

No. 1-14-2337

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. 04 CR 14107
)	
MICHAEL SMITH,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* Where the trial court prematurely *sua sponte* dismissed defendant's *pro se* section 2-1401 petition fewer than 30 days after it was filed, the dismissal is vacated. In addition, the trial court's order imposing fees for a frivolous filing is vacated where such fees are not permitted on initial section 2-1401 petitions.

¶ 2 Defendant Michael Smith appeals from the *sua sponte* dismissal of his *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). On appeal, defendant contends that the dismissal was premature and must be vacated where (1) the trial court dismissed his petition fewer than 30 days after its filing, and (2) he did

not properly serve the petition on the State. Defendant further contends that the trial court lacked statutory authorization to impose frivolous filing fees on what was his first section 2-1401 petition.

¶ 3 For the reasons that follow, we vacate both the trial court's dismissal order and the order imposing the frivolous filing fees and remand for further proceedings.

¶ 4 Following a 2007 jury trial, defendant was convicted of first degree murder and sentenced to a term of 40 years' imprisonment, to be served consecutively to a 25-year sentence that had previously been imposed on a separate armed robbery conviction. On direct appeal, we granted defense counsel's motion to withdraw and affirmed. *People v. Smith*, No. 1-07-3491 (2009) (unpublished order under Supreme Court Rule 23). In 2010, defendant filed a *pro se* postconviction petition, which the trial court summarily dismissed. This court granted appellate counsel's motion to withdraw and affirmed the trial court's judgment. *People v. Smith*, 2012 IL App (1st) 110185-U.

¶ 5 On May 5, 2014, defendant mailed the *pro se* section 2-1401 petition at issue in the instant case to the clerk of the circuit court of Cook County and the Cook County State's Attorney, both at 2650 South California Avenue, Chicago. Specifically, the attached "Notice of Filing/Affidavit of Service" indicated that defendant placed the petition "in the institutional mail at Menard Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service." The clerk of the circuit court received the petition on May 8, 2014, and stamped it "filed" on May 19, 2014.

¶ 6 The circuit court first addressed the petition on May 27, 2014, when it stated on the record that it was setting the matter for June 13, 2014, for status. No prosecutor's name appeared

on the cover sheet of the transcript of proceedings and no one other than the court spoke on the record. On June 13, 2014, the circuit court *sua sponte* denied defendant's petition and ordered the imposition of a \$90 fee for filing a frivolous section 2-1401 petition and a \$15 fee for mailing. Again, no prosecutor's name appeared on the cover sheet of the transcript of proceedings and, other than the clerk announcing defendant's name, no one other than the court spoke on the record.

¶ 7 This appeal followed.

¶ 8 On appeal, defendant contends that the dismissal of his section 2-1401 petition was premature and must be vacated where (1) the trial court dismissed his petition fewer than 30 days after its filing, and (2) he did not properly serve the petition on the State. Because the State concedes defendant's first point and we agree with the parties, we need not discuss defendant's argument regarding service on the State.

¶ 9 A circuit court may *sua sponte* dismiss a section 2-1401 petition when it does not, as a matter of law, warrant relief. *People v. Vincent*, 226 Ill. 2d 1, 9-10 (2007). However, *sua sponte* dismissal is only appropriate if the petition is "ripe for adjudication." *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). Pursuant to Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985), service of a section 2-1401 petition must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which in turn mandates service on the opposing party either by summons, prepaid certified or registered mail, or publication. Under Rule 105(a) (eff. Jan. 1, 1989), after a petition has been served, a respondent has 30 days to file an answer or otherwise file an appearance in the office of the clerk of the court. Consequently, a court cannot *sua sponte* dismiss a defendant's section 2-1401 petition until the State has had 30 days to respond. *Laugharn*, 233 Ill. 2d at 323.

If the record does not affirmatively show when the petition was served on the State, then the 30-day responding period is calculated from the date of filing. See *People v. Carter*, 2015 IL 117709, ¶ 24. We review the dismissal of a section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 10 Here, defendant and the State agree that the trial court erred in failing to wait 30 days from the date of filing before ruling on defendant's section 2-1401 petition. According to the record, defendant mailed his petition to the State on May 5, 2014. However, the "Notice of Filing/Affidavit of Service" does not affirmatively demonstrate when, how, or indeed if, the State received notice, and the State never affirmatively waived proper service in open court. See *Carter*, 2015 IL 117709, ¶¶ 20, 24. Because the record does not affirmatively establish the date of service, we look to the date of filing in determining ripeness. See *id.* ¶ 24. It is clear from the record that fewer than 30 days passed between the filing of defendant's petition on May 19, 2014, and the circuit court's *sua sponte* dismissal on June 13, 2014. Thus, we agree with the parties that the circuit court dismissed the petition before it was ripe for adjudication. As such, we vacate the circuit court's judgment and remand for further proceedings.

¶ 11 Defendant's next contention on appeal is that the trial court lacked statutory authorization to impose a \$90 frivolous filing fee and \$15 mailing fee on what was his first section 2-1401 petition. The State concedes the issue. Section 22-105(a) of the Code of Civil Procedure permits a court to order a petitioner responsible for the full payment of filing fees and actual court costs of a frivolous "second or subsequent" section 2-1401 petition. 735 ILCS 5/22-105(a) (West 2014). Here, the petition at issue was the *first* section 2-1401 petition filed by defendant. Accordingly, section 22-105(a) does not apply. We accept the State's concession and, pursuant to

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our authority under Supreme Court Rule 615 (eff. Aug. 27, 1999), vacate the \$90 and \$15 fees. On remand, the circuit court is to issue an order restoring the funds to defendant's prisoner trust account.

¶ 12 For the reasons explained above, we vacate the judgment of the circuit court dismissing the section 2-1401 petition, vacate the order imposing fees for a frivolous filing, and remand for further proceedings.

¶ 13 Judgment vacated; remanded.