

NOTICE  
Decision filed 06/26/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 120395-U

NO. 5-12-0395

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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,	)	Madison County.
	)	
v.	)	No. 98-CF-2863
	)	
LARRY D. ADAY,	)	Honorable
	)	Charles V. Romani, Jr.,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court.  
Justices Chapman and Spomer concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly dismissed the defendant's postjudgment petition where it was filed more than 30 days after entry of final judgment but was not filed pursuant to section 2-1401 of the Code of Civil Procedure.

¶ 2 Larry D. Aday (the petitioner) appeals from the dismissal, by the circuit court of Madison County, of his "Petition for relief of Mandatory Supervised Release" following his conviction and sentence of imprisonment for the offense of armed robbery. The defendant had pleaded guilty to the offense on September 7, 1999, pursuant to a negotiated plea, and on February 24, 2000, he was sentenced to a 40-year term of

imprisonment. His subsequent motion to withdraw his guilty plea was denied, and his appeal from the denial of that motion was dismissed at his own request.

¶ 3 On July 1, 2004, the petitioner filed a petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)), raising an argument based on the principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This petition was summarily dismissed as frivolous and the dismissal was affirmed by this court on appeal. *People v. Aday*, No. 5-04-0515 (2005) (unpublished order under Supreme Court Rule 23).

¶ 4 On February 20, 2008, the petitioner filed a motion for relief from judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2008)). The State's motion to dismiss the petition as untimely was granted by the circuit court on April 30, 2008. No appeal was brought.

¶ 5 On July 26, 2012, the petitioner filed a "Petition for relief of Mandatory Supervised Release" in which he argues that the imposition of a term of mandatory supervised release is unconstitutional, and asks that it be removed from his sentence. The petition is accompanied by a "Proof/Certificate of Service" indicating that copies were placed in the prison's institutional mail addressed to the Madison County circuit clerk and the Madison County State's Attorney.

¶ 6 On August 20, 2012, the circuit court of Madison County entered an order dismissing the petition for relief of mandatory supervised release. The order dismissed the petition for failure to state a cause of action, finding that *People v. Whitfield*, 217 Ill. 2d 177 (2005), did not apply retroactively to the petitioner's case, and that, in any event, pursuant to *People v. Adams*, 373 Ill. App. 3d 991 (2007), due process was satisfied as

long as the prison term plus the mandatory supervised release was less than the maximum sentence the defendant was told he could receive. Such was the case with the petitioner. Accordingly, the petition was dismissed.

¶ 7 The petitioner appeals, arguing that the petition was filed pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), and that such a petition cannot be dismissed *sua sponte* by the court prior to the 30-day period for the State to respond. The petitioner is correct that a petition filed pursuant to section 2-1401 of the Code cannot be dismissed *sua sponte* prior to the conclusion of the usual 30-day period for the State to answer or otherwise plead. To do so would be premature and require vacatur of the dismissal order and remand for further proceedings on the petition. See *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009).

¶ 8 We find, however, that the petition for relief of mandatory supervised release was not filed pursuant to section 2-1401 of the Code. Section 2-1401 provides a comprehensive civil procedure that allows for the vacatur of a final judgment older than 30 days, but the petition must be filed not later than two years following the entry of that final judgment. *People v. Prado*, 2012 IL App (2d) 110767, ¶ 6. The final judgment in the case at bar was the judgment order sentencing the defendant on February 24, 2000. Clearly, the petition for relief of mandatory supervised release was not filed within two years of that judgment. Furthermore, all parties to a section 2-1401 petition must be served with notice of the filing of the petition either by summons, by prepaid certified or registered mail, or by publication. *Prado*, 2012 IL App (2d) 110767, ¶ 6. The notice must state that a judgment by default may be taken against the party unless he files an

answer or otherwise files an appearance within 30 days after service. *Prado*, 2012 IL App (2d) 110767, ¶ 6. No such notice of the filing of the petition for relief of mandatory supervised release was served on the State in the case at bar. Clearly, the petitioner did not treat the motion as one filed pursuant to section 2-1401.

¶ 9 Furthermore, the purpose of a section 2-1401 petition is to bring before the trial court facts not appearing in the record which, if known to the court at the time judgment was entered, would have prevented entry of the judgment. *In re Estate of Barth*, 339 Ill. App. 3d 651, 662 (2003). The petition must set forth specific factual allegations supporting the following three elements: (1) the existence of a meritorious claim or defense, (2) due diligence in presenting this claim or defense to the trial court in the original action, and (3) due diligence in filing the section 2-1401 petition. *Estate of Barth*, 339 Ill. App. 3d at 662. The petition for relief of mandatory supervised release presented no newly discovered evidence or facts which support a meritorious claim or defense, nor does it include any claims of due diligence before the trial court in the original action or in filing the petition for relief of mandatory supervised release. It simply does not appear to be a petition filed pursuant to section 2-1401.

¶ 10 Finally, the circuit court did not treat the petition as one filed pursuant to section 2-1401. In its order dismissing the petition, the court did not address any of the required elements of a section 2-1401 petition. More to the point, the circuit court dismissed the petition without waiting the 30 days required before dismissing a section 2-1401 petition.

¶ 11 In *Keener v. City of Herrin*, 235 Ill. 2d 338, 348 (2009), our supreme court rejected the argument that a postjudgment motion had been filed pursuant to section 2-

1401 where neither the petitioner nor the circuit court even attempted to comply with the requirements for section 2-1401 proceedings. As in the case at bar, the proper procedures for service of process were not followed, and the circuit court granted the order before the 30 days to answer had expired. Our supreme court found that this procedure was not consistent with section 2-1401 proceedings. 235 Ill. 2d at 349. Furthermore, in its ruling the circuit court never mentioned section 2-1401 and did not indicate that it was proceeding under that section. The circuit court granted the motion without any reference to newly discovered evidence or the requirements of section 2-1401. 235 Ill. 2d at 349. The supreme court concluded that the circuit court had lacked jurisdiction to even rule on the motion as it was filed more than 30 days after the original judgment and was not filed pursuant to section 2-1401. 235 Ill. 2d at 350.

¶ 12 In the case at bar, we affirm the circuit court's dismissal of the petition for relief of mandatory supervised release. Although the circuit court dismissed the petition for relief of mandatory supervised release essentially for failure to state a cause of action, we find that the circuit court lacked jurisdiction to consider the petition. We can affirm on any basis appearing in the record. *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1983). Because the petition for relief of mandatory supervised release was filed more than 30 days after entry of the final judgment, but not pursuant to section 2-1401 of the Code, the circuit court had lost jurisdiction over the case. Accordingly, we affirm the dismissal of the petition.

¶ 13 For the foregoing reasons the judgment of the circuit court of Madison County is hereby affirmed.

¶ 14 Affirmed.