

2019 IL App (1st) 170311-U

No. 1-17-0311

September 23, 2019

First Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 02 CR 25936
)	
JOSE BARRERA,)	Honorable
)	Michael B. McHale,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Griffin and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* We vacate the trial court's *sua sponte* dismissal of defendant's petition for relief from judgment and remand for further proceedings.

¶ 2 Defendant, Jose Barrera, appeals the trial court's *sua sponte* dismissal of his petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). He argues the court's dismissal of his petition was premature and must be vacated because the 30-day period in which the State was entitled to respond to his petition had

not yet expired, and he requests that we remand the matter for further proceedings. We vacate the court's order dismissing defendant's petition and remand this matter for further proceedings.

¶ 3 Following a jury trial which was held *in absentia*, defendant was found guilty of reckless homicide, aggravated driving under the influence (DUI), aggravated reckless driving, and obstruction of justice. Defendant was sentenced *in absentia* to 14 years' imprisonment on the reckless homicide charge (which was merged with the aggravated reckless driving charge), which was to be served concurrently with the 3-year prison term on the aggravated DUI and obstruction of justice charges. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Barrera*, No. 1-09-0739 (unpublished order under Supreme Court Rule 23).

¶ 4 We also affirmed the summary dismissal of defendant's 2012 postconviction petition, the 2013 denial of his motion for leave to file a successive postconviction petition, and *sua sponte* dismissal of his 2015 *pro se* petition for relief from judgment under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)). *People v. Barrera*, Nos. 1-12-0818, 1-13-3736, 1-15-2582 (unpublished summary orders under Supreme Court Rule 23) (granting appellate counsels' motions to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987)).

¶ 5 In December 2016, defendant filed the section 2-1401 petition for relief from judgment at issue here. In his petition, defendant asserted his time in prison should be reduced from 14 years to 12 years because the 2-year term of mandatory supervised release attached by law to his sentence is "included within," or a part of, his 14 year sentence. The proof of service indicated defendant placed his petition in the institutional mail for mailing through the United States Postal Service to the State on December 1, 2016, and his petition bears a file stamp indicating it was filed on December 7, 2016.

¶ 6 The petition was docketed and called by the trial court, with the State present, on December 22, 2016, at which time the court continued the matter to December 29, 2016. On December 29, 2016, the trial court *sua sponte* dismissed the petition in open court. An assistant state's attorney was present during the proceedings but did not speak, file a motion to dismiss, or raise any affirmative defenses to defendant's petition.

¶ 7 This appeal followed.¹

¶ 8 On appeal, defendant does not argue the trial court erred in its evaluation of the merits of his petition. Rather, defendant's sole contention is the court erred by dismissing the petition before it was ripe for adjudication. Specifically, citing *People v. Laugharn*, 233 Ill. 2d 318 (2009), defendant contends the trial court improperly denied the petition before the expiration of the 30-day period within which the State was entitled to respond. Defendant argues the State's silence during the hearing at which the petition was dismissed was not sufficient to waive the response period, and as a result, the case law precludes the trial court's *sua sponte* dismissal of the petition within 30 days of its filing. Our review of the trial court's *sua sponte* dismissal is *de novo*. *Laugharn*, 223 Ill. 2d at 322.

¶ 9 Section 2-1401 establishes a comprehensive procedure under which a party may obtain the vacatur of a final judgment which is older than 30 days. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Section 2-1401 provides a civil remedy that applies to criminal cases. *Id.* at 8. Proceedings under section 2-1401 are collateral in nature and are commenced by the filing of a

¹ Defendant's notice of appeal states his appeal is from an order dismissing his petition for relief from judgment entered on December 22, 2016. The record indicates the order dismissing his petition was in fact entered on December 29, 2016, but defendant was informed by letter the order was entered on December 22, 2016. Because defendant's notice of appeal was filed on January 24, 2017, within 30 days of the court's December 29, 2016, order dismissing his petition, his appeal was timely filed. Ill. S. Ct. R. 606(b) (eff. July 1, 2017).

petition. *Id.* at 7. “Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition.” *Id.* at 7-8.

¶ 10 The trial court may *sua sponte* dismiss a section 2-1401 petition without notice or an opportunity to be heard when the petition does not, as a matter of law, warrant relief. *Id.* at 9-10. However, *sua sponte* dismissal is not appropriate if the petition is not “ripe for adjudication.” *Laugharn*, 233 Ill. 2d at 323.

¶ 11 Section 2-1401(b) of the Code provides that notice must be given as provided by rule. 735 ILCS 5/2-1401(b) (West 2016). After notice has been served, the responding party has 30 days to answer the petition or otherwise plead. *Laugharn*, 233 Ill. 2d at 323. “When the responding party 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.” *People v. Dalton*, 2017 IL App (3d) 150213, ¶ 33 (citing *Vincent*, 226 Ill. 2d at 9-10). Thus, the trial court is precluded from dismissing a defendant’s petition *sua sponte* until the 30-day period in which the State is entitled to respond has expired. *Id.* (citing *Laugharn*, 233 Ill. 2d at 323). “The only exceptions to the 30-day requirement are a responsive pleading filed by the State [citation] or an express indication on the record of the State’s intent to waive the time allotted for a response and consent to the court’s early decision on the merits—silence will not suffice [citation].” *Id.* ¶ 35.

¶ 12 In this case, the record does not affirmatively demonstrate the date on which the State’s 30-day period in which to respond commenced. Defendant, citing *People v. Carter*, 2015 IL 117709, ¶ 24, contends the 30-day period began to run when the petition was filed in the circuit

court on December 7, 2016. The State bases its analysis on that same date. However, the record does not establish the date on which the State was served with notice of the petition. It does show the State had actual notice of the petition no later than December 22, 2016, when it was present at the hearing in which the trial court continued the matter to December 29, 2016. See *People v. Ocon*, 2014 IL App (1st) 120912, ¶ 31 (the State received actual knowledge of the petition when it was present in court for the continuance, and the 30-day response period commenced on that date).

¶ 13 In any event, the trial court's *sua sponte* dismissal of the petition on December 29, 2016 occurred only 22 days after the petition was filed and 7 days after the State had actual notice of the petition. Thus, the trial court's *sua sponte* dismissal occurred within the 30-day response period. Accordingly, unless one of the two exceptions to the 30-day requirement applies, we must vacate the trial court's order and remand this matter for further proceedings. See *Dalton*, 2017 IL App (3d) 150213, ¶ 35.

¶ 14 The State argues its silence during the hearing at which the trial court *sua sponte* dismissed defendant's petition indicated the State had decided not to file a responsive pleading and had no objection to the trial court's dismissal of the petition prior to the expiration of the 30-day period to answer or otherwise plead. According to the State, it waived its opportunity to respond to the petition by remaining mute and, therefore, defendant's petition was ripe for adjudication.

¶ 15 We expressly rejected this argument in *People v. Clemons*, 2011 IL App (1st) 102329, ¶¶ 15-17. In *Clemons*, the defendant mailed a petition under section 2-1401 on June 11, 2010, and the petition was file stamped on June 24, 2010. *Id.* ¶ 5. On July 1, 2010, the State was present but

remained silent at a hearing in which the trial court addressed and *sua sponte* denied the petition. *Id.* ¶ 6. On appeal, the defendant, citing *Laugharn*, argued the court prematurely ruled on his petition and requested the order be vacated and the matter remanded for further proceedings. *Id.* ¶ 8.

¶ 16 In *Clemons*, we followed *Laugharn* and granted defendant the relief he requested, by concluding the defendant's petition was not ripe for adjudication. We found that the 30-day period in which the State was entitled to respond had not yet expired. *Id.* ¶ 15. We rejected the State's argument that its appearance and silence at the hearing on the petition rendered it ripe for adjudication, explaining "a failure to respond to a section 2-1401 petition is of no import and does not frame the issues until after the 30-day time period to answer has passed and the responding party is in default." *Id.* ¶¶ 16-17. Thus, we concluded "[m]ere silence on the part of the State, within the 30-day period allowed for it to respond to a defendant's section 2-1401 petition, does not render the petition ripe for adjudication." *Id.* ¶ 17.

¶ 17 In *People v. Gray*, 2011 IL App (1st) 091689, ¶ 22, we likewise concluded that where the State was present at a hearing on a section 2-1401 petition but remained silent, the trial court's *sua sponte* dismissal of the defendant's petition within the 30-day response period was premature. We expounded on our holding in *Clemons* and explained that we did not accept *Laugharn*, where there was no indication that the State was present, as a bright-line rule for vacating *sua sponte* dismissals of section 2-1401 petitions entered before the expiration of the State's 30-day allotment to answer or otherwise plead. Rather, we found *Laugharn* and *Clemons* "would not apply where the State, present at the hearing, *expressly* represents to the court its waiver of the 30-day time period and consents to a *sua sponte* decision on the merits." *Id.*

¶ 18 Accordingly, we conclude, as we did in *Clemons* and *Gray*, the State's silence during the hearing in which the trial court considered and dismissed defendant's petition did not constitute a waiver of the 30-day time period in which the State was entitled to respond and did not render the petition ripe for adjudication. The State did not file a responsive pleading or expressly indicate on the record its intent to waive its right to respond and consent to an early decision on the merits. See *Dalton*, 2017 IL App (3d) 150213, ¶ 35. Thus, the trial court's *sua sponte* dismissal of defendant's petition was premature, and we must vacate the court's order and remand this matter for further proceedings.

¶ 19 For the reasons stated, we vacate the trial court's order dismissing defendant's petition and remand for further proceedings.

¶ 20 Order vacated; cause remanded.