2015 IL App (1st) 131744-U

FOURTH DIVISION
July 30, 2015

No. 1-13-1744

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. 91 CR 26586
	)	
HARRY PEÑA,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court of Cook County's *sua sponte* order dismissing defendant's section 2-1401 petition is vacated. The dismissal was premature because the State was not properly served, the State did not have actual notice of the petition, and the State did not waive any objection to the improper service. The cause is remanded for further proceedings without consideration of the merits of the petition.

¶ 2 Defendant appeals the *sua sponte* dismissal of his petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). The petition claimed defendant's right to due process of law was violated when the Illinois Department of Corrections (DOC) added a three-year term of mandatory supervised release (MSR) to his sentence, thus rendering it void. On appeal, defendant further contends that the circuit court's *sua sponte* dismissal was premature because the petition was not properly served on the State, and there is no indication that the State had actual notice or waived defective service. For the following reasons, we vacate the dismissal and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Defendant was found guilty of first-degree murder and armed robbery after a jury trial in 1993. The trial court sentenced defendant to concurrent terms of 45 and 30 years' imprisonment, respectively. This court affirmed that judgment on direct appeal. *People v. Peña*, No. 1-94-0564 (1997) (unpublished order under Supreme Court Rule 23).

¶ 5 In October 1998, defendant filed a *pro se* petition for relief under section 122-1 of the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2008)), raising a claim of ineffective assistance of counsel. The trial court summarily dismissed defendant's petition, and this court affirmed that decision on appeal. *People v. Peña*, No. 1-99-0757 (2000) (unpublished order under Supreme Court Rule 23).

¶ 6 On March 6, 2013, defendant filed the petition for relief from judgment pursuant to section 2-1401 of the Code that is the subject of this appeal. Defendant alleged that his sentence is void because the trial court did not impose the three-year MSR term DOC added to his

sentence and DOC had no authority to do so. Defendant thus requested that his term of imprisonment be reduced by three years. On April 17, 2013, the trial court dismissed the petition *sua sponte* finding that the period of MSR was appropriately added by operation of law and that defendant had not stated a basis for relief.

¶ 7 On appeal, defendant first contends that only the trial court, and not DOC, has the authority to impose a term of MSR, and, therefore, the addition of an MSR term to his sentence by DOC violated his right to due process. Alternatively, defendant argues this cause must be remanded for further proceedings because the trial court's *sua sponte* dismissal of his petition was premature where the petition was not properly served on the State, and the record does not indicate that the State had actual notice of the petition or waived defective service. The State responds defendant lacks standing to challenge the State's lack of notice, and defendant should not receive appellate relief based on his own alleged technical error.

¶ 8 ANALYSIS

¶ 9 Section 2-1401(b) of the Code provides that "[a]ll parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). Illinois Supreme Court Rules 105 and 106 (Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989), R. 106 (eff. Aug. 1, 1985)) provide that notice of the filing of the petition shall be directed to the party and must be served either by summons, prepaid certified or registered mail, or publication. *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 35. Pursuant to Rule 105(a), a party responding to a section 2-1401 petition has 30 days after notice has been served in which to file an answer or otherwise appear. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). In *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009), our supreme court determined that a

petition is not ripe for adjudication before the 30-day period for a response expires. *Laugharn*, 233 Ill. 2d at 323. Where the State fails to answer the petition within the 30-day period, it is deemed to admit all well-pled facts, and the petition is ripe for adjudication. *Laugharn*, 233 Ill. 2d at 323; *People v. Vincent*, 266 Ill. 2d 1, 9-10 (2007). The trial court may then deny the petition if it determines that the allegations contained in the petition do not provide a legal basis for relief under section 2-1401. *Vincent*, 266 Ill. 2d at 12. We review *de novo* the trial court's denial of a petition brought under section 2-1401. *Laugharn*, 233 Ill. 2d at 322.

¶ 10 1. Standing

¶ 11 The State contends that defendant does not have standing to raise the State's lack of notice. In doing so, the State relies on *People v. Kuhn*, 2014 IL App (3d) 130092, ¶¶ 14-16, where the Third District held that the defendant did not have standing to raise a claim regarding the State's receipt of a 2-1401 petition. The State further asserts that defendant should not be permitted to seek relief based on his own error. In support of this claim, the State cites *People v. Segoviano*, 189 Ill. 2d 228, 240-41 (2000), where our supreme court discussed the long-standing principle that a party may not proceed in one manner, and then claim on appeal that such action was in error. Defendant replies he invited no error occurred because he did not take a position below and then assert the opposite on appeal.

¶ 12 Our supreme court held that a section 2-1401 petitioner may challenge the trial court’s premature dismissal of the petition on appeal. *Laugharn*, 233 Ill. 2d at 323. Moreover, we find *Kuhn* distinguishable. There, the State appeared at two hearings on motions to withdraw the defendant's guilty plea after the defendant's section 2-1401 petition had been file-stamped. *Kuhn*

held that the "notice provided to the State was sufficient to allow the State to determine how it wanted to proceed" and the State did not file a responsive pleading or object to the improper service after its representative had participated in two court proceedings. *Kuhn*, 2014 IL App (3d) 130092, ¶ 17. In the instant case, there is no indication in the record that the State was informed defendant had filed a section 2-1401 petition.

¶ 13 2. Ripeness

¶ 14 Defendant sent notice of his petition to the State by regular mail. Since this is not one of the methods provided for in Rule 105, defendant contends that his petition was not ripe for adjudication and this cause must be remanded for further proceedings. In support of his contention, defendant cites *People v. Carter*, 2014 IL App (1st) 122613, ¶¶ 25-26, *appeal granted*, No. 117709 (Sept. 24, 2014), where the Second Division of this court found that the *sua sponte* dismissal on the merits of the defendant's petition was premature in the absence of a showing that the State was properly served. In this case, the State points out that our supreme court has granted the State's petition for leave to appeal in *Carter* and that other appellate courts have subsequently declined to follow *Carter*.

¶ 15 We adhere to the holding in *Carter* that where service was never effectuated, the *sua sponte* dismissal of a defendant's petition is premature, even after 30 days have passed. *Carter*, 2014 IL App (1st) 122613, ¶¶ 25-26. We thus conclude that the *sua sponte* dismissal in this case was premature and that remand is required. In reaching this conclusion, we acknowledge the decision in *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 50, where the Fourth District disagreed that our supreme court's decisions in *Laugharn* and *Vincent* mandated the result

reached in *Carter*, and affirmed the *sua sponte* dismissal of the defendant's section 2-1401 petition where he failed to properly serve the State. We disagree with *Alexander*. The basis of the Fourth District's decision was judicial economy. *Id.* ¶¶ 50-51, 62-63. While the Fourth District's solution saved the trial court from an arguably needless remand, it did nothing to address the recurrence of the original error of the premature dismissal. The better approach is that taken by this court in *Carter*, which is to require prosecutors to stand before the trial court and "clearly and articulately stat[e] the State's position regarding the matter at hand." *Carter*, 2014 IL App (1st) 122613, ¶ 23.

¶ 16 We find *Carter* is applicable here, where there was no indication in the record that the State was present in court when the petition was docketed, waived any objection to the defective service, or otherwise had actual notice of defendant's section 2-1401 petition.

¶ 17 CONCLUSION

¶ 18 For the reasons stated, we vacate the *sua sponte* dismissal of defendant's petition, and remand the cause for further proceedings.

¶ 19 Judgment vacated; cause remanded for further proceedings.