

No. 1-14-0989

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 JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 89 CR 19350 |
| |) | |
| ERIC LANGHAM, |) | Honorable |
| |) | Nicholas R. Ford, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court's *sua sponte* dismissal of defendant's *pro se* section 2-1401 petition affirmed as defendant could not affirmatively establish, based on record on appeal, improper service on the State.

¶ 2 Defendant Eric Langham appeals from the *sua sponte* dismissal of his *pro se* petition for relief under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). Langham contends that the petition was not ripe for adjudication at the time that the trial court dismissed it because "the record does not indicate" that Langham served the petition on the State through any of the means allowed by Supreme Court Rules. Langham also contends that

the trial court improperly entered an assessment under section 22-105(a) of the Code (735 ILCS 5/22-105(a) (West 2012)), because that provision applies only to second or subsequent petitions for relief from judgment and this was his first petition. We affirm the dismissal based on our Supreme Court's recent decision in *People v. Carter*, 2015 IL 117709, and vacate the \$105 assessment.

¶ 3 Background

¶ 4 After a jury trial, Langham was found guilty of first degree murder and sentenced to 60 years in prison. This judgment was affirmed on direct appeal. See *People v. Langham*, No 1-90-2706 (1992) (unpublished order under Supreme Court Rule 23). Langham then filed multiple unsuccessful collateral attacks on his conviction through the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). See *People v. Langham*, Nos. 1-03-3231 (2005), 1-05-2466 (2006), 1-06-2526 (2007) (unpublished orders under Supreme Court Rule 23); *People v. Langham*, 2011 IL App (1st) 100462-U, 2013 IL App (1st) 102991-U.

¶ 5 On November 7, 2013, Langham mailed a section 2-1401 petition to the clerk of the circuit court of Cook County and the Cook County State's Attorney. Specifically, the "Proof/Certificate of Service" indicated that the attached petition for relief from judgment was placed "in the institutional mail at Hill Correctional Center, properly addressed *** for mailing through the United States Postal Service." The petition alleged that Langham should be granted relief because the court fraudulently concealed information from the jury that an "out of courtroom session" was held to determine whether a deputy sheriff assigned to the courtroom where Langham's trial was held had inappropriately provided "extraneous judicial testimony."

¶ 6 The clerk of the circuit court stamped the petition "filed" on November 22, 2013. The matter appeared on the trial court's call on December 3, 2013; January 17, 2014; and February 14, 2014.

¶ 7 The transcript from January 17, 2014, indicates an assistant State's Attorney informed the trial court that "the attorneys were here on this matter" and that they agreed to a February 14, 2014 status date.

¶ 8 At the February 14 hearing, the trial court dismissed Langham's petition *sua sponte* in a written order finding, in pertinent part, that Langham was attempting to relitigate an issue which had been rejected by the court "as early as 2004." The trial court also found the petition to be frivolous and assessed fees and costs in the amount of \$105 under section 22-105(a) of the Code. See 735 ILCS 5/22-105(a) (West 2012).

¶ 9 Analysis

¶ 10 Initially, we note that by solely challenging the *sua sponte* dismissal of his petition as premature because the State was not properly served, Langham has waived any challenge to the actual merits of his petition. Ill. S. Ct. R. 341(h) (7) (eff. Jan. 1, 2016). Langham argues that the dismissal must be vacated and the cause remanded for further proceedings.

¶ 11 Section 2-1401 of the Code establishes a comprehensive procedure for allowing the vacatur of final judgments more than 30 days after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Section 2-1401(b) states that "[a]ll parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). Supreme Court Rule 106 (eff. Aug. 1, 1985), states that service of a section 2-1401 petition must comply with Supreme Court Rule 105 (eff. Jan. 1,

1989), which in turn mandates service either by summons, prepaid certified or registered mail, or publication.

¶ 12 Supreme Court Rule 105(a) (eff. Jan. 1, 1989) requires a party responding to a section 2-1401 petition to file an answer or otherwise appear within 30 days after notice has been served. Our supreme court has determined that a petition is not ripe for adjudication before the 30-day period for a response expires. Review of the denial of a section 2-1401 petition is *de novo*. *Id.* at *People v. Laugharn*, 233 Ill. 2d 318, 322 (2009).

¶ 13 *People v. Carter*, 2015 IL 117709, is dispositive. In *Carter*, the defendant filed a motion to vacate the judgment and attached a certificate of service indicating that he had placed the motion in the institutional mail at the facility where he was incarcerated. The circuit court dismissed the pleading *sua sponte*. On appeal, the defendant claimed that the dismissal was premature because the petition was never properly served on the State. *Id.* ¶ 7.

¶ 14 Our supreme court determined that there was no meaningful record from the circuit court to be reviewed regarding the defendant's alleged error—defective service. *Id.* ¶ 20. The "scant record" from the circuit court consisted solely of the defendant's statement in the proof of service that he " 'placed the documents listed below in the institutional mail at Menard Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service.' " *Id.* The court found that this statement could not serve as a basis for the defendant's allegation of error on appeal because it only showed where the defendant mailed his petition; the correctional facility's institutional mail; and the medium through which it was to be transmitted, the United States Postal Service. *Id.* The language in the proof of service did not affirmatively establish transmittal by regular mail, and the court declined to assume, based on the

record before it, that the defendant's service on the State was deficient. *Id.* ¶¶ 20, 23. Because the defendant failed to affirmatively establish through the record on appeal that the State was not properly served, the supreme court presumed the trial court's order dismissing the petition was rendered in accordance with applicable law. *Id.* ¶¶ 19, 23-24.

¶ 15 As in *Carter*, this court cannot conclude that the record on appeal affirmatively establishes that Langham's service on the State was deficient. Like *Carter*, there is a "scant record" with which to review Langham's claim of deficient service. The only evidence of service in the record is the "Proof/Certificate of Service" attached to the petition which indicates that the petition was placed "in the institutional mail at Hill Correctional Center, properly addressed *** for mailing through the United States Postal Service." The proof of service was addressed to, the clerk of the circuit court and the State's Attorney's office. But, nothing in the record indicates whether the petition was actually mailed via regular, certified, or registered mail. Our supreme court has held that a defendant who "seeks to use, on appeal, his own error, by way of allegedly defective service, in an effort to gain reversal of a circuit court's *sua sponte* dismissal" of a section 2-1401 petition "must affirmatively demonstrate the error via proceedings of record." See *id.* ¶¶ 19, 25. For the same reasons, we must find that Langham has failed to satisfy his burden to present a sufficient record showing that his means of service was, in fact, improper. See *id.* ¶ 25.

¶ 16 Defendant next contends, and the State concedes, that because the petition was defendant's first petition for relief from judgment, section 22-105(a) of the Code does not authorize the imposition of fees and costs. Section 22-105 of the Code applies only to "a second or subsequent" section 2-1401 petition. See 735 ILCS 5/22-105(a) (West 2012). As the petition

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was defendant's first petition for relief for judgment, section 22-105(a) of the Code did not apply and the trial court improperly imposed the \$105 assessment.

¶ 17 Affirmed in part; vacated in part.