

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).

2018 IL App (3d) 160207-U

Order filed May 22, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

| | | |
|--------------------------------------|---|--|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois, |
| Plaintiff-Appellee, |) | |
| v. |) | Appeal No. 3-16-0207 |
| JAMES E. CASHAW, |) | Circuit No. 03-CF-731 |
| Defendant-Appellant. |) | Honorable Kathy Bradshaw-Elliott, Judge, Presiding. |

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court prematurely dismissed defendant's *pro se* petition for postjudgment relief.

¶ 2 Defendant, James E. Cashaw, appeals the *sua sponte* dismissal of his *pro se* petition for postjudgment relief. We vacate and remand for further proceedings.

¶ 3 **FACTS**

¶ 4 Defendant pled guilty to the offense of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 2002)) and was sentenced to a 4-year term of probation. Subsequently, defendant was found to have violated his probation and resentenced to 10 years' imprisonment.

¶ 5 Thereafter, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2016)).¹ The substantive claim on defendant's *pro se* petition is not relevant to this appeal. The proof of service attached to defendant's petition averred that he placed his petition in the institutional mail at Big Muddy River Correctional Center on February 5, 2016, and that a copy was sent to the Kankakee County circuit clerk and the Kankakee County state's attorney on the same day. Defendant's petition was stamped by the circuit clerk as received and filed on February 22, 2016. The State did not file any response to defendant's petition.

¶ 6 On March 14, 2016, (21 days after the court received the petition) the circuit court entered an order *sua sponte* dismissing defendant's petition on the merits.

¶ 7 ANALYSIS

¶ 8 On appeal, defendant contends that the circuit court's dismissal of his *pro se* section 2-1401 petition was premature. He argues that the dismissal was premature because the court failed to wait until the usual 30-day period had expired for the State to file an answer or otherwise plead. We review the dismissal of a section 2-1401 petition *de novo*. *People v. Carter*, 2015 IL 117709, ¶ 13.

¶ 9 After notice of the section 2-1401 petition 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

¹Defendant incorrectly labeled his petition, but both parties on appeal agree that his pleading should be construed substantively as a section 2-1401 petition.

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.

¶ 10 Here, defendant's argument is based on the premise that under *Laugharn* the circuit court's failure to wait 30 days from the filing of his *pro se* petition before ruling on the petition requires this court to vacate the dismissal and remand for further proceedings. We agree the circuit court's dismissal order was premature as it was entered on March 14, 2016, less than 30 days after the petition was received and filed by the circuit clerk. Consequently, we find that under *Laugharn* the court lacked authority to *sua sponte* dismiss the petition on its merits. *Id.*

¶ 11 In reaching this conclusion, we reject the State's contention that defendant's petition was not prematurely dismissed because defendant placed his petition in the mail more than 30 days prior to the March 14 dismissal order. Specifically, the State contends that this court should apply the mail box rule and conclude that defendant's petition was considered filed on the day he placed it in the mail. The 30-day rule of *Laugharn* ensures that the State has the 30 days to which it is entitled to answer or otherwise plead so that the proceedings on a section 2-1401 petition are not short-circuited. *Id.* It is inappropriate to maintain that the 30-day period to answer or otherwise plead is triggered before the circuit court even receives the petition.

¶ 12 Moreover, while the mail box rule has been consistently applied to postplea motions, a section 2-1401 petition is a distinct pleading in that it initiates rather than continues a proceeding. *Wilkins v. Dellenback*, 149 Ill. App. 3d 549, 554 (1986). Like the filing of a complaint which initiates a proceeding, the mail box rule does not apply to the filing of a section 2-1401 petition.

Id. It follows that a section 2-1401 petition is considered filed for purposes of triggering the 30-day period on the date the petition is received by the circuit clerk's office. We believe this conclusion is consistent with the recent amendment to Illinois Supreme Court Rule 373 (eff. July 1, 2017). The current version of Rule 373 states:

“Unless received after the due date, the time of filing records, briefs or other documents required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court. If received after the due date, the time of mailing by an incarcerated, self-represented litigant shall be deemed the time of filing. Proof of mailing shall be as provided in Rule 12. This rule also applies to a motion directed against the judgment and to the notice of appeal filed in the trial court.” Ill. S. Ct. R. 373 (eff. July 1, 2017).

The plain language of Rule 373 provides that the filing date of a section 2-1401 petition is the date received by the court. This rule also creates an exception in those cases where an incarcerated, *pro se* litigant mails documents that are ultimately untimely because they are received after a specified due date. In that scenario the documents are considered constructively filed on the date they are placed in the mail. This is because Rule 373 is intended to avoid the harsh consequences of finding an incarcerated, *pro se* litigant's filing to be untimely merely because of delay between the time the document is placed in the mail and the time it reaches the court. When the exception applies, the earliest date that the 30-day period for the State to answer or otherwise plead could begin is the date the petition is actually received by the court. Holding otherwise would deprive the State of the entire 30-day period to which it is entitled to answer or otherwise plead. *Laugharn*, 233 Ill. 2d at 323.

¶ 14 The judgment of the circuit court of Kankakee County is vacated and remanded for further proceedings.

¶ 15 Vacated and remanded for further proceedings.