

No. 1-12-2579

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).

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. 01 CR 690
)	
WILLIAM WARD,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's initial section 2-1401 petition was properly dismissed where defendant failed to present a meritorious defense or due diligence in preparing it, but his subsequent petitions were prematurely dismissed; therefore, the circuit court judgment was affirmed in part, vacated in part, and the cause remanded for further proceedings.

¶ 2 Defendant, William Ward, appeals from an order of the circuit court dismissing *sua sponte* all three of his pending petitions for relief from judgment brought pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). Defendant contends the court erred by prematurely dismissing the petitions. We affirm the dismissal of defendant's

initial petition, vacate the dismissal of the two subsequent petitions, and remand for further proceedings.

¶ 3 On September 24, 2000, J.C. Johnson and Michael Walker were shot in a drive-by shooting in Harvey. As a consequence, Johnson, whose thigh bone was shattered by a bullet, underwent multiple surgeries and complained at trial of continuing physical impairment. Walker, who was shot in the back, sustained injuries rendering him a paraplegic. Defendant was arrested for the shootings and was tried on counts of attempted murder and aggravated battery with a firearm as to each of the two victims. Following a jury trial, defendant was acquitted of attempted murder but found guilty of two counts of aggravated battery with a firearm. The jury also found that severe bodily injury was sustained by both Johnson and Walker. The circuit court sentenced defendant to consecutive terms of 20 years in prison on one count of aggravated battery with a firearm and 15 years on the other count. On appeal, defendant raised numerous claims of error, including a sentencing issue, namely, that the finding of severe bodily injury, resulting in consecutive sentences, was improperly made by the jury instead of the circuit court at the same time the jury was deliberating as to guilt or innocence. We affirmed the judgment of the circuit court. *People v. Ward*, 371 Ill. App. 3d 382 (2007).

¶ 4 Following the defendant's direct appeal, he filed several *pro se* petitions and motions, all of which were denied by the circuit court. On May 25, 2012, the defendant filed a *pro se* section 2-1401 petition for relief from judgment, alleging that the imposition of consecutive sentences was improper because the jury was required to decide the issue of severe bodily injury without first being allowed to reach a verdict of guilt or innocence. The petition also alleged that

consecutive sentences were unwarranted because the two offenses were committed in a single course of conduct and because one of the victims, Johnson, did not suffer severe bodily injury.

¶ 5 On June 6, 2012, the defendant filed a second *pro se* section 2-1401 petition, again challenging his consecutive sentences for the same reasons stated in his initial section 2-1401 petition.

¶ 6 On June 27, 2012, defendant filed his third *pro se* section 2-1401 petition, asserting that he was charged under section 12-4.2(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/12-4.2(a)(1) (West 2000)), aggravated battery with a firearm, but was sentenced under section 12-4.1 of the Code (720 ILCS 5/12-4.1 (West 2000)), heinous battery.

¶ 7 On June 29, 2012, the circuit court ruled on all three section 2-1401 petitions as well as a pending successive postconviction petition:

"There is a multitude of various filings by Mr. Ward before this Court. The Court has reviewed Mr. Ward's petitions, and the Court first thing does note that, most of these petitions are repetitive from other matters previously filed and litigated before this Court, as well as the Appellate Court.

Secondly, the petitions for relief of judgment under Section 2-1401, are untimely as well. Most of the arguments he has made here are somewhat incomprehensible as to what he is asking, and based upon this, the Court finds that all petitions here are all primarily untimely and frivolous and repetitive of previous petitions. All matters that are before the Court are dismissed."

¶ 8 Defendant now appeals from that portion of the June 29, 2012, order which dismissed the

three section 2-1401 petitions. Defendant contends that the circuit court erred by prematurely dismissing the June 6 and June 27 petitions without waiting the usual 30-day period to file an answer or other pleading. Defendant also argues that those two petitions were supplemental to the initial petition filed on May 25, serving to extend the 30-day waiting period on that petition which, he concludes, was also prematurely dismissed.

¶ 9 Section 2-1401 provides that relief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition. *People v. Johnson*, 352 Ill. App. 3d 442, 444 (2004). In criminal proceedings, a petition filed pursuant to section 2-1401 seeks to correct all errors of fact occurring in the prosecution of a case that were unknown to the petitioner and the court at the time of trial which, if then known, would have prevented the judgment being entered. *Id.*; *People v. Pinkonsly*, 207 Ill. 2d 555, 566 (2003). A section 2-1401 petition is not designed to provide a general review of all trial errors, nor is it designed to substitute for direct appeal. *Id.* To obtain relief under section 2-1401, the defendant must show both a meritorious defense to the charges against him and due diligence in presenting it. *Id.* at 565. A meritorious defense under section 2-1401 involves an error of fact, not law. *Id.* A section 2-1401 petition "must be filed not later than 2 years after the entry of the order or judgment." 735 ILCS 5/2-1401(c) (West 2012). A section 2-1401 motion cannot be used to relitigate questions already validly adjudicated. *In re J.D.*, 317 Ill. App. 3d 445, 449 (2000). When a court enters either a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, on appeal that order will be reviewed *de novo*. *People v. Vincent*, 226 Ill.2d 1, 18 (2007).

¶ 10 In *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009), our supreme court pronounced a

bright-line rule that a section 2-1401 petition may not be dismissed before the passage of the usual 30-day period to answer or otherwise plead. Accord, *People v. Clemons*, 2011 IL App (1st) 102329, ¶¶ 15-19. Defendant's appeal is based on his contention that, pursuant to *Laugharn*, the circuit court's failure to wait 30 days after the filing of his section 2-1401 petitions before ruling on the petitions requires this court to reverse the judgment below.

¶ 11 The circuit court's dismissal order was entered on June 29, 2012, more than 30 days after the initial section 2-1401 petition was filed on May 25. Dismissal of that petition was therefore not premature. The petition was properly dismissed where defendant failed to plead facts which, if true, would have established a meritorious defense. Rather, the petition alleged error in allowing the jurors to determine whether the victims sustained severe bodily injury at the same time they were determining his guilt or innocence, an argument which this court considered and rejected on defendant's direct appeal. *Ward*, 371 Ill. App. 3d at 429. The petition also asserted error in sentencing defendant to consecutive prison terms where the two offenses were committed in a single course of conduct and where one of the shooting victims did not sustain severe bodily injury. None of the alleged errors was based on facts unknown to defendant and the court at trial which, if then known, would have prevented the entry of the judgment. Defendant also failed to establish due diligence in presenting his claims of error where the judgment below was entered in 2004 and he filed the section 2-1401 petitions eight years later.

¶ 12 Defendant argues that the two petitions filed on June 6 and June 27 were supplemental to the initial petition filed on May 25 and served to extend the 30-day waiting period on that petition. In support of that assertion, defendant analogizes to the Post-Conviction Hearing Act

(Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), where the 90-day period for the court to enter an order on a postconviction petition is extended from the date of filing of an amended petition. We reject defendant's analogy. A section 2-1401 petition, providing for relief from judgments pursuant to the Code of Civil Procedure, is an entirely distinct form of collateral relief from that provided by the Act. Moreover, while defendant portrays the June 6 petition as an "amended version" of the May 25 petition, no amendment was made to the substance of the original petition. Further, the defendant did not request, nor did the circuit court grant, leave to file any amendment to the May 25 petition. Thus, the circuit court properly dismissed the May 25 petition which failed to demonstrate defendant was entitled to section 2-1401 relief, and the dismissal order was not premature where it was entered more than 30 days after the petition was filed.

¶ 13 We agree with defendant, however, that *Laugharn* requires the conclusion that the petitions filed on June 6 and June 27 were prematurely dismissed where the June 29 dismissal order was entered less than 30 days after their filing.

¶ 14 The State contends that the June 6 and June 27 petitions were not prematurely dismissed because defendant mailed each of them from the penitentiary more than 30 days prior to the June 29 dismissal order. This contention flies in the face of *Laugharn*, which held that, pursuant to Supreme Court Rules 105(a) (eff. Jan. 1, 1989) and 106 (eff. Aug. 1, 1985), the court must allow the State the 30 days to which it was entitled to answer or otherwise plead. It is incongruous to maintain that the period when a petition becomes ripe for adjudication, and the 30-day period to answer or otherwise plead, are triggered before the petition has reached the court.

¶ 15 The State also contends that it waived the 30-day period in which to answer or otherwise plead to the June 6 petition because an assistant State's Attorney was present in court at the time of filing of that petition. The State argues that the assistant State's Attorney's presence in court on June 6 and acknowledgment of the filing of the section 2-1401 petition on that date effectively waived the service and answer requirement." The record reveals that on that date, the assistant State's Attorney's only asked the court, "Can we hold [the petition] for post conviction people?" When the court agreed to do so and asked for a date, she suggested June 29. We reject the State's assertion that this exchange waived the 30-day period, and we conclude that both the June 6 and June 27 petitions were prematurely dismissed.

¶ 16 In conclusion, we affirm the circuit court's dismissal of defendant's initial *pro se* section 2-1401 petition filed on May 25, but we vacate the dismissal of the subsequent petitions filed on June 6 and June 27 in accord with the mandate of *Laugharn*, and we remand the cause to the circuit court for further proceedings on those petitions.

¶ 17 Affirmed in part and vacated in part; cause remanded.