FIFTH DIVISION
OCTOBER 31, 2014

No. 1-12-2929

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. 92 CR 1527
	)	
LAWRENCE RHODEN,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Dismissal of section 2-1401 petition reversed, and matter remanded for further proceedings where the petition was prematurely dismissed.

¶ 2 Defendant Lawrence Rhoden appeals the *sua sponte* dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) by the circuit court of Cook County. He maintains that the dismissal was

premature because the petition was not properly served on the State. In the alternative, he maintains that the court erred in dismissing his petition less than 30 days after it was filed.

¶ 3 Defendant is currently serving the sentence of natural life imprisonment that was imposed on his 1992 bench convictions for the first degree murder of his common-law wife and her 13-year-old son. That judgment was affirmed on direct appeal. *People v. Rhoden*, No. 1-93-0484 (1995) (unpublished order under Supreme Court Rule 23). This court also affirmed defendant's numerous unsuccessful collateral pleadings, which included, *inter alia*, post-conviction petitions and section 2-1401 petitions for relief from judgment. *People v. Rhoden*, Nos. 1-97-0523 (1997), 1-98-2948 (1999), 1-99-0207 (2000), 1-00-2496 (2001), 1-05-2079 (2006), 1-07-2150 (2009), 1-07-2568 (2009) (unpublished orders under Supreme Court Rule 23).

¶ 4 In November 2011, defendant filed a *pro se* section 2-1401 petition. The proof/certificate of service relating to that petition reflects that on November 1, 2011, defendant placed it in the prison mail system, properly addressed to the clerk of the circuit court and the State for mailing through the "United States Postal Service." The petition was file stamped November 4, 2011, and docketed on November 15, 2011.

¶ 5 Defendant alleged in this petition that the probable cause determination in the "*Gerstein*[1] court" was void because subject matter jurisdiction was never acquired where the State chose to charge him with a felony by complaint in the municipal court, which did not have jurisdiction to adjudicate a felony. Defendant also alleged that the "indictment" was void for failure to obtain it within 48 hours of his arrest and present it to him. Defendant maintained that the decision

[1] A *Gerstein* hearing, mandated by the Fourth Amendment, affords a defendant arrested without a warrant a prompt judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest. *People v. Galan*, 229 Ill. 2d 484, 506 (2008).

reached by the grand jury must be vacated because he did not receive an indictment within 48 hours of his arrest, and that his appellate counsel was ineffective for failing to argue that his post-conviction judge was biased. Defendant further complained of this court's decisions in his prior appeals as well as the circuit court's prior orders denying him relief. He requested immediate release from custody, and a new trial.

¶ 6 As part of his petition defendant included a request for admission of facts by the State, and also filed a motion for substitution of judge. Defendant subsequently filed additional requests for admission of facts and asked that they be incorporated into his petition for relief from judgment. On January 23, 2012, the circuit court denied defendant's motion for the State to admit facts, and defendant appealed that order. This court subsequently allowed defendant's request to dismiss that appeal. *People v. Rhoden*, No. 1-12-0794 (2012) (dispositional order).

¶ 7 In August 2012, defendant filed a *pro se* "addendum to supplemental petition for relief from judgment," which "augments the issues raised in his previously filed *pro se* petition and in his supplemental petition." The proof/certificate of service indicates that on August 6, 2012, defendant placed a copy of this addendum in the prison mail system properly addressed to the clerk of the circuit court and the State through the "United States Postal Service." The addendum was received in the circuit court on August 10, 2012, and on August 21, 2012, it was entered into the computer system and file stamped.

¶ 8 In it, defendant alleged that the trial court was under the erroneous belief that it had no alternative but to sentence him to natural life imprisonment, and failed to adhere to the statutory sentencing requirements. He further alleged that the legislature, in requiring mandatory natural life imprisonment, stripped the judiciary of its sentencing discretion in violation of the separation

of powers. He maintained that the sentencing statute, Ill. Rev. Stat. , 1972 Supp., ch. 38, sec. 1005-8-1(c), as written, precludes consideration of mitigating factors, and that his sentence of natural life imprisonment was therefore unconstitutional and void.

¶ 9 On August 28, 2012, the circuit court, with the State present, denied defendant's 2-1401 petition. In doing so, the court solely referenced defendant's addendum claim that his sentence was unconstitutional, and noted that this issue had been resolved by the supreme court. Accordingly, the court found defendant's petition without merit.

¶ 10 Defendant then filed a notice of appeal from the order of "December 16, 1992," which is the date of his conviction. After the State noted this discrepancy in its response brief, we allowed defendant leave to file an amended notice of appeal, in which he indicated that he is appealing the August 28, 2012, denial of his section 2-1401 petition.

¶ 11 In this court, defendant contends that the circuit court's *sua sponte* dismissal of his section 2-1401 petition was premature because the petition was not properly served on the State. He maintains that he sent both the petition and addendum through regular mail, but that service cannot be effectuated in that manner under Supreme Court Rule 105(b) (eff. Jan. 1, 1989). In the alternative, defendant claims that the *sua sponte* dismissal was erroneous because it was entered less than 30 days after the petition was filed with the court.

¶ 12 The State responds that this court has no jurisdiction to consider either of these arguments. The State maintains that defendant abandoned his original section 2-1401 petition filed in November 2011, because he never obtained a ruling on it, and instead, filed a notice of appeal. The State further maintains that defendant did not request leave of court to file an addendum to his petition, that the record is incomplete because it does not contain the

supplemental petition which was ostensibly the basis for the addendum, and that the addendum did not restart a 30-day response period for the State.

¶ 13 Initially, we note that, as amended, defendant is appealing the *sua sponte* dismissal order entered on August 28, 2012, where the circuit court solely addressed the contentions in the addendum and made no reference to the original petition or the "supplemental petition" noted therein. In doing so, defendant assumes that the dismissal pertained to both the original petition and to the addendum which he asked the court to incorporate therein.

¶ 14 The State responds that defendant abandoned the original petition when he filed notice of appeal in 2012, prior to a ruling on his section 2-1401 petition, and there is no indication in the record that the circuit court ever saw that petition, much less dismissed it. The State reminds that failure to rule on a motion does not constitute a denial of the motion (*Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622, 628 (2008)) and that defendant's failure to bring his petition to the attention of the court constituted an abandonment. Defendant replies that his original appeal referred only to the admission of facts and that he should not be faulted for the circuit court's failure to address the original petition when he asked the court to incorporate the addendum into it.

¶ 15 The record shows that defendant clearly indicated in the addendum that he was augmenting the issues raised in his original and "supplemental" petitions, and, as such, was not abandoning them with the filing of the notice of appeal in 2012. *Cf. People v. Pinkonsly,* 207 Ill. 2d 555, 566-67 (2003) (where an amended pleading is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be part of the record for most purposes and is effectively abandoned and withdrawn); *Tunca v. Painter*, 2012 IL App (1st) 093384, ¶¶28-

29 (where amended complaint does not incorporate, reallege or otherwise refer to the counts in the original complaint, it is abandoned for purposes of trial and review). Through this action, we find that defendant did not abandon his prior filings (*Childs v. Pinnacle Health Care, LLC*, 399 Ill. App. 3d 167, 176 (2010); *Silver Fox Limousine v. City of Chicago*, 306 Ill. App. 3d 103, 105-06 (1999)), and reject the State's jurisdictional challenge based on that assertion.

¶ 16 The State, however, further contends that defendant never obtained leave of court to file his addendum or supplemental pleadings, and, accordingly, it did not create a new 30-day response time. There is no indication in the record that defendant sought leave to file any of the pleadings mailed to the circuit court after his initial section 2-1401 petition was filed. However, under the reasoning expressed in *People v. Tidwell*, 236 Ill. 2d 150, 160 (2010), and *People v. Collier*, 387 Ill. App. 3d 630, 635-36 (2008), regarding leave to file successive post-conviction petitions, we believe that in ruling on the addendum before it, the circuit court implicitly allowed defendant leave to file it.

¶ 17 The dispositive issue, however, is whether the petition was ripe for adjudication. Defendant contends that his section 2-1401 petition was prematurely dismissed because the State was not properly served, and the 30-day period for the State to respond did not commence because he placed his petition in the regular mail. Our review is *de novo*. *People v. Nitz*, 2012 IL App (2d) 091165, ¶9.

¶ 18 Section 2-1401 establishes a comprehensive procedure for allowing the vacatur of final judgments more than 30 days after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Once the section 2-1401 petition has been filed, 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). Service of a

petition under section 2-1401 must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which mandates service either by summons, prepaid certified or registered mail, or publication (*People v. Prado*, 2012 IL App (2d) 110767, ¶6, citing Ill. S. Ct. R. 105(b)), and does not provide for service by regular mail (*People v. Carter*, 2014 IL App (1st) 122613, ¶¶13-14).

¶ 19 The certificate/proof of service attached to defendant's original 2-1401 petition reflects that he placed this petition in the prison mail system on November 1, 2011, to the clerk of the circuit court and the State through the "United States Postal Service," *i.e.* regular mail. When he subsequently filed the addendum at issue he followed the same procedure. Neither the section 2-1401 petition nor the addendum were sent by registered or certified mail, as required by the rule, nor by publication or summons. *People v. Prado*, 2012 IL App (2d) 110767, ¶6. We find, however, that the State had actual notice of the section 2-1401 petition where it was present during the dismissal of the petition on August 28, 2012.

¶ 20 Defendant relies on *Prado*, 2012 IL App (2d) 110767, ¶8, which held that the *sua sponte* dismissal of defendant's section 2-1401 petition was premature because the State was not properly served with notice of the petition via certified or registered mail. The court, therefore, vacated the dismissal and remanded for further proceedings. In doing so, the court noted that should the State wish to make the disposition of cases such as this one more efficient, the best course would be to waive an objection to the defective service, and then the action could proceed normally through an adjudication on the merits. *Prado*, 2012 IL App (2d) 110767, ¶12.

¶ 21 In *People v. Ocon*, 2014 IL App (1st) 120912, ¶31, we noted that, unlike in *Prado*, an assistant State's Attorney was present in court when the 2-1401 petition was docketed, and the trial court's dismissal was entered after the 30-day period for a response had passed. This court

found that although it was unclear whether defendant properly served the State with his section 2-1401 petition, the State had actual notice of the filing of the petition. *Ocon*, 2014 IL App (1st) 120912, ¶31. *Ocon* held that where the record showed that the State had actual notice of the filing of the section 2-1401 petition because it was present when it was docketed, the 30-day notice period started from that day. *Ocon*, 2014 IL App (1st) 120912, ¶31. We explained that the purpose of service was achieved where there was notice of the litigation and an appearance by the assistant State's Attorney. *Ocon*, 2014 IL App (1st) 120912, ¶35. This court further noted that the State could have objected to the improper notice or responded, but chose not to do so, and that once the 30-day period for a response passed after actual notice to the State, the petition was ripe for adjudication, and the trial court was able to dismiss defendant's petition *sua sponte*. *Ocon*, 2014 IL App (1st) 120912, ¶41.

¶ 22 We observe that *People v. Carter*, 2014 IL App (1st) 122613, ¶¶14, 25, held that the dismissal of defendant's section 2-1401 petition was premature because the State did not receive proper notice of the filing of the petition by registered or certified mail. *Carter* observed that the State's presence was noted on the cover page of the report of proceedings when the petition was dismissed, but found this was insufficient to conclude that the State received notice of the filing of the section 2-1401 petition. *Carter*, 2014 IL App (1st) 122613, ¶21. In so deciding, the court noted that it could not be assumed that 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. *Carter*, 2014 IL App (1st) 122613, ¶21.

¶ 23 We find the better reasoned decision is *Ocon,* in which we found that actual notice to the State was sufficient. If an assistant State's Attorney is indicated as present at the proceeding, then the State has notice of what occurred at that proceeding. Here, the State was shown as present when the addendum was dismissed, and this was sufficient to show that the State had actual notice of the filing.[2] *Ocon,* 2014 IL App (1st) 120912, ¶31.

¶ 24 However, for the reasons that follow, we find that the petition was prematurely dismissed. Our supreme court in *Vincent*, held that a trial court may *sua sponte* dismiss a section 2-1401 petition, and the State's failure to answer a defendant's petition amounts to an admission of all well-pleaded facts. *Vincent*, 226 Ill. 2d at 9-14. The court further held that the State's failure to answer the petition renders the case ripe for adjudication. *Vincent*, 226 Ill. 2d at 9-10. In *Laugharn*, 233 Ill. 2d at 323-24, our supreme court held that a trial court may only properly *sua sponte* dismiss a section 2-1401 petition 30 days from the date of service. Therefore, in accordance with *Vincent* and *Laugharn*, we look to the date of service to determine whether the trial court properly *sua sponte* dismissed defendant's section 2-1401 petition.

¶ 25 Here, the first time the State was present at a proceeding on the section 2-1401 petition was on August 28, 2012, which was the date the State received actual notice of the petition. *Ocon*, 2014 IL App (1st) 120912, ¶31. The circuit court, however, dismissed the petition on that same day, and thus, the State did not receive the required 30-day time period to respond. Furthermore, the State's silence did not render defendant's section 2-1401 petition ripe for

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[2] Notably, the Third District has decided this particular issue on standing, finding that defendant does not have standing to raise an issue regarding the State's receipt of service. *People v. Kuhn*, 2014 IL App (3d) 464266, ¶16. The State, however, has not raised standing in this case, so we decline to address it.

adjudication. *People v. Clemons*, 2011 IL App (1st) 102329, ¶17; compare *People v. Gray*, 2011 IL App (1st) 091689, ¶22 (*Laugharn* and *Clemons* do not apply where the State is present at the dismissal hearing and expressly represents to the court its waiver of the 30-day time period and consents to a *sua sponte* decision on the merits). We, therefore, conclude that the trial court prematurely dismissed defendant's petition before the 30-day period to respond had expired.

¶ 26 In light of the forgoing, we reverse the dismissal of defendant's section 2-1401 petition as premature, and remand for further proceedings.

¶ 27 Reversed and remanded.