2016 IL App (1st) 140493-U

FIRST DIVISION
February 22, 2016

No. 1-14-0493

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. 94 CR 1229
	)	
ADRIAN THOMAS,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Liu and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court's *sua sponte* dismissal of defendant's petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)) was premature because it dismissed the petition prior to the expiration of the 30-day time period allotted for responsive pleadings.

¶ 2 In 1995, defendant Adrian Thomas was convicted by bench trial of first degree murder, armed violence and unlawful use of a weapon by a felon for the shooting death of a 15-month-old victim and injury to the victim's mother. The trial court subsequently sentenced defendant to an aggregate 117 years in prison for the above convictions. On direct appeal, this court affirmed

defendant's conviction and sentence. *People v. Thomas*, No. 1-95-3668 (1995) (unpublished order under Supreme Court Rule 23).

¶ 3 In 1997, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-2.1(a)(2) (West 1996)), alleging his trial counsel was ineffective for failing to call witnesses to support his self-defense theory. Appointed counsel filed a supplemental petition alleging defendant's sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This court subsequently affirmed the trial court's dismissal of defendant's postconviction petition. *People v. Thomas*, No. 1-02-3354 (2004) (unpublished opinion under Supreme Court Rule 23).

¶ 4 From 2006 to 2011, defendant filed three *pro se* petitions for relief from judgment actions pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401), generally alleging his convictions were void and his extended-term sentence improper under various legal theories. Each of these petitions was dismissed and this court affirmed, after finding no issues of arguable merit existed on appeal and granting counsel leave to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987). See *People v. Thomas*, No. 1-06-2271 (2008) (unpublished order under Supreme Court Rule 23); *People v. Thomas*, No. 1-08-3022 (2010) (unpublished order under Supreme Court Rule 23); *People v. Thomas*, 2012 IL App (1st) 112186-U.

¶ 5 In 2012, defendant filed "A Motion to Correct Errors in Criminal and Quasi-Criminal Actions," alleging the prosecution presented false evidence at trial, withheld exculpatory evidence, and held inconsistent theories by asserting defendant was the shooter when Carlton Gray pled guilty to being the sole shooter. The trial court dismissed the motion and defendant appealed, but he subsequently dismissed his appeal from the trial court's dismissal. *People v. Thomas*, No. 1-12-1910 (2013).

¶ 6 On November 12, 2013, defendant filed the instant *pro se* petition for relief from judgment, alleging (1) actual innocence based upon Carlton Gray's guilty plea to the same offense; and (2) that he was prosecuted by a State's attorney who was not authorized to represent the State in criminal cases. Defendant also attached a "Notice of Filing/Proof of Service" to the petition, which stated that defendant mailed the original and two copies of his petition to be filed by the circuit clerk of Cook County and to Lisa Madigan, Attorney General for the State of Illinois. The document did not indicate whether the petition was mailed certified, registered, or standard mail.

¶ 7 The circuit court called the case on December 3, 2013. Although a formal appearance was never entered, an Assistant State's Attorney (ASA) was present in court. The court explained that defendant filed his petition on November 12, 2013, and asked if the ASA was going to find someone to appear on the State's behalf or if she would be handling the matter herself. The ASA responded, "[N]o, Judge, what I would like to do – If I can copy the – ." The trial court allowed her to make a copy of the petition and continued the case to December 12, 2013. At the subsequent hearing in December, there was no appearance made on the record by the State and the case was continued to January 2, 2014. On this date, the court dismissed defendant's petition on the record and followed the ruling with a written order. The order confirmed the in-court ruling, rejecting defendant's petition on its merits, and also assessed court costs and fees for filing a frivolous petition. The State again failed to make an appearance on the record.

¶ 8 Defendant now appeals from this ruling, alleging the trial court prematurely dismissed his petition in violation of the Illinois Supreme Court's holding in *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). Defendant argues that the trial court erred when it dismissed, *sua sponte*, his petition for relief from judgment prior to the expiration of the usual 30-day period allotted for

responsive pleadings in civil proceedings. See *Laugharn*, 233 Ill. 2d at 323. Accordingly, defendant requests that this court vacate the ruling of the circuit court, including the order assessing court costs and fees, and remand the cause for further proceedings. *Id.* Defendant does not argue the trial court's dismissal of his petition was improper because his claims were meritorious. The State concedes the application of *Laugharn*, but argues the trial court complied with the 30-day requirement.

¶ 9 As a preliminary matter, we note that initial service upon the State was deficient because defendant addressed his petition to the Attorney General instead of the State's Attorney's office. The parties do not dispute, however, that the State's presence in court and acceptance of a copy of defendant's petition on December 3 constitutes actual notice sufficient to meet the notice requirement under section 2-1401. See *People v. Ocon*, 2014 IL App (1st) 120912, ¶ 31 (although the State was not formally served, actual notice to an ASA present in court of petition's filing is sufficient to meet notice requirements under section 2-1401). Consequently, the parties also agree that the 30-day timeline for responsive pleadings began December 3, 2013.

¶ 10 The parties' dispute concerns the timeliness of the trial court's dismissal and the date the petition became "ripe for adjudication." The State argues the petition was ripe for adjudication on January 2, 2014, the thirtieth day after notice was received, excluding the date of actual notice. Defendant, however, argues that the petition was not ripe for adjudication until the expiration of the thirtieth day, and thus, the trial court could not dismiss defendant's petition until January 3, 2014, the thirty-first day after notice was received, again excluding the date of actual notice.

¶ 11 The *Laugharn* court, construing the language of Illinois Supreme Court Rules 105(a) (eff. May 21, 2009) and 106 (eff. Aug. 1, 1985), held that a court may not *sua sponte* dismiss a section 2-1401 petition prior to the expiration of 30 days, excluding the date service or notice

was received. *Laugharn*, 233 Ill. 2d at 323. In so finding, our supreme court concluded that a petition is not "ripe for adjudication" until 30 days have passed. See *Id.* Thus, under *Laugharn*, the State was allotted 30 days, excluding the day notice was received, or until January 2, 2014, to file a responsive pleading to defendant's petition, and the petition only became "ripe for adjudication" 30 days after December 3, 2013. See Ill. S. Ct. R. 105(a); *People v. Lake*, 2014 IL App (1st) 131542, ¶ 26.

¶ 12 As a general rule, under section 1.11 of the Statute on Statues (5 ILCS 70/1.11 (West 2012)), the computation of time excludes the first day and includes the last day of any given time period. See Ill. S. Ct. R. 2 (eff. Jan. 4, 2013) (adopting by reference the Statute on Statutes). Although neither *Laugharn*, the Rules, nor section 2-1401 of the Code of Civil Procedure expressly indicate the time by which a day is calculated, our courts have long taken the view that a day consists of 24 hours, from midnight to midnight, unless the legislature or the supreme court expressly state otherwise. See *Rock Finance Co. v. Central Nat. Bank of Sterling*, 339 Ill. App. 319, 325 (1950); *Kuznitsky v. Murphy*, 381 Ill. 2d 182, 186 (1942) ("where the computation of time has become necessary, our courts have always taken as a basis a twenty-four-hour day from midnight to midnight."). Thus, the State was allotted until midnight on January 2, 2014, to appear or otherwise plead, and the circuit court had no authority to impose judgment on the merits of defendant's petition before this time. See *Lake*, 2014 IL App (1st) 131542, ¶ 26; *Laugharn*, 233 Ill. 2d at 323. As such, the circuit court's dismissal of defendant's petition on January 2, 2014, was premature.

¶ 13 Nonetheless, the State argues that the trial court could assume the State did not intend to respond when it failed to appear in court or otherwise plead when the case was docketed on January 2, 2014. Even if the trial court properly assumed as such, this does not overrule our

supreme court's mandate to postpone a *sua sponte* dismissal on the merits of a section 2-1401 petition until 30 full days have passed. The only "exceptions" to the timeliness requirement are (1) a responsive pleading filed by the State; or (2) an express indication on the record of the State's intent to waive the time allotted for response and consent to the trial court's early decision on the merits– utter silence will not suffice. See *People v. Gray*, 2011 IL App (1st) 091689, ¶ 22. Therefore, because the court's dismissal was premature and the record makes clear that neither of the two "exceptions" was present, its judgment, including the order imposing court costs, is vacated.

¶ 14 The State also asserts that remand is an inappropriate remedy for a premature *sua sponte* dismissal of a section 2-1401 petition, and argues that *Laugharn* does not support defendant's proposition that "a defendant is entitled to remand based on his own failure to properly serve the State." Defendant, however, is not raising a challenge to service – this issue has clearly been waived –he is challenging the timeliness of the court's *sua sponte* dismissal. As our supreme court in *Laugharn* has explicitly stated, such action was not authorized prior to the expiration of the 30-day period allotted for response, the remedy for which is to vacate the judgment and remand the cause for further proceedings. See *Laugharn*, 233 Ill. 2d at 323-24.

¶ 15 The State also argues, citing *People v. Nitz*, 2012 IL App (2d) 091165, that equitable principles suggest this court should affirm the dismissal but modify the order to reflect a dismissal "without prejudice" to save judicial time and energy. This court, however, is bound by the decisions of the Illinois Supreme Court and must follow the law established. *People v. Spahr*, 56 Ill. App. 3d 434, 438 (1978*); Illinois Labor Relations Board v. Chicago Transit Authority*, 341 Ill. App. 3d 751, 758 (2003).Therefore, because *Laugharn* controls, we apply the remedy established therein, and remand the cause for further proceedings.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Cook County is vacated and the cause is remanded for further proceedings.

¶ 17 Judgment vacated; cause remanded.