

2014 IL App (1st) 130930-U
No. 1-13-0930
Order Filed July 25, 2014

SIXTH 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 Cook County
Plaintiff-Appellee,)	
)	No. 99 CR 11231
v.)	
)	
STEVEN SPEARS,)	
)	Honorable
Defendant-Appellant.)	William G. Lacy,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's *sua sponte* dismissal of the defendant's petition for relief from judgment was premature where the defendant failed to serve the petition on the State in accordance with the rule, and there was no evidence that the State had actual notice of the petition or waived proper service.

¶ 2 The defendant, Steven Spears, appeals from the *sua sponte* dismissal of his petition for relief from judgment pursuant to section 2-1401(f) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401(f) (West 2012)). On appeal, the defendant contends that, because he failed to serve the State with the petition in accordance with Illinois Supreme Court Rule 105(b) (eff. Jan. 1, 1989), the circuit court erred when it dismissed his petition. The defendant raises no issues regarding the merits of his petition.

¶ 3 The record reflects that on November 19, 2012, the *pro se* defendant deposited a petition for relief from judgment, order and sentence, summons and an affidavit in the mail box at the Danville Correction Center, addressed to Dorothy Brown, Clerk of the Circuit Court of Cook County and to Anita Alvarez, State's Attorney of Cook County.¹ On December 14, 2012, the circuit court noted that the defendant's petition had been filed with the circuit court clerk on December 5, 2012. The court commented that it did not know if the State had been served but, presuming it had, the State had 30 days to respond. The case was continued to January 7, 2013, and further continued to January 18, 2013.

¶ 4 On January 18, 2013, the circuit court noted that the 30-day response period had passed without a response from the State. The court found no basis in law or fact to grant relief and dismissed the petition. The defendant appeals.

¶ 5 ANALYSIS

¶ 6 Rule 105(b) requires that a section 2-1401 petition be served by personal service, prepaid certified or registered mail or by publication. Ill. S. Ct. R. 103(a), (b) (eff. Jan. 1, 1989).

¹ On his proof of service, the defendant spelled "Alvarez" as "Alverez."

Where the petition is sent by regular mail, the State has not been not properly served. *People v. Carter*, 2014 IL App (1st) 122613, ¶ 14.

¶ 7 In *Carter*, this court held that due to the defendant's failure to serve the State in accordance with Rule 105(b), the circuit court's *sua sponte* dismissal of his petition for relief from judgment was premature. This court vacated the dismissal and remanded for further proceedings. *Carter*, 2014 IL App (1st) 122613, ¶ 26.

¶ 8 We find *Carter* dispositive of the case before us.² As in *Carter*, the defendant failed to serve the State in accordance with Rule 105(b), but his petition was dismissed *sua sponte*. The majority of the arguments the State raises on appeal here were raised and rejected by this court in *Carter*.

¶ 9 The State contends that because the clerk's office received the defendant's petition, we should presume that the State also received the petition and chose not to respond to it. We rejected that same argument in *Carter*. See *Carter*, 2014 IL App (1st) 122613, ¶ ¶ 22-23. The State further argues that we should presume that there was an assistant State's Attorney present because "[a]ssistant State's Attorneys are routinely present in every felony courtroom." See *People v. Ocon*, 2014 IL App (1st) 120912 ¶ 31 (the presence of an assistant State's Attorney when the case was docketed served as actual notice to the State). The record before us does not reflect the presence of any assistant State's attorney, either at the time the petition was docketed or when the circuit court dismissed the petition. See *Carter*, 2014 IL App (1st) 122613, ¶ 21 (the reviewing court would not assume that the State had knowledge of the petition simply because the front cover of the transcript listed the prosecutor as present

² The modified opinion in *Carter* was issued on April 22, 2014, the same day the State filed its brief in this appeal. The State has not requested that it be allowed to supplement its argument to address the opinion in *Carter*.

when the case was called). In the present case, the fronts of the transcripts do not list anyone from the State, either on the date the petition was docketed or dismissed.

¶ 10 The State argues that it is unclear from the record on appeal that the defendant's service did not comply with Rule 105(b). The State points out that certified, registered and regular mail is sent through the same prison mail service. The State reasons since the language of the summons the defendant drafted demonstrated knowledge of the requirements of Rule 105(b), this court should presume the defendant complied with the service requirements of the rule.

¶ 11 In *Carter*, this court rejected the same argument where the defendant's proof of service showed that he placed the documents in the institutional mail at the Menard Correctional Center properly addressed to the parties for mailing through the United States Postal Service. *Carter*, 2014 IL App (1st) 122613, ¶ 14. The State's arguments regarding the rules and the institutional requirements for certified or registered mail and the defendant's familiarity with Rule 105(b) do not contradict the evidence in the record before us and amount to mere speculation on the State's part. We will not assume that the defendant complied with Rule 105(b) in the absence of any indication in the record that the service on the State was made other than by regular mail.

¶ 12 The State then argues that the circuit court had personal and subject matter jurisdiction to rule on the defendant's petition and, therefore, the defendant had no standing to object to the dismissal of his petition on the grounds that the State had not been properly served. See *In re M.W.*, 232 Ill. 2d 408, 426-27 (2009) (a party may object to improper service of process only on behalf of himself, since the objection may be waived). In *M.W.*, the appearance of the minor's parent submitted him to the jurisdiction of the court. *M.W.*, 232 Ill. 2d at 429.

¶ 13 In the present case, there is nothing in the record establishing that the State was served with the defendant's petition or appeared in court in connection with the case, either of which would have evidenced actual notice of the proceedings. See *Ocon*, 2014 IL App (1st) 120912, ¶ 35 (the purpose of service, actual notice of the litigation and an appearance, was achieved by the court appearance of an assistant State's Attorney). Moreover, this court has refused to assume that waiver of service occurred. See *Carter*, 2014 IL App (1st) 122613, ¶ 22 ("there are many events that one could assume took place where the prosecutor was shown to be present that do not necessarily reflect service of the petition and an intentional waiver of service and right to respond"). In the absence of proper service in accordance with Rule 105(b) or waiver of the service requirement by the State, any ruling on the merits of the defendant's section 2-1401 petition was premature.

¶ 14 For all of the foregoing reasons, the circuit court's *sua sponte* dismissal on the merits of the defendant's section 2-1401 petition was premature. We vacate the judgment of the circuit court and remand for further proceedings. See *Carter*, 2014 IL App (1st) 122613, ¶ 26 (the appropriate disposition is to vacate and remand for further proceedings).

¶ 15 Judgment vacated; cause remanded for further proceedings.