

No. 1-12-2579

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST 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:* The defendant's initial section 2-1401 petition was properly dismissed where he failed to present a meritorious defense or due diligence in preparing it, but his subsequent section 2-1401 petitions were prematurely dismissed prior to the expiration of the 30-day time period allotted for responsive pleadings.

¶ 2 The defendant, William Ward, appeals from an order of the circuit court dismissing *sua sponte* all three of his *pro se* petitions for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). On appeal, he contends that the circuit court erred by prematurely dismissing his petitions. On December 5, 2014, we issued an order

affirming the dismissal of the defendant's initial petition, vacating the dismissal of two subsequent petitions, and remanding for further proceedings. *People v. Ward*, 2014 IL App (1st) 122579-U. We have since vacated that decision pursuant to the supreme court's supervisory order directing us to reconsider our decision in light of *People v. Matthews*, 2016 IL 118114. *People v. Ward*, No. 118723 (Jan. 25, 2017) (supervisory order). After considering the instant case in light of *Matthews*, we again affirm the dismissal of the defendant's initial petition, vacate the dismissal of 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. The 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, he 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 the 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 direct appeal, the 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* postconviction petitions and motions, all of which were denied by the circuit court. The defendant appealed and this

court issued a dispositional order dismissing the appeal because the defendant failed to return the record to the clerk of the appellate court. *People v. Ward*, 1-09-3349 (2010) (dispositional order).

¶ 5 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.

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

¶ 7 On June 27, 2012, the defendant filed his third 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.

¶ 8 On June 29, 2012, in the presence of an assistant State's Attorney, the circuit court ruled on all three section 2-1401 petitions as well as a pending successive postconviction petition. The court stated:

"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."

¶ 9 The defendant now appeals from that portion of the June 29, 2012, order which dismissed the three section 2-1401 petitions. He argues 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. He 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.

¶ 10 Section 2-1401 of the Code provides a statutory procedure to vacate a final judgment that is more than 30 days but less than 2 years old. 735 ILCS 5/2-1401 (West 2012). Pursuant to Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985), service of a section 2-1401 petition must be made by the means set out in Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). Rule 105(b) provides that notice may be served by summons, prepaid certified or registered mail, or publication. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). After notice has been served, the responding party has 30 days to answer or otherwise plead in response to the petition. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). When the responding party fails to answer the petition within the 30-day period, it is deemed to admit all well-pleaded facts and the petition is ripe for adjudication. *People v. Vincent*, 226 Ill. 2d 1, 9-10 (2007). The court can dismiss a petition despite a lack of responsive pleading if the petition is deficient as a matter of law. *Id.* at 8-9. However, the court cannot *sua sponte* dismiss a petition before the 30-day response period

expires. *Laugharn*, 233 Ill. 2d at 323. We review the dismissal of a section 2-1401 petition *de novo*. *People v. Carter*, 2015 IL 117709, ¶ 13.

¶ 11 In this case, the defendant's appeal is based upon the 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 vacate the dismissal and remand for further proceedings.

¶ 12 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. Although the defendant does not argue the merits of his initial petition, we note that the petition was properly dismissed because he 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 direct appeal. *Ward*, 371 Ill. App. 3d at 429. The petition also asserted error in sentencing the 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 the defendant and the court at trial which, if then known, would have prevented the entry of the judgment. The 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.

¶ 13 The defendant argues, however, 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, the defendant analogizes to the Post-

Conviction Hearing 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 the defendant's analogy. A section 2-1401 petition, providing for relief from judgment pursuant to the Code of Civil Procedure, is an entirely distinct form of collateral relief from that provided by the Act. Moreover, while the 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's dismissal of the May 25 petition was not premature where it was entered more than 30 days after the petition was filed.

¶ 14 We agree with the 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.

¶ 15 The State contends that the June 6 and June 27 petitions were not prematurely dismissed because the 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 Illinois 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, is triggered before the petition has reached the court.

¶ 16 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.

¶ 17 Finally, our supreme court's decision in *Matthews* does not change the result. There, the clerk of the Cook County circuit court received the defendant's section 2-1401 petition on April 11, 2012, and file-marked and docketed the petition on April 23. *Matthews*, 2016 IL 118114, ¶ 4. On May 24, more than 30 days after the petition was filed, the circuit court entered an order dismissing the petition. *Id.* The defendant appealed, arguing that the dismissal was premature because he never properly served the State and, thus, the 30-day period for filing a response had not yet expired. *Id.* ¶ 5. Our supreme court held that the defendant was estopped from challenging the validity of the dismissal order based upon his claim that he failed to properly serve the State pursuant to Rule 105. *Id.* ¶ 23. The supreme court further held that, because service and personal jurisdiction can be waived, only the party to whom service is owed can object to improper service. *Id.* Thus, the defendant lacked standing to challenge the validity of the dismissal order based upon lack of personal jurisdiction and the judgment of the circuit court was affirmed. *Id.*

¶ 18 In the instant case, unlike *Matthews*, the defendant does not seek to invalidate the circuit court's dismissal order based upon his failure to properly serve the State, nor does he challenge the validity of the dismissal order based upon lack of personal jurisdiction over the State. Rather, he simply contends that the circuit court's *sua sponte* dismissal of his petition for relief

from judgment fewer than 30 days after its filing was premature and must be vacated. Therefore, the supreme court's decision in *Matthews* does not apply to the case at bar. As discussed above, the defendant's petitions of June 6 and June 27 were prematurely dismissed before the expiration of the 30-day period allotted for responsive pleadings and must be vacated. See *Laugharn*, 233 Ill. 2d at 323 (a section 2-1401 petition may not be dismissed before the passage of the usual 30-day period to answer or otherwise plead).

¶ 19 In conclusion, we affirm the circuit court's dismissal of the 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.

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