by a notarized "Certificate of Service/Notice of Filing," directed to the offices of the Illinois Attorney General and the Cook County State's Attorney at their respective addresses in Chicago, Illinois. The notice began with:

> "I am hereby to NOTIFY YOUR OFFICE that on: November 28, 2012, I filed through the CLERK OFFICE OF THE COOK JUDICIAL CIRCUIT, COOK COUNTY, ILLINOIS, CRIMINAL DIVISION, located at 2650 S. CALIFORNIA ST., Chicago, IL 60608, one original and four copies of a 21 OF 21 Pg. PETITION FOR RELIEF FROM VOID JUDGMENT [735 ILCS 5/2-1401(f)(WEST)(735 ILCS 5/2-617(WEST))] *** "

[1] The DOC website indicates defendant's projected parole date is July 19, 2019, and his projected discharge date is July 19, 2022, indicating a MSR term of three years is included in his sentence.

and then described additional documents. The Certificate of Service/Notice of Filing was dated November 28, 2012 and signed by defendant, attesting that he filed the petition with the court clerk on that date. It did not state by what method the described documents were delivered to the court, or whether and by what method they were served on the State.

¶ 7 The petition was stamped as received by the Clerk of the Circuit Court, Criminal Division on December 27, 2012, and was stamped as filed on January 3, 2013. On January 10, 2013, the trial court stated on the record that defendant had "filed on January 3rd a Petition for Relief from Judgment also known as a 2-1401 Petition." The cover page of the January 10 transcript reflects that only the judge and the court reporter were present in court on that date. The cause was continued for status to January 18, 2013, but the record does not contain a transcript for that date. The next transcript in the record, for March 28, 2013, indicates that only the judge and the court reporter were in attendance. The record does not contain a responsive pleading from the State. On March 28, the trial court *sua sponte* "denied and dismissed" the section 2-1401 petition after finding it to be "frivolous and patently without merit." This appeal followed.

¶ 8 ANALYSIS

¶ 9 On appeal, defendant contends the trial court erred in *sua sponte* dismissing his section 2-1401 petition because the addition of a three-year term of MSR to his prison sentence violated his constitutional right to due process and was void because at the time he was sentenced, the trial judge did not explicitly advise him, and the written order of commitment did not state, that he would have to serve a mandatory three-year period of MSR after his prison sentence.

Defendant also contends that due to his own failure to serve the State properly with notice of his petition, the trial court's dismissal of the petition was premature.

¶ 10 A trial court's *sua sponte* denial of the relief sought in a section 2-1401 petition is the same as a dismissal with prejudice. *People v. Vincent*, 226 Ill. 2d 1, 12 (2007). Absent an evidentiary hearing on a petition, we review the dismissal of a section 2-1401 petition *de novo*. *Id.* at 14-15. We may affirm the circuit court's judgment on any basis supported by the record, regardless of the actual reasoning or grounds relied upon by the circuit court. *People v. Harvey*, 379 Ill. App. 3d 518, 521 (2008). Initially we address defendant's assertion that the trial court's *sua sponte* dismissal of his section 2-1401 petition was premature because he failed to serve the State properly as required by Illinois Supreme Court Rule 105(b) (eff. Jan. 1, 1989), and, consequently, his petition was not ripe for adjudication. The State responds that defendant has no standing to object on behalf of the State for allegedly improper service and that defendant should not be permitted to reap the benefits of his own admitted error of improper service.

¶ 11 Defendant's Standing to Raise the Ripeness Issue

¶ 12 The State contends that a defendant has no standing to object to his own improper service and he should not be permitted to benefit from his own error. The State relies on *People v. Kuhn*, 2014 IL App (3d) 130092, where the court held that a defendant lacked standing to raise the issue of his own improper service of notice of his section 2-1401 petition. *Id.* ¶ 16. We find that case distinguishable. There, 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. *Kuhn* 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.* ¶ 17. In the instant case, there is no indication in the record that the State was informed defendant had filed a section 2-1401 petition. A section 2-1401 petitioner may challenge the trial court's premature dismissal of the petition on appeal. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009).

¶ 13 Ripeness of the Petition for Adjudication

¶ 14 Section 2-1401 of the Code of Civil Procedure establishes a procedure for seeking relief from judgments, in both civil and criminal cases, more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2012); *Vincent*, 226 Ill. 2d at 8. The rules of civil practice govern proceedings under this section, even in criminal proceedings. *Id.* Section 2-1401(b) requires that "[a]ll parties to the petition be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). The rule referred to is Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985), which provides that notice for the filing of a section 2-1401 petition is governed by Rule 105. Supreme Court Rule 105(a) states: "The notice *** shall state that a pleading seeking new or additional relief against him has been filed and that a judgment by default may be taken against him for the new or additional relief unless he files an answer or otherwise files an appearance in the office of the clerk of the court within 30 days after service ***." A copy of the pleading shall be attached to the notice. The notice may be served by either summons, certified or registered mail, or publication. Ill. S. Ct. R. 105(b); *People v. Prado*, 2012 IL App (2d) 110767, ¶ 6. Actual notice may also be sufficient. *People v. Ocon*, 2014 IL App (1st) 120912, ¶¶ 31, 41.

¶ 15 Once notice has been served, the responding party has 30 days in which to file an answer or otherwise appear. Ill. S. Ct. R. 105(a). "Section 2-1401 petitions are essentially complaints inviting responsive pleadings." *Vincent*, 226 Ill. 2d at 8. A respondent's failure

to answer a section 2-1401 petition constitutes an admission of all well-pleaded facts. *Id.* at 9. However, "responsive pleadings are no more required in section 2-1401 proceedings than they are in any other civil action." *Id.* Our supreme court rejected "the notion that the trial court was prohibited from acting because of the lack of a responsive pleading from the State." *Id.* When the State fails to file a response, the petition becomes "ripe for adjudication" (*id.* at 10) and the trial court may *sua sponte* dismiss the section 2-1401 petition (*id.* at 10-12). In *Laugharn*, 233 Ill. 2d at 323, our supreme court held that a section 2-1401 petition is not ripe for adjudication prior to the expiration of the 30-day period for a response.

¶ 16 There is no dispute in the instant case that more than 30 days passed from when the section 2-1401 petition was filed on January 3, 2013, to when the circuit court *sua sponte* dismissed the petition on the merits on March 28, 2013. However, defendant argues that the petition was dismissed prematurely because he failed to properly serve the petition on the State and, consequently, the 30-day period for the State to respond to his petition never began to run. On appeal, the State has not objected to nor specifically waived service of the petition. In fact, its position is that proper service in accordance with Rule 105 should be presumed because the Certificate of Service/Notice of Filing "does not state that service was contrary to the governing rule," and "the record does not affirmatively demonstrate that the notice was not properly mailed." However, we agree with defendant that service of his petition was deficient. The notice of filing failed to state that a judgment by default could be taken against the State unless it filed an answer or otherwise filed an appearance. The certificate of service also failed to state by what

method the notice was sent, or whether copies of the petition were sent with the notice to the Attorney General and the State's Attorney.

¶ 17 When the court docketed defendant's section 2-1401 petition on January 10, 2013, the transcript does not indicate an assistant State's Attorney was present in court. The court continued the case to January 18; however, there is no transcript in the record for January 18. The transcript for the next court date, March 28, 2013, shows that the court *sua sponte* dismissed the petition; on that date no assistant State's Attorney was present. Without the transcript of January 18 we are unable to conclude that the State received actual notice of the filing of the petition. There is no evidence that on January 18, the State did receive actual notice of the petition or that it waived service. The State does not maintain on appeal that it received actual notice. Therefore, "we can assume nothing regarding the State's knowledge of this petition." *People v. Carter*, 2014 IL App (1st) 122613, ¶ 15, *appeal allowed*, No. 117709 (Ill. Sept. 24, 2014).

¶ 18 Defendant contends that the decision in *Carter* is dispositive on this issue. There, another division of this court agreed with the defendant that the State had not been properly served where service was by regular mail. *Id.* ¶ 14. The appellate court held that, "in accordance with *Vincent* and *Laugharn*, we look to the date of service to determine whether the trial court properly *sua sponte* dismissed defendant's section 2-1401 petition." *Id.* ¶ 12. The court concluded in *Carter*: "Because a case is not ripe for adjudication until 30 days after service, the circuit court in this case prematurely dismissed defendant's petition *sua sponte* where service was never effectuated." *Id.* ¶ 25. The court vacated the judgment of the circuit court and remanded for further proceedings. *Id.* ¶¶ 26, 28-29.

¶ 19 In *People v. Lake*, 2014 IL App (1st) 131542, ¶ 23, we acknowledged the difference of opinion among the districts of the appellate court and within the divisions of the First District on the ramifications when a defendant fails to serve the State properly with a copy of his petition. In addition to the *Carter* decision in the First District, the courts of several other districts have held under those circumstances that the circuit court's *sua sponte* dismissal of a section 2-1401 petition was premature and that the appropriate disposition was to remand for further proceedings: *Powell v. Lewellyn*, 2012 IL App (4th) 110168; *People v. Prado*, 2012 IL App (2d) 110767; *People v. Miller*, 2012 IL App (5th) 110201; *People v. Maiden*, 2013 IL App (2d) 120016.

¶ 20 Rule 105(a) makes it clear that a party responding to a section 2-1401 petition has 30 days *after notice has been served* in which to file an answer or otherwise appear. *Laugharn* dictates that the petition is not ripe for adjudication before the 30-day period for a response expires. Consequently, we agree with the conclusion of *Carter* that where service was never effectuated, the *sua sponte* dismissal of a defendant's petition is premature, even after 30 days have passed. We acknowledge that in *People v. Alexander*, 2014 IL App (4th) 130132, the Fourth District rejected the analysis in *Carter* and affirmed the *sua sponte* dismissal of an improperly served *pro se* section 2-1401 petition. However, we disagree with *Alexander*. The reason the Fourth District gave for not following this court's decision in *Carter* was its disagreement with this court that our supreme court's decision in *Laugharn* mandated the result in *Carter*. *Id.* ¶ 50. But the basis of the Fourth District's decision was judicial economy. *Id.* ¶¶ 50-51, 62-63. While the Fourth District's solution saved the trial court from an arguably needless remand it did nothing to address the recurrence of the original error of the premature dismissal.

The better approach is that taken by this court in *Carter*, which was to require prosecutors to stand before the trial court and "clearly and articulately stat[e] the State's position regarding the matter at hand." *Carter*, 2014 IL App (1st) 122613 ¶ 23.

¶ 21 We conclude that, in the absence of evidence that the State was properly served in this case, had actual notice of the petition, or waived any objection to the defective service, the trial court's *sua sponte* dismissal of the section 2-1401 petition was premature. In accordance with *Carter*, the appropriate disposition is to vacate the dismissal and remand for further proceedings. Consequently, we need not reach defendant's arguments related to the merits of his petition. *Laugharn*, 233 Ill. 2d at 324 (declining to express an opinion on the merits of the argument raised by the defendant).

¶ 22 CONCLUSION

¶ 23 Judgment vacated; cause remanded for further proceedings.