

2017 IL App (1st) 131212-UB

No. 1-13-1212

June 22, 2017

Fourth 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
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 04 CR 9222
)	
NAHUM BUSTOS,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge, presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* Pursuant to *People v. Matthews*, 2016 IL 118114, defendant cannot use his own failure to comply with Illinois Supreme Court Rule 105(a) to seek reversal of the circuit court's dismissal of his section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)).

¶ 2 Defendant Nahum Bustos appeals from the circuit court's *sua sponte* dismissal of his petition for relief from judgment filed under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant argued this case should be

remanded for further proceedings because the State was not served with notice of his petition. On June 30, 2015, this court issued an order vacating the circuit court's dismissal of defendant's petition and remanding for further proceedings. *People v. Bustos*, 2015 IL App (1st) 131212-U, ¶ 12. We have since vacated that decision pursuant to the Illinois Supreme Court's order directing us to reconsider this case in light of *People v. Matthews*, 2016 IL 118114. *People v. Bustos*, No. 119655 (Jan. 25, 2017) (supervisory order). After considering the instant case in light of *Matthews*, we affirm the circuit court's *sua sponte* dismissal of defendant's petition.

¶ 3 Pursuant to a guilty plea in 2005, defendant was convicted of murder and sentenced to 20 years in prison and a three-year period of mandatory supervised release (MSR). Defendant did not seek to withdraw his plea or take a direct appeal.

¶ 4 On January 28, 2013, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code, asserting that the circuit court's judgment was void because it included an MSR period. That petition is the subject of this appeal. On February 4, 2013, the circuit court noted that the petition was filed and held it on call until March 1, 2013. On that date, the circuit court entered a written order denying defendant's petition. The court summarized its ruling on open court on March 1, 2013; the record does not indicate that an assistant State's Attorney was present on either the February or March court date.

¶ 5 Defendant contends on appeal that the dismissal of his petition was premature because the petition had not been properly served on the State and the State did not waive proper service or appear in court to answer the petition. A defendant filing a petition under section 2-1401 must provide notice to the opposing party of the petition's filing by service in person, by mail or by publication, in accordance with Illinois Supreme Court Rule 105(a) (eff. Jan. 1, 1989). See also

Ill. S. Ct. R. 106 (eff. Aug. 1, 1985) (stating that the service procedures in Rule 105 apply to section 2-1401 petitions). If the opposing party fails to respond within 30 days, the petition is treated as properly stating a cause of action. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). The circuit court cannot dismiss a petition *sua sponte* before the 30-day response period has expired. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009).

¶ 6 In our initial order addressing defendant's section 2-1401 petition, we held that a petition could not be dismissed by the circuit court *sua sponte* where the State had not received notice of its filing, relying in part on *People v. Carter*, 2014 IL App (1st) 122613. *Bustos*, 2015 IL App (1st) 131212-U, ¶¶ 8. Our supreme court has since reversed the appellate decision in *Carter*, affirming the circuit court's dismissal of a petition because the record failed to establish the State did not receive proper notice or that the dismissal was premature. *People v. Carter*, 2015 IL 117709, ¶ 24. The supreme court in *Carter* did not address whether the defendant could challenge his own improper service.

¶ 7 That question has been answered in *Matthews*. There, the supreme court held that the defendant could not challenge the validity of the circuit court's order dismissing his section 2-1401 petition based on the defendant's claim of his own improper service on the State. *Matthews*, 2016 IL 118114, ¶ 15. Noting that the 30-day window for the State's response provides it with the opportunity to answer the petition or otherwise plead, the supreme court observed that "[n]one of the notice requirements at issue were designed to allow a petitioner to object to lack of service on behalf of the opposing party." *Id.* The supreme court also rejected the defendant's alternative assertion that the court lacked personal jurisdiction over the parties, finding that the defendant could not raise that objection on the State's behalf. *Id.* ¶ 20. The

supreme court affirmed the judgment of the circuit court and dismissed defendant's petition with prejudice. *Id.* ¶ 23.

¶ 8 For the reasons set out in *Matthews*, defendant cannot challenge the circuit court's dismissal of his petition brought under section 2-1401 on the grounds of his improper service. Accordingly, the circuit court's dismissal of defendant's petition is affirmed. Additionally, because the petition in *Matthews* was dismissed with prejudice, we reject defendant's contention, citing *People v. Nitz*, 2012 IL App (2d) 091195, that he should be allowed to refile his petition and properly serve the State.

¶ 9 Affirmed.