2014 IL App (1st) 13-0043-U

First Division
Order filed: June 23, 2014

No. 1-13-0043

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 04 CR 021178; 04 CR 23300-03;05 CR
	)	7844; 05 CR 19720-23
	)	
v.	)	
RONALD HILLOCK,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The court's *sua sponte* dismissal of the defendant's petition for relief from judgment under section 2-1401 of the Code of Civil Procedure was error, because the defendant failed to properly serve the State with notice of the petition, and there was no basis to conclude that the State had appeared or otherwise waived proper service.

¶ 2 The defendant, Ronald Hillock, filed a *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), alleging that the addition of a term of mandatory supervised release to his sentence by the Department of

Corrections was a usurpation of the role of the judiciary, and a violation of the due process and separation of powers clauses of the federal constitution. The trial court dismissed the petition *sua sponte*, and the defendant now appeals, contending, in relevant part, that the dismissal of his petition on the merits was premature because he never properly served the State with process. We agree, and vacate and remand for further proceedings.

¶ 3 On January 31, 2006, the defendant entered non-negotiated guilty pleas to nine counts of theft and one count of identity theft from several small businesses that had employed him as their accountant. For the first eight convictions, the trial court sentenced him to concurrent terms of 14 years' imprisonment for each of four Class 1 thefts and to 6 years' imprisonment for each of four Class 2 thefts. For the two remaining offenses, which occurred while the defendant was free on bond for the previous crimes, the court sentenced him to concurrent prison terms of 15 years for the Class 1 theft and 3 years for the Class 4 identity theft, which ran consecutive to the sentences for the eight prior crimes, for an aggregate sentence of 29 years' imprisonment.

¶ 4 The defendant filed a direct appeal challenging the validity of his sentencing hearing. This court rejected his arguments, and affirmed his conviction and sentence (*People v. Hillock,* No. 1-06-1951 (2008) (unpublished order under Supreme Court Rule 23)). He then filed a post-conviction petition asserting claims related to the voluntariness of his plea and the alleged ineffectiveness of his counsel. The trial court dismissed the petition, and this court affirmed that dismissal (*People v. Hillock,* 2012 IL App (1st) 102281-U). Next, the defendant filed his first motion for relief from judgment under Rule 2-1401, followed by a motion under Rule 2-617 (735 ILCS 5/2-617 (West 2010)), again alleging issues arising from his guilty plea. The trial court denied both motions.

¶ 5 Finally, on August 29, 2012, the defendant filed the petition for relief from judgment at issue in this appeal. He contends that the addition by the Department of Corrections of a term of mandatory supervised release to his sentence amounted to an unconstitutional usurpation of the province of the trial court, which must be stricken as void. He attached the following proof of service, addressed to the Clerk of the Circuit Court and to the State's Attorney, averring as follows:

> "Please take notice that on 15 of Aug, 2012, I placed the attached or enclosed documents in the institutional mail at _____ Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service."

¶ 6 The transcript of proceedings indicates that on September 6, 2012, apparently with neither of the parties appearing, the court docketed the defendant's petition and continued the matter until October 12, "for the Court to review his pleadings." On October 12, 2012, with an Assistant State's Attorney present, the court continued the matter until October 26, 2012. At the hearing of October 26, 2012, again with neither party in attendance, the court ruled that the petition would be dismissed for failure to show the existence of a meritorious claim, and entered a written order to this effect. This appeal followed.

¶ 7 On appeal, the defendant appears to concede that the substantive arguments in his petition were addressed and rejected in the recent case of *People v. McChriston*, 2014 IL 115310. Alternatively, however, he asserts that the *sua sponte* dismissal of his petition on the merits was premature because he failed to execute proper service of the petition upon the State. Specifically, he points out that he served the State by regular mail, which is not an authorized method of service under Supreme Court Rule 105(b). See Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). Accordingly, the petition was not "ripe for adjudication." The State responds that it is unclear

from the record on appeal whether the defendant in fact failed to comply with Rule 105(b), and in any event, the State was present on the second court date after the petition was docketed but voiced no objections to the improper service. Accordingly, it effectively waived any challenge to service upon it. See *People v. Ocon*, 2014 IL App (1st) 120912, 7 N.E.3d 42.

¶ 8 Section 2-1401 is a civil remedy that has been extended to criminal cases, and establishes a comprehensive procedure allowing for the vacatur of final judgments more than 30 days after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871 N.E.2d 17 (2007). Once the petition for relief 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, 323 909 N.E.2d 802 (2009). Service of a petition under section 2-1401 must comply with Supreme Court Rule 105 (see Ill. S. Ct R. 106 (eff. Aug. 1, 1985)), which mandates service by prepaid certified or registered mail. Service by regular mail is insufficient. See Ill. S. Ct. R. 105(b); see also *People v. Carter*, 2014 IL App (1st) 122613.

¶ 9 In this case, the defendant's proof of service clearly states that the petition was deposited in the institutional mail for "mailing through the United States Postal Service." The State points to nothing to contradict this statement or to indicate that service was properly made. Further, the State failed to appear at the initial hearing in which the court docketed the petition, which tends to suggest that it had not received the document.

¶ 10 The State argues that its presence was unnecessary under the principles articulated in *Vincent*, where the court held that the *sua sponte* dismissal of a section 2-1401 petition is appropriate even in the absence of any responsive pleading by the State, because, as with a civil complaint, the lack of a response constitutes an admission of all well-pleaded facts in the petition. *Id.*, 226 Ill. 2d at 8 - 9. We disagree, however, that the holding in *Vincent* can be read

to condone such dismissal in the face of improper service. See *Id.* at 5 (issue before court was summary disposition of "properly served section 2–1401 petition.").

¶ 11 In *Laugharn,* 233 Ill. 2d 318, the court qualified *Vincent* to permit *sua sponte* dismissal only if it occurs after the expiration of the 30-day response period, concluding that the petition is not "ripe for adjudication" until the State has an opportunity to answer or otherwise plead. Further, in cases involving alleged improper service, this court has emphasized the notice requirement of section 2-1401(b) and held that, without proper notice to the State, or an affirmative waiver by the State of proper service, the 30-day response period does not commence to run. See *People v. Nitz,* 2012 IL App (2d) 091165, 971 N.E.2d 633 (statute requires parties be notified, and failure to give notice results in deficient petition); see also *Carter*, 2014 IL App (1st) 122613; *People v. Prado,* 2012 IL App (2d) 110767, 979 N.E.2d 564; *cf. Ocon,* 2014 IL App (1st) 120912. Accordingly, any ruling on the petition on its merits is premature.

¶ 12 In this case, we find neither proper service nor evidence of any real waiver of service by the State. The report of proceedings shows only one "appearance" by the State, on October 12, 2012, where the court merely continued the case and the Assistant State's Attorney did not speak. Although the State appears to argue that this constituted a submission to the court's jurisdiction, we cannot agree. We agree with *Carter,* that we cannot assume, merely because the transcript indicates that the State was briefly physically present, that it had been served, was aware of the petition and had forfeited its right to respond. Accordingly, we hold that the trial court's dismissal of the petition on its merits was premature, as valid service was not effectuated.

¶ 13 We recognize this court's holding in *Ocon*, 2014 IL App (1st) 120912, that the State's presence at a hearing docketing the petition was sufficient to show that it had actual notice of the petition. However, there, unlike in this case, the court dismissed the petition more than 30 days

after the State's appearance. Thus, the court found that the State had been given its allotted time to respond. Here, by contrast, even if we were to conclude that the appearance of October 12 showed actual notice of the petition, the petition was dismissed only 14 days later, on October 26, depriving the State of response time. Accordingly, *Ocon* is distinguishable from this case.

¶ 14 For the foregoing reasons, we vacate the judgment of the circuit court dismissing the defendant's petition, and remand this case for further proceedings. In the event the defendant elects to refile his petition, he should promptly serve the State. See *Carter*, 2014 IL App (1st) 122613; *Prado*, 2012 IL App (2d) 110767.

¶ 15 Vacated and remanded.