

FOURTH DIVISION  
November 12, 2015

No. 1-13-3805

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 14868
	)	
ISAAC VILLAREAL,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Justices Ellis and Cobbs concurred in the judgment.

**O R D E R**

¶ 1 **Held:** The trial court's *sua sponte* dismissal of defendant's *pro se* section 2-1401 petition is vacated where defendant failed to serve notice of the petition on the State.

¶ 2 Defendant Isaac Villareal appeals from the *sua sponte* dismissal of his *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends that because he did not serve his section 2-1401 petition on the State, the petition was not ripe for adjudication at the time the trial court dismissed it. For the reasons that follow, we vacate the trial court's judgment and remand for further proceedings.

¶ 3 The record shows that on March 19, 2008, defendant pleaded guilty to aggravated kidnapping in exchange for a 14-year term of imprisonment. Defendant did not file a motion to withdraw his plea or take a direct appeal. On August 14, 2013, defendant placed a section 2-1401 petition in the institutional mail at the correctional center where he was incarcerated. The certificate of service indicates that the petition was addressed solely to the clerk of the circuit court of Cook County. In the petition, defendant alleged that his sentence was void because his waiver of a presentence investigation was invalid where the trial court did not make a specific finding on the record as to his criminal history. Defendant also attached an affidavit in which he asserted that the trial court did not admonish him that he would be subject to a term of mandatory supervised release.

¶ 4 The clerk of the circuit court received the petition on August 20, 2013, and stamped it "filed" on August 23, 2013. The matter appeared on the circuit court's September 3, 2013, call. The transcript of proceedings from that date indicates that only the judge and court reporter were present. The trial court stated that defendant had filed a *pro se* section 2-1401 petition and set the matter for October 17, 2013, for court review.

¶ 5 On October 17, 2013, the circuit court dismissed defendant's petition in a written order, finding that contrary to defendant's claims, the trial court did make a finding of defendant's criminal history on the record and did admonish him that he would serve three years of mandatory supervised release. The cover page of the transcript of proceedings from October 17, 2013, does not indicate that anyone other than the judge and the court reporter was present in court.

¶ 6 On appeal, defendant contends that because he did not serve his petition on the State, it was not yet ripe for adjudication when the court dismissed it. Defendant further argues that there is no indication in the record that the State received actual notice of the petition when it was filed or dismissed. He asserts that the dismissal must be vacated and the cause must be remanded for further proceedings. The State responds that defendant should not be rewarded for his own malfeasance and that defendant lacks standing to challenge improper service on the State.

¶ 7 Section 2-1401 establishes a comprehensive procedure for allowing the vacatur of final judgments more than 30 days after their entry. *Vincent*, 226 Ill. 2d 1, 7 (2007). Section 2-1401(b) 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 Rule 106 (eff. Aug. 1, 1985) provides that service of a section 2-1401 petition must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which in turn mandates service either by summons, prepaid certified or registered mail, or publication. Under Rule 105(a) (eff. Jan. 1, 1989), 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. 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. Where the State 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. *Laugharn*, 233 Ill. 2d at 323; *People v. Vincent*, 266 Ill. 2d 1, 9-10 (2007). Our review of the denial of a section 2-1401 petition is *de novo*. *Laugharn*, 233 Ill. 2d at 322.

¶ 8 This court recently addressed a situation similar to the instant case in *People v. Carter*, 2014 IL App (1st) 122613, ¶¶ 4-5, 13-14, *appeal granted*, No. 117709 (Sept. 24, 2014). In *Carter*, the defendant mailed the State, through the institutional mail at the correctional center where he was incarcerated, a section 2-1401 petition that was thereafter file stamped by the clerk of the circuit court and docketed for proceedings. When the case was first called, only the judge and the court reporter were present. *Id.* ¶ 5. On the next court date, the trial judge dismissed the petition *sua sponte*. *Id.* ¶ 6. An assistant State's Attorney was present at the dismissal but made no comments on the record. *Id.* ¶ 16. On appeal, this court determined that the defendant's petition could not be properly dismissed without a showing that service was achieved or that the State had waived proper service, and that the correct remedy was to vacate the dismissal and remand for further proceedings. *Id.* ¶¶ 25-26.

¶ 9 We find the instant case to be even stronger than *Carter*, as there is no indication here that defendant mailed his petition to the State or that an assistant State's Attorney was present at dismissal. Because there is no evidence that the State was served notice in this case, the court's *sua sponte* dismissal of the section 2-1401 petition was premature. The appropriate disposition is to vacate and remand for further proceedings. *Carter*, 2014 IL App (1st) 122613, ¶ 26.

¶ 10 We are mindful that the Fourth District appellate court recently declined to follow *Carter* in *People v. Alexander*, 2014 IL App (4th) 130132. However, despite *Alexander*, we see no reason to depart from the reasoning of *Carter*. The *Alexander* court affirmed the circuit court's dismissal of the defendant's 2-1401 petition where the defendant failed to properly serve the State. *Id.* ¶¶ 46-48. After indicating that this was the defendant's sixth appeal and that the defendant's notice of filing his 2-1401 petition "reveal[ed] his knowledge of the requirements of Rule 105, which he chose to disregard," the *Alexander* court found that "the State (1) does not contest the deficient service, (2) has taken the position that defendant's petition is frivolous, and (3) has represented to this court that it will take the same position if the case is remanded to the trial court." *Id.* ¶ 50. For these reasons, the *Alexander* court denied the defendant's request for a remand, explaining, "Under these circumstances, we see no reason to remand the case so that (1) defendant can properly serve the State or the State can waive service, (2) the State can respond by repeating its position that defendant's petition is frivolous, and (3) the court can repeat its denial of defendant's petition." *Id.* While we appreciate the *Alexander* court's frustration with defendants who abuse the judicial system, we do not find that such frustrations merit departing from our precedent requiring proper service or waiver of service before a court may *sua sponte* dismiss a section 2-1401 petition. See *Carter*, 2014 IL App (1st) 122613.

¶ 11 Moreover, the basis of the Fourth District's decision in *Alexander* was judicial economy. *Alexander*, 2014 IL App (4th) 130132, ¶¶ 50-51, 62-63. We disagree with the *Alexander* court on this point. While the Fourth District's solution saved the trial court from what may have been an arguably needless remand, it did nothing to address the recurrence of the original error of the

premature dismissal. In contrast to *Alexander*, we agree with the *Carter* court's position on judicial economy:

"Judicial economy is best served when the prosecutor, in the first instance, affirmatively spreads of record whether the petition has been served and, if not, whether the State intends on waiving the required service. When this has been done, the trial court will be in a position to inquire whether the prosecution intends to file a response. Should the trial court then dismiss the petition, this potential appellate issue will be eliminated. Otherwise, \*\*\* section 2-1401 defendants that use the same or similar method of service as used by the defendant in this case will routinely seek appellate review." *Carter*, 2014 IL App (1st) 122613, ¶ 24.

¶ 12 With regard to standing, we acknowledge that the Third District in *People v. Kuhn*, 2014 IL App (3d) 130092, ¶¶ 15-16, held that a defendant lacked standing to raise the issue of his own improper service of notice of a section 2-1401 petition by regular mail. However, we find *Kuhn* distinguishable. There, the proof of service indicated that the defendant had sent documents to the State's Attorney via regular mail, and after the defendant's section 2-1401 petition had been file-stamped, the State appeared at two hearings on motions to withdraw the defendant's guilty plea. *Id.* ¶¶ 4, 14. The *Kuhn* court held that the "notice provided to the State was sufficient to allow the State to determine how it wanted to proceed" and that 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. Here, in contrast to *Kuhn*, there is

no indication in the record that defendant mailed the documents in any way to the State, or that the State was otherwise informed of the section 2-1401 petition by participating in any court proceedings. Given these circumstances, we find that the circuit court's order dismissing defendant's petition must be vacated, and the cause must be remanded for further proceedings.

See *Carter*, 2014 IL App (1st) 122613, ¶ 26.

¶ 13 For the reasons explained above, we vacate the judgment of the circuit court and remand for further proceedings.

¶ 14 Judgment vacated; remanded.