

No. 1-13-1230

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 19852
)	
DETERTORING SANDERS,)	Honorable
)	Steven J. Goebel,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's appeal dismissed for want of jurisdiction where defendant did not timely file a notice of appeal. Even if this court had jurisdiction, it would not consider the claims in defendant's petition for relief from judgment as they are barred by *res judicata* or forfeited.

¶ 2 Defendant Detertoring Sanders was convicted of the offense of armed habitual criminal after a bench trial at which the State presented evidence that police recovered an assault rifle from defendant's car. Defendant, proceeding *pro se*, appeals from the dismissal of his petition for relief from judgment, brought pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). We dismiss defendant's appeal because defendant did not timely file his notice of appeal, depriving this court of jurisdiction to consider his claims. We also note

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that, even if defendant had timely filed his notice of appeal, his claims would be barred by *res judicata* or forfeited because he either raised or could have raised them in prior proceedings.

¶ 3

I. BACKGROUND

¶ 4 This court previously discussed the facts underlying defendant's conviction in its opinion in *People v. Sanders*, 2013 IL App (1st) 102696. We will recite those facts only insofar as they are necessary to dispose of the instant appeal.

¶ 5 Prior to his trial, defendant filed a motion to quash his arrest and suppress evidence. At the hearing on defendant's motion, a police officer testified that an unidentified woman flagged him down and said that she saw a man put a machine gun into a vehicle. She described the man and told the officer the license plate number of the vehicle. The officer located the car and pulled it over; defendant was the driver. As defendant was exiting the vehicle, another police officer who assisted with the traffic stop saw an assault rifle in the backseat of the car. The trial court denied defendant's motion to suppress, finding that the officer had a reasonable, articulable suspicion sufficient to justify the traffic stop under *Terry v. Ohio*, 392 U.S. 1 (1968).

¶ 6 At defendant's bench trial, the police officers who testified at the motion to suppress hearing testified to the same facts. The person who initially flagged down the police did not testify. The trial court convicted defendant of armed habitual criminal.

¶ 7 Defendant appealed his conviction, alleging that the trial court erred in denying his motion to suppress. This court affirmed defendant's conviction. *Sanders*, 2013 IL App (1st) 102696.

¶ 8 While defendant's direct appeal was pending, he filed a postconviction petition, asserting: (1) his arrest was fabricated; (2) his right to confront the witnesses against him was violated; (3) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose an exculpatory

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videotape and firearm report; (4) the police officers who testified against him committed perjury; and (5) that the trial court violated the separation of powers in the Illinois Constitution in sentencing him. The trial court summarily dismissed defendant's petition. On appeal, his appointed counsel filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted counsel's motion and affirmed the dismissal of defendant's petition in a summary order.

¶ 9 On June 15, 2012, defendant filed the *pro se* petition for relief from judgment at issue in this case. Defendant's petition asserted: (1) the police officers who testified against him committed perjury; (2) the police officer who received the tip from the unidentified woman improperly testified to her hearsay statements; (3) the police lacked a reasonable, articulable suspicion to pull defendant over; and (4) the State violated the rules of discovery by not producing the informant's name and address. The State did not respond to defendant's petition.

¶ 10 On February 5, 2013, the circuit court dismissed defendant's petition for relief from judgment in a written order. The clerk of the circuit court mailed defendant a copy of the order along with a letter dated February 15, 2013.

¶ 11 Defendant filed a notice of appeal from that decision. The clerk of the circuit court stamped defendant's notice of appeal as "filed" on March 11, 2013. Defendant included a certificate of service with his notice of appeal, stating that defendant deposited his notice of appeal "in the United States Postal Service Mail at Shawnee Corr. Cen. [*sic*], postage prepaid for mailing on this 3rd day of March, 05, [*sic*] 2013." The certificate of service was not notarized. It also stated, "SWORN AS TRUE UNDER PENALTY OF PERJURY, Ch. 735, Sec. 5/1-109." The clerk stamped defendant's certificate of service as "received" and "filed" on March 11, 2013.

¶ 12

II. ANALYSIS

¶ 13 Although neither the State nor defendant addresses the timeliness of defendant's notice of appeal in this case, the Illinois Supreme Court has instructed this court to " 'be certain of its jurisdiction prior to proceeding in a cause of action.' " *People v. Smith*, 228 Ill. 2d 95, 106 (2008) (quoting *R.W. Dunteman Co. v. C/G Enterprises, Inc.*, 181 Ill. 2d 153, 159 (1998)). "Unless there is a properly filed notice of appeal, a reviewing court has no jurisdiction over the appeal and is obliged to dismiss it." *Smith*, 228 Ill. 2d at 104.

¶ 14 A notice of appeal must be filed within 30 days of the judgment from which the appellant seeks review. Ill. S. Ct. 606(b) (eff. Feb. 6, 2013). Pursuant to Illinois Supreme Court Rule 373, if a notice of appeal is received after the due date, "the time of mailing *** shall be deemed the time of filing," and "[p]roof of mailing *** shall be as provided in Rule 12(b)(3)." Ill. S. Ct. R. 373 (eff. Dec. 29, 2009). Illinois Supreme Court Rule 12(b)(3) provides that a party proves service by mail "by certificate of the attorney, or affidavit of a person other than the attorney, who deposited the document in the mail ***, stating the time and place of mailing or delivery, the complete address which appeared on the envelope or package, and the fact that proper postage *** was prepaid." Ill. S. Ct. R. 12(b)(3) (eff. Jan. 4, 2013).

¶ 15 In this case, the circuit court dismissed defendant's *pro se* 2-1401 petition on February 5, 2013. Defendant thus had to file a notice of appeal on or before March 7, 2013. As the clerk received defendant's notice of appeal on March 11, 2013, defendant's notice of appeal was timely if he proved service by mail via an affidavit complying with Rule 12(b)(3).

¶ 16 Although defendant included a certificate of service with his notice of appeal indicating that he mailed his notice of appeal on March 3, 2013 with proper postage, it was not notarized. "[A]n affidavit must be sworn to, and statements in writing not sworn to before an authorized person cannot be considered affidavits." *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490,

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494 (2002). As defendant's unnotarized certificate of service does not indicate that it was given under oath before an authorized person, it is not an "affidavit" under Rule 12(b)(3) and is null. *Roth*, 202 Ill. 2d at 494, 497; see also *People v. Tlatenchi*, 391 Ill. App. 3d 705, 714-15 (2009) (finding that an unnotarized proof of service did not constitute an "affidavit" under Rule 12(b)(3) (internal quotation marks omitted)).

¶ 17 We recognize that, in *Robidoux v. Oliphant*, 201 Ill. 2d 324, 340 (2002), the Illinois Supreme Court held that an affidavit in support of a motion for summary judgment did not need to be notarized to be considered an "affidavit." In *Roth*, however, the Illinois Supreme Court expressly limited its holding in *Robidoux* to affidavits under Illinois Supreme Court Rule 191(a). *Roth*, 202 Ill. 2d at 495-96. At issue in *Roth* was the sufficiency of an unnotarized statement of intent to file a petition for leave to appeal under Illinois Supreme Court Rule 315. *Id.* at 492-94. The *Roth* court distinguished *Robidoux* because the rule at issue in *Robidoux* set out express requirements for affidavits but omitted a requirement of notarization:

"Because Rule 191(a) sets out specific requirements for an affidavit, but omits reference to notarization, it was reasonable for this court to conclude in *Robidoux* that notarization is not required. In this case, we cannot excuse the noncompliance with the traditional requirements of an affidavit because Rule 315(b), unlike Rule 191(a), gives absolutely no guidance as to what is required of the party filing the affidavit." *Id.* at 496.

As Rule 315 did not define "affidavit," the *Roth* court looked to case law, which consistently required that an affidavit be sworn to before an authorized person. *Id.* at 493-94, 496. The *Roth* court thus concluded that the unnotarized affidavit of intent was not an "affidavit" under Rule 315 and was a nullity. *Id.* at 494, 497.

¶ 18 Pursuant to *Roth*, we find *Robidoux* to be inapplicable to the instant case. Rule 12(b)(3) requires that service by mail be proved via an "affidavit." Ill. S. Ct. R. 12(b)(3) (eff. Jan. 4, 2013). Unlike the rule at issue in *Robidoux*, Rule 12(b)(3) does not specify what such an "affidavit" must contain or exclude a requirement of notarization. Like the *Roth* court, we construe Rule 12(b)(3) to require that an "affidavit" be notarized. Defendant's certificate of service did not constitute an "affidavit" under Rule 12(b)(3) because it was not notarized. As defendant did not prove service of his notice of appeal, the date listed on his certificate of service cannot be considered the date he filed it under Rule 373. Defendant's notice of appeal was thus untimely, as the clerk did not receive it until March 11, 2013.

¶ 19 We have also considered *People v. Hansen*, 2011 IL App (2d) 081226, but find it to be distinguishable. In that case, the court held that the defendant timely filed his notice of appeal where the postmark on the envelope in which defendant mailed his notice of appeal showed that it was timely mailed. *Id.* ¶ 14. Unlike *Hansen*, the record in this case does not contain a postmarked envelope showing when defendant mailed his notice of appeal. Absent any other evidence establishing that defendant mailed his notice of appeal on or before March 7, 2013, we must find that defendant's notice of appeal was untimely.

¶ 20 Although defendant's certificate of service also contained a verification clause pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2012)), this court has rejected the contention that such a verification can substitute for an affidavit of service. *Tlatenchi*, 391 Ill. App. 3d at 715-16. Even the *Hansen* court, which excused the defendant from strict compliance with Rule 12(b)(3), did not consider the date on the defendant's unnotarized, verified certificate of service as evidence of timely mailing. *Hansen*, 2011 IL App (2d) 081226, ¶¶ 4, 11-15. Instead, it considered only the postmark on the envelope containing the defendant's

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notice of appeal. *Id.* ¶¶ 11-15. We thus find that defendant's verification of his certificate of service did not make it an "affidavit" under Rule 12(b)(3).

¶ 21 As the record lacks proof of timely mailing under Rule 12(b)(3), we must consider defendant's notice of appeal filed as of March 11, 2013. Defendant's notice of appeal is thus untimely. We lack jurisdiction to address defendant's claims and must dismiss his appeal.

¶ 22 We note that, even if we had jurisdiction over defendant's appeal, his claims would be barred by the doctrine of *res judicata* or forfeited. In the context of a collateral proceeding, "issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered forfeited." *People v. Davis*, 2014 IL 115595, ¶ 13. Likewise, "a ruling on an initial postconviction petition has *res judicata* effect with regard to all claims that were raised or could have been raised in the initial petition." *People v. Guerrero*, 2012 IL 112020, ¶ 17. In this case, each of the claims in defendant's section 2-1401 petition were either raised or could have been raised in his direct appeal or his postconviction petition. Defendant's claim that the officers committed perjury was previously raised in his postconviction petition, which was dismissed. His claims that the police officer's hearsay testimony was inadmissible and that the State violated the rules of discovery could have been raised on direct appeal or in his first postconviction petition. His claim that the police lacked a reasonable, articulable suspicion to stop him was raised at trial and in his direct appeal. Defendant included no evidence with his section 2-1401 petition that would cast new light on any of these issues. Even if defendant had properly vested this court with jurisdiction, therefore, we would not consider his claims.

¶ 23

III. CONCLUSION

¶ 24 For the reasons stated, we dismiss defendant's appeal.

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¶ 25 Appeal dismissed.