

NOTICE

This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2024 IL App (4th) 230802-U

**FILED**

NO. 4-23-0802

October 17, 2024

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
CORY W. CALHOUN,	)	No. 17CF904
Defendant-Appellant.	)	
	)	Honorable
	)	Talmadge ‘‘Tad’’ Brenner,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Justices Steigmann and Doherty concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court vacated the circuit court’s judgment and remanded for further proceedings, concluding the *sua sponte* denial of defendant’s section 2-1401 petition (735 ILCS 5/2-1401 (West 2022)) before the conclusion of the 30-day period for the State to respond was premature.

¶ 2 Defendant, Cory W. Calhoun, appeals the circuit court’s judgment denying his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2022)). On appeal, defendant argues this court should vacate the judgment and remand for further proceeding because the circuit court’s *sua sponte* denial of his petition was premature. For the reasons that follow, we agree and vacate and remand for further proceedings.

¶ 3 **I. BACKGROUND**

¶ 4 In February 2020, defendant, pursuant to a negotiated guilty plea involving multiple criminal cases, was sentenced to terms of probation for aggravated home repair fraud, theft over \$10,000, and theft over \$500. Defendant's plea to aggravated home repair fraud stemmed from the case presently before this court, Adams County case No. 17-CF-904. Defendant's probation sentences were later revoked, and, in February 2022, he was resentenced, respectively, to 6, 7, and 10 years in prison. The first two sentences were ordered to run concurrently to each other but consecutively to the 10-year sentence, for a total of 17 years in prison. Following his resentencing, defendant appealed, and this court affirmed. *People v. Calhoun*, 2023 IL App (4th) 221056-U.

¶ 5 In May 2023, defendant filed in the instant case a *pro se* petition for relief from judgment under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2022)). In his petition, defendant claimed his conviction for aggravated home repair fraud was void because the statute upon which it was based was unconstitutional and void *ab initio*. One day after its filing, the circuit court enter an order denying the petition, finding it was untimely. Later that month, defendant filed a *pro se* petition for rehearing, arguing the court erroneously concluded his section 2-1401 petition was barred on timeliness grounds.

¶ 6 In June 2023, defendant filed a *pro se* notice of appeal from the circuit court's denial of his section 2-1401 petition, and this court appointed defendant counsel on appeal. Later that month, the circuit court conducted a status hearing, at which the State appeared. The court summarized the proceedings on the record, noting defendant filed a section 2-1401 petition, it entered an order denying the petition as untimely, defendant filed a petition for rehearing, and defendant filed a notice of appeal. After summarizing the proceedings, the following exchange occurred between the court and the State:

“[THE COURT:] The circuit clerk did file a notice of appeal,

so I believe the matter is with the Fourth District.

\*\*\* [D]oes the State have any position on any of this?

[STATE]: No, Your Honor. I think the appeal is the—

(Off the record discussion)

THE COURT: Okay. My impression was that he filed an appeal on the denial of his motion under [section] 1401.

[STATE]: Does he have appellate counsel? I would assume the Appellate Defender's Office is representing him on the appeal.

THE COURT: I believe so.

[STATE]: So then if he is represented by counsel, then it is the appellate defender's issue to take up.”

¶ 7 In July 2023, the circuit court entered a written order striking defendant's notice of appeal and denying his petition for rehearing. In the order, the court indicated (1) it was denying the petition for rehearing because “it does not raise issues not already considered by the court” and (2) its order was “final and appealable.” Later that month, this court dismissed defendant's pending appeal because of the circuit court's order striking the notice of appeal.

¶ 8 In September 2023, defendant filed a timely *pro se* motion for leave to file a late notice of appeal, which this court granted.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues this court should vacate the circuit court's judgment and remand for further proceeding because the court's *sua sponte* denial of his section 2-1401 petition was premature. Specifically, defendant asserts the court's ruling was premature because

(1) it was rendered before the expiration of the 30-day period for the State to respond and (2) the record is devoid of any evidence indicating the State responded to his petition or otherwise indicated an intent to waive the 30-day period.

¶ 12 The State, in response, initially argues this court should dismiss defendant's appeal for lack of jurisdiction because defendant did not file a motion to withdraw his guilty plea in accordance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2017) and he forfeited the issue raised in his section 2-1401 petition by not raising it earlier. The State alternatively argues this court should affirm the circuit court's judgment because, "although the [circuit] court's \*\*\* *sua sponte* [denial] was before 30 days from notice, any impropriety was cured" when (1) the State was given and declined the opportunity to respond to the section 2-1401 petition at the status hearing and (2) the court denied the petition for rehearing outside the 30-day period.

¶ 13 We first consider our jurisdiction to address the circuit court's judgment. Section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2022)) provides a comprehensive statutory procedure applicable to both criminal and civil cases allowing for the vacatur of final judgments older than 30 days. *People v. Abdullah*, 2019 IL 123492, ¶ 13, 160 N.E.3d 833. A section 2-1401 proceeding is a civil proceeding subject to the rules of civil procedure. *People v. Stoecker*, 2020 IL 124807, ¶ 18, 181 N.E.3d 201.

¶ 14 Generally, "[e]very final judgment of a circuit court in a civil case is appealable as of right." Ill. S. Ct. R. 301 (eff. Feb. 1, 1994). "A judgment is final if it determines the litigation on the merits so that, if affirmed, nothing remains for the [circuit] court to do but to proceed with its execution." *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 233, 840 N.E.2d 1174, 1182 (2005). "The filing of a notice of appeal is the jurisdictional step which initiates

appellate review.” (Internal quotation marks omitted.) *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176, 950 N.E.2d 1136, 1143 (2011).

¶ 15 To confer this court with jurisdiction, a notice of appeal must generally be filed within 30 days after the entry of the final judgment from which the appeal is taken. Ill. S. Ct. R. 303(a)(1) (eff. July 1, 2017). If a timely postjudgment motion is filed, the time for filing a notice of appeal is tolled and the appealing party must file a notice of appeal “within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment or order.” *Id.*; see 735 ILCS 5/2-1203(a) (West 2022) (providing postjudgment motion generally must be filed within 30 days after the entry of the judgment). If a party files a notice of appeal before the entry of the order disposing of the last pending postjudgment motion, the notice becomes effective when the order disposing of the last pending postjudgment motion is entered. Ill. S. Ct. R. 303(a)(2) (eff. July 1, 2017).

¶ 16 In this case, the circuit court entered its judgment denying defendant’s section 2-1401 petition one day after it was filed. Defendant then filed a petition for rehearing, followed by a notice of appeal, the latter of which initiated proceedings in this court. The petition for rehearing was timely filed within 30 days of the judgment. The circuit court conducted a status hearing. The transcripts from that hearing demonstrate both the court and the State believed, erroneously, the petition for rehearing did not have to be addressed because of the notice of appeal. In fact, the notice of appeal had not become effective while the timely petition for rehearing remained pending. At some point following the hearing, the court apparently became aware of the need to dispose of the petition for rehearing. The court entered an order denying the petition. As part of that order, the court also, unnecessarily, struck the notice of appeal. In any event, defendant

filed a timely *pro se* motion for leave to file a late notice of appeal, which we granted. See Ill. S. Ct. R. 303(d) (eff. July 1, 2017).

¶ 17 The State, without addressing the above law and procedural history, argues this court should dismiss defendant’s appeal for lack of jurisdiction because defendant did not file a motion to withdraw his guilty plea in accordance with Rule 604(d) and forfeited the issue raised in his section 2-1401 petition by not raising it earlier. We reject the State’s argument. To begin with, the purported errors of defendant do not affect our jurisdiction. See *People v. Robinson*, 2021 IL App (4th) 200515, ¶ 11, 197 N.E.3d 683 (“A defendant’s failure to comply with [Rule 604(d)] does not deprive us of jurisdiction.”); *Ballinger v. City of Danville*, 2012 IL App (4th) 110637, ¶ 13, 966 N.E.2d 594 (“[T]he forfeiture rule is an admonition to the parties and does not affect this court’s jurisdiction.”). Moreover, the State fails to address case law holding (1) the requirements of Rule 604(d) are “inapplicable to proceedings brought pursuant to section 2-1401 of the Code” (*People v. Mathis*, 357 Ill. App. 3d 45, 49, 827 N.E.2d 932, 936 (2005)) and (2) certain voidness challenges are exempt from forfeiture and may be raised at any time (*People v. Thompson*, 2015 IL 118151, ¶¶ 31-32, 43 N.E.3d 984).

¶ 18 Based upon our review of the applicable law and the procedural history of this case, we conclude circuit court’s judgment is properly before this court.

¶ 19 We now turn to the merits of this appeal. The circuit court’s denial of defendant’s section 2-1401 petition is subject to *de novo* review. *People v. Vincent*, 226 Ill. 2d 1, 18, 871 N.E.2d 17, 28 (2007).

¶ 20 As our supreme court has explained, “Section 2-1401 petitions are essentially complaints inviting responsive pleadings.” *Id.* at 8. Under our rules of civil procedure, a respondent has 30 days from service to respond to a section 2-1401 petition. Ill. S. Ct. R. 105(a) (eff. Jan. 1,

2018). A respondent's failure to respond to a section 2-1401 petition within the 30-day period constitutes "an admission of all well-pleaded facts" in the petition and renders the petition "ripe for adjudication." *Vincent*, 226 Ill. 2d at 9-10.

¶ 21 Critical to this appeal is the supreme court's decision in *People v. Laugharn*, 233 Ill. 2d 318, 909 N.E.2d 802 (2009). In *Laugharn*, the circuit court *sua sponte* dismissed the defendant's section 2-1401 petition only seven days after its filing. *Id.* at 323. Our supreme court held the circuit court could not *sua sponte* dismiss a section 2-1401 petition unless it is " 'ripe for adjudication.' " *Id.* The supreme court found "[t]he circuit court's *sua sponte* dismissal of defendant's petition before the conclusion of the usual 30-day period to answer or otherwise plead was premature." *Id.* It explained the dismissal "short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead." *Id.* Without addressing the merits of the claim raised in the section 2-1401 petition before it, the court concluded the premature *sua sponte* dismissal "requires *vacatur* of the dismissal order." *Id.*

¶ 22 In this case, there is no dispute the circuit court improperly *sua sponte* denied defendant's section 2-1401 petition before the 30-day period for the State to respond concluded. The court issued its judgment one day after the petition was filed, and the record is devoid of any evidence indicating the State responded to the petition or otherwise indicated an intent to waive the 30-day time requirement before the denial. See *People v. Dalton*, 2017 IL App (3d) 150213, ¶ 35, 79 N.E.3d 883 ("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]."). Therefore, we find, in accordance with *Laugharn*, the circuit court's *sua sponte* denial of defendant's petition before the conclusion of the 30-day period for the State

to respond was premature; the petition was not ripe for adjudication at the time of the court's ruling. See *Laugharn*, 233 Ill. 2d at 323.

¶ 23 The State argues this court may nevertheless affirm the circuit court's judgment because any impropriety was cured when (1) it was given and declined the opportunity to respond to the section 2-1401 petition at the status hearing and (2) the court denied the petition for rehearing outside the 30-day period. We are not convinced. First, with respect to the status hearing, our review of the record demonstrates neither the court nor the State believed the merits of the section 2-1401 petition or the correctness of the prior ruling were at issue; instead, they were focused on whether the petition for rehearing was properly before the court, erroneously believing it was not. Second, with respect to the court's ruling on the petition for rehearing, the court did not grant the requested relief and reconsider its ruling; instead, it denied the petition for rehearing because it did "not raise issues not already considered by the court." Despite the State's attempt, this simply is not a case where, following a premature *sua sponte* ruling on a section 2-1401 petition, the State waived its right to respond and the court issued a new ruling.

¶ 24 Therefore, in accordance with *Laugharn* and absent any other argument, we find it necessary to vacate the circuit court's judgment and remand for further proceedings.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we vacate the circuit court's judgment and remand for further proceedings.

¶ 27 Judgment vacated; cause remanded for further proceedings.