

2017 IL App (1st) 123734-U

No. 1-12-3734

March 28, 2017

SECOND 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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS, )	Appeal from the Circuit Court
Respondent-Appellee, )	of Cook County.
v. )	
ROBERT GILBERT, )	No. 04 CR 26102
Petitioner-Appellant. )	The Honorable
)	Carol A. Kipperman,
)	Judge presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The defendant cannot use his own failure to comply with Supreme Court rules as grounds for reversal of the trial court's judgment.
- ¶ 2 Robert Gilbert filed a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), seeking relief from his conviction and sentence for attempted

murder. The trial court dismissed the petition *sua sponte*, 28 days after the prosecutor acknowledged receipt of the petition. Gilbert argues on appeal that the trial court dismissed the petition prematurely, because the court did not give the State 30 days to respond. We find that Gilbert cannot use his own failure to serve the State in accord with the Supreme Court Rules as grounds for reversal. Because the clerk of court stamped the petition as received more than 30 days before the trial court dismissed the petition, we hold that the trial court did not prematurely dismiss the petition.

¶ 3

### BACKGROUND

¶ 4

In 2006, a jury found Gilbert guilty of attempted murder. The trial court sentenced Gilbert to 25 years in prison. This court affirmed the conviction and sentence. *People v. Gilbert*, No. 1-06-0882 (2008) (unpublished order under Supreme Court Rule 23). From 2009 through 2011, Gilbert filed three postconviction petitions and two petitions for relief from the judgment under section 2-1401. The circuit court dismissed the postconviction petitions and denied the 2-1401 petitions. This court affirmed the circuit court's judgments. *People v. Gilbert*, No. 1-09-1553 (2010) (unpublished order under Supreme Court Rule 23); *People v. Gilbert*, No. 1-09-2316 (2011) (unpublished order under Supreme Court Rule 23); *People v. Gilbert*, No. 1-10-3132 (2011) (unpublished order under Supreme Court Rule 23); *People v. Gilbert*, No. 1-10-3133 (2011) (unpublished order under Supreme Court Rule 23); *People v. Gilbert*, No. 1-11-0839 (2012) (unpublished order under Supreme Court Rule 23).

¶ 5

Gilbert later filed yet another petition under section 2-1401, alleging, this time, that his trial counsel failed to inform him before trial that the State offered to recommend a sentence of 15 years in prison in exchange for a guilty plea. Gilbert signed and dated the proof of

service for the petition on October 27, 2012, claiming only that he deposited the petition in the prison mail on that date. The clerk of court stamped the petition as received on November 6, 2012.

¶ 6 At a hearing on November 9, 2012, the assistant State's Attorney told the circuit court that she received a copy of the petition that morning. The court scheduled the petition for hearing on December 7, 2012. On December 7, the court, on its own motion, dismissed the petition without hearing any argument from the State or Gilbert. Gilbert now appeals.

¶ 7 ANALYSIS

¶ 8 Because the circuit court dismissed Gilbert's section 2-1401 petition based on the pleadings, without holding an evidentiary hearing, we review the order *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 9 Gilbert contends only that the circuit court dismissed his petition prematurely, as the prosecutor actually received the petition on November 9, 2012, only 28 days before the *sua sponte* dismissal. Gilbert contends that the date the clerk of court stamped the petition as received, November 6, 2012, has no effect because Gilbert did not send the notice by registered or certified mail, as required by Supreme Court Rule 105(b). Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989).

¶ 10 *People v. Matthews*, 2016 IL 118114, controls our decision. In *Matthews*, the trial court found Matthews guilty of murder and the appellate court affirmed the conviction. On March 25, 2012, Matthews mailed to the court a section 2-1401 petition seeking relief from the conviction. The clerk of the circuit court file stamped the petition on April 11, 2012. The

circuit court dismissed the petition, *sua sponte*, on May 24, 2012. *Matthews*, 2016 IL 118114, ¶¶ 3-4.

¶ 11 On appeal, Matthews argued that he had not properly served the petition on the State, as he had used only the mail at his prison, rather than sending the petition by prepaid certified mail or registered mail. Supreme Court Rules 105 and 106 require service of section 2-1401 petitions by prepaid certified mail or registered mail, or by publication. *Matthews*, 2016 IL 118114, ¶¶ 5-7; Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989); Ill. S. Ct. R. 106 (eff. Aug. 1, 1985). Under Supreme Court Rule 101(d) (eff. May 30, 2008), the State had 30 days after it received service to respond to the petition. "[T]he court cannot *sua sponte* dismiss a petition before the 30-day response period expires." *Matthews*, 2016 IL 118114, ¶ 8. Matthews argued that the 30 day period never started because he never properly served his petition on the State. The *Matthews* court held that "a defendant cannot challenge the trial court order based on his own failure to properly serve the State." *Matthews*, 2016 IL 118114, ¶ 15

¶ 12 Gilbert, like Matthews, seeks to use his own failure to comply with Supreme Court Rules as grounds to challenge the trial court's order. The court received the petition on November 6, 2012, and dismissed it more than 30 days later, on December 7, 2012. Gilbert argues only that the court acted prematurely because he did not comply with the requirement for service by certified or registered mail, and therefore the 30 day period should not have commenced until the prosecutor actually received the petition, on November 9, 2012. Because Gilbert cannot use his failure to comply with court rules as grounds for reversing the trial court's decision, we find him estopped from arguing that the court acted prematurely. Gilbert does

not suggest any other grounds for reversing the trial court's order. Accordingly, following *Matthews*, we affirm the trial court's judgment dismissing Gilbert's 2-1401 petition.

¶ 13

CONCLUSION

¶ 14

Following *Matthews*, we affirm the dismissal of Gilbert's section 2-1401 petition.

¶ 15

Affirmed.