2014 IL App (1st) 122103-U

SIXTH DIVISION
November 14, 2014

No. 1-12-2103

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. 07 CR 9487
	)	
JAMES LEWIS,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice HOFFMAN and Justice ROCHFORD concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court erred when it dismissed defendant's section 2-1401 petition *sua sponte* because the petition was not ripe for adjudication.

¶ 2 Defendant appeals from the order of the circuit court dismissing *sua sponte* his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends that 1) the trial court erred when it dismissed defendant's petition for relief from judgment; 2) the *sua sponte* dismissal on the merits of defendant's petition should be vacated, because defendant's petition should not have

been dismissed before he properly served the petition on the State; and 3) the trial court erred in assessing filing fees against defendant pursuant to section 22-105 of the Civil Code. (735 ILCS 5/22-105 (West 2012)). We vacate the dismissal order and remand the cause for further proceedings.

¶ 3 The record shows that defendant, and two codefendants who are not parties to this appeal, were charged in relation to a series of events that occurred on April 18, 2007, on the south and southeast sides of Chicago. Following a bench trial, defendant James Lewis was found guilty of multiple counts of aggravated kidnapping, home invasion, and two counts of armed robbery. After merging duplicative charges, the court ultimately sentenced defendant to three 60-year sentences for home invasion and the two armed robberies and 35 years for the aggravated kidnapping.

¶ 4 On direct appeal, defendant claimed that (1) the trial court erred by denying his Motion to Suppress Identification; (2) his due process rights were violated when the behavioral clinical examination requested by counsel prior to trial was not performed; and (3) his sentence was excessive. This court rejected defendant's appellate contentions and affirmed his conviction and sentence. *People v. Lewis*, No. 1-10-2617 (2012) (unpublished order under Supreme Court Rule 23).

¶ 5 Defendant then filed a *pro se* "Petition for Judicial Notice of Law" and a "Petition for Writ of Mandamus," in which he challenged various aspects of his preliminary hearing and grand jury proceedings. Two months later, defendant filed a "Petition for Post-Conviction Hearing," in which he argued that he did not receive “a fair and reliable judicial determination of probable cause hearing.” Defendant informed the circuit court that he wished to withdraw his previously

filed petitions and substitute them with his petition for post-conviction hearing. The court summarily dismissed the petition. Defendant appealed, and this court affirmed in an unpublished order. *People v. Lewis*, 2012 IL App (1st) 111252-U.

¶ 6 Next, defendant filed a "Cause in Fact/Cause of Action" and "Petition to Challenge for Cause/Challenge to Jury Array," which the court re-characterized as a motion to file a successive postconviction petition. He filed a "Right to Remedy and Justice/Injunctive Relief," which discussed the separation of powers but did not present an argument applicable to his case. He also submitted a "Motion to Dismiss," claiming that he was never properly charged. This issue was also raised in the first petition. Defendant later submitted a "Notice of Default in Judgment," in which he complained that the court had not yet ruled on his Right to Remedy and Justice/Injunctive Relief. The court denied defendant's leave to file a successive postconviction petition. Defendant subsequently filed a Motion to Reconsider the court's ruling, which the court denied the next month. Defendant appealed, but subsequently moved to withdraw his appeal. This court granted his motion.

¶ 7 The subject of the instant appeal is defendant's section 2-1401 petition for relief from judgment. Defendant's certificate of service states that it was placed in institutional mail on March 22, 2012. Defendant's proof of service indicates he served his petition via his prison mailing system through regular mail, rather than sending the petition by prepaid certified mail or registered mail. The first status hearing on the petition occurred on April 24, 2012. The State was present on only one of the eight status hearing dates, June 1, 2012 when judge stated, "Devon Nowell and James Lewis. I'm going to give them both order of court 6/7." The court *sua sponte*

dismissed defendant's petition on June 15, 2012. The court also ordered the Department of Corrections to collect $105 in fees and costs from defendant's prison trust fund account.

¶ 8 On appeal, defendant contends that 1) the trial court erred when it dismissed defendant's petition for relief from judgment on the merits without considering the issue of whether a State's witness perjured her testimony, which was supported by a new affidavit; 2) the *sua sponte* dismissal on the merits of defendant's petition for relief from judgment should be vacated, and the cause remanded for further proceedings, because the court prematurely dismissed defendant's petition before it was properly served on the State 3) the trial court erred in assessing filing fees against defendant pursuant to section 22-105 of the Civil Code (735 ILCS 5/22-105 (West 2012)) because he filed a first petition for relief from judgment and the statute applied only to "second and subsequent" petitions for relief from judgment.

¶ 9 Initially, we note that the State argues that this court does not have jurisdiction to hear this appeal because defendant's notice of appeal specifically challenges only the imposition of costs and fees and not the lower court's dismissal of his petition on the merits. We disagree. In conjunction with its dismissal order, the trial court entered an order assessing filing fees. That order made four findings that all filings are entirely frivolous in that:

> "1. They lacked an arguable basis in law or in fact;
>
> 2. The allegations and other factual contentions did not have evidentiary support;
>
> 3. The filings, in *toto*, were presented to hinder, cause unnecessary delay, and needless increase in the cost of litigation;
>
> 4. The allegations are duplicative of numerous other pleadings filed by Petitioner."

In defendant’s two-page notice of appeal, he states that "[t]he trial court stated in it’s [*sic*] order numbers 1 through 4 lacked law or facts; evidence supporting the petition, unnecessary delay and etc. That’s not true. I have attached supporting documents and etc." Although he does not explicitly state what he was challenging, it is apparent that he was referring to the court's findings which formed the basis of the dismissal order. Moreover, in *McGrath v. Price*, 342 Ill App. 3d 19, 31 (2003), this court held that "a notice of appeal is to be liberally construed." Thus, we can infer from defendant’s notice of appeal that he is challenging the trial court's substantive rulings.

¶ 10 Defendant contends that the *sua sponte* dismissal on the merits of defendant's petition for relief from judgment should be vacated, and the cause remanded for further proceedings, because the court prematurely dismissed defendant's petition before it was properly served on the State. Section 2-1401(b) requires "[a]ll parties to the petition [to] be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). Pursuant to Illinois Supreme Court Rule 106, notice of the filing of section 2-1401 petitions "shall be given by the same methods provided in Rule 105." Ill. S. Ct. R. 106 (eff. Aug. 1, 1985). According to Illinois Supreme Court Rule 105, service cannot be made by regular mail. Instead, it must be served in the same manner as service by summons, by prepaid certified or registered mail, or by publication. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). Once the 2-1401 petition for relief has been served, the opposing party has 30 days to answer or otherwise plead in response to the petition. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). The dismissal of a section 2-1401 petition for relief from judgment based on the pleadings alone is reviewed *de novo*. *People v. Vincent*, 226, Ill. 2d 1, 18 (2007).

¶ 11 In this case, defendant argues that the State was not properly served because defendant improperly placed his petition for mailing through regular institutional mail, and therefore the petition was not ripe for adjudication when the court dismissed it. The State counters that it is not clear from the record on appeal that defendant's service did not comply with the requirements of Rule 105(b). We agree with defendant that the State was not properly served in this case, and the trial judge's dismissal on the merits was premature because the 30 days for the State to answer had yet to commence. Contrary to the State's argument, the record shows that defendant's proof of service clearly states that the petition was deposited in the institutional mail for "mailing through the United States Postal Service." There is no indication that the petition was served by certified or registered mail, and there is nothing in the record that contradicts defendant's proof of service by regular mail. Thus, we reject the State's argument.

¶ 12 We find *People v. Carter*, 2014 IL App (1st) 122613 is instructive. In *Carter*, the trial court found defendant guilty of murder and the appellate court affirmed. On May 9, 2012, Carter mailed a section 2-1401 petition seeking relief from the conviction. The clerk of the circuit court file stamped the petition on May 15, 2012. The circuit court dismissed the petition, *sua sponte*, on July 10, 2012. *Id.* ¶ 6. On appeal, Carter argued that he had not properly served the petition on the State, as he had used only the mail at his prison, rather than sending the petition by prepaid certified mail or registered mail. Because nothing in the record showed proper service on the State, or actual service prior to July 10, 2012, the circuit court could not properly dismiss the petition *sua sponte* less than 30 days after July 10, 2012, unless the State waived its right to respond. *Id.* ¶¶ 10-22. Similar to the defendant in *Carter*, defendant placed the petition in the prison mail and there is nothing in the record to indicate that defendant used certified or

registered mail. Accordingly, we find that like the defendant in *Carter*, he did not properly serve the petition on the State by mail.

¶ 13 We reject the State's alternate argument that it effectively waived service by appearing in court and not objecting to improper service. The State made the same argument in *Carter*, and this court rejected it. *Id*. ¶ 15. Similar to the instant case, the State's attorney in *Carter* was present on at least one court date; however, the attorney "did not make any comment on the record that it was appearing or waiving services. No questions were directed to or comments solicited from the prosecutor by the court." *Id*. ¶ 16. The court concluded that the record did not reflect that the State had actual knowledge of defendant's filing. In the instant case, the transcript of the proceedings on June 1, 2012, shows the judge and the assistant State's attorney were present when the court stated, "Devon Nowell and James Lewis. I'm going to give them both order of court 6/7." Although the State appears to argue that its appearance on the record constituted a submission to the court's jurisdiction, we cannot agree. From this brief, two-sentence statement of the trial court we can assume nothing regarding the State's knowledge of this petition. See *Carter*, 2014 IL App (1st)122613, ("we cannot assume the state had knowledge of the petition and waived service simply because the prosecutor was shown on the cover page of the transcript of the proceedings as 'present' in court at the time the case was called.") Because a case is not ripe for adjudication until 30 days after service, and valid service was not effectuated on the State, we hold that the trial court's dismissal of the petition on its merits was premature. Furthermore, we need not address defendant's substantive issues regarding whether the court properly consider a State's witness' perjured testimony, because we find the issue was not ripe for adjudication.

¶ 14 Some panels of the appellate court have expressed concern that ruling that a section 2-1401 petition is never "ripe for adjudication" if not properly served upon the State, may burden the trial courts with cases on their dockets that cannot be disposed of. See *Vincent*, 226 Ill. 2d at 23. However, we do not anticipate this problem. If a section 2-1401 petition languishes too long in the trial court and defendant never perfects service on the State, the trial court can, in the exercise of its discretion, dismiss for want of prosecution. See *People v. Prado*, 2012 IL App (2d) 110767, ¶ 9. Alternatively, if the State learns of the filing and wishes to expedite the proceedings it may expressly waive service of process and the trial court can then set the matter down for further proceedings. *People v. Mescall*, 347 Ill. App. 3d 995, 997 (2004). Accordingly, we reject the suggestion that our disposition of this appeal will create a logjam of cases in the trial court for which there is no possible disposition.

¶ 15 Finally, because the issue may arise on remand, we note that the parties agree that because this was defendant's first section 2-1401 petition, defendant's $105 assessment pursuant to section 22-105 of the Code (735 ILCS 5/22-105 (West 2012
)) was improperly imposed.

¶ 16 For the foregoing reasons, the circuit court's *sua sponte* dismissal of defendant's section 2–1401 petition was premature. We vacate the judgment of the circuit court and remand for further proceedings.

¶ 17 Judgment vacated; cause remanded.