

2017 IL App (1st) 142325-U  
No. 1-14-2325  
Order filed September 29, 2017

Fifth 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 of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 10375
	)	
ANTONIO THOMAS,	)	Honorable
	)	Arthur F. Hill Jr.,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE REYES delivered the judgment of the court.  
Justices Hall and Gordon concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Circuit court's *sua sponte* dismissal of defendant's *pro se* section 2-1401 petition affirmed where our supreme court held that a defendant is estopped from claiming that service was improper based on his own failure to comply with Illinois Supreme Court Rule 105(b).
- ¶ 2 Defendant Antonio Thomas appeals from an order of the circuit court of Cook County dismissing *sua sponte* his *pro se* petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (725 ILCS 5/2-1401 (West 2012)). On appeal,

defendant does not challenge the merits of his petition, but instead, solely contends that the dismissal was premature because he did not properly serve his petition on the State. We affirm.

¶ 3 Following a 2001 jury trial, defendant was convicted of aggravated kidnapping and attempted armed robbery, but acquitted of first degree murder. The trial court sentenced defendant to an extended term of 60 years' imprisonment based on a prior attempted murder conviction. This court affirmed that judgment on direct appeal. *People v. Thomas*, No. 1-02-0319 (2004) (unpublished order under Supreme Court Rule 23).

¶ 4 In 2005, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2004)) which was summarily dismissed by the circuit court. On appeal, this court allowed the State Appellate Defender to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed that judgment. *People v. Thomas*, No. 1-06-0325 (2007) (unpublished order under Supreme Court Rule 23).

¶ 5 In December 2013, defendant mailed the instant *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code. Therein, defendant solely alleges that his extended-term sentence is void because the State failed to give him notice that his sentence would be extended based on his prior conviction.

¶ 6 Defendant attached to his petition a "Proof/Affidavit of Service" which indicates that he mailed his petition to the Cook County State's Attorney at the Richard J. Daley Center, and to the clerk of the circuit court at 2650 South California Avenue. The proof of service further states that defendant "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.” Defendant’s petition was stamped “RECEIVED” by the clerk of the circuit court on December 17, 2013, and “FILED” by the clerk on January 13, 2014.

¶ 7 The report of proceedings shows that on February 21, 2014, the circuit court noted that defendant’s *pro se* petition was pending and continued the proceedings to March 7, 2014, when it again continued the case. The record indicates that an assistant State’s Attorney was present in court on both of these dates, but did not speak on the record.

¶ 8 On April 8, 2014, the circuit court reviewed defendant’s allegation, found that his claim was without merit, and dismissed his petition *sua sponte*. The record does not indicate whether an assistant State’s Attorney was in court at the time of the dismissal. Defendant subsequently filed a *pro se* motion to reconsider the dismissal, which the circuit court denied.

¶ 9 On appeal, defendant raises no substantive issues regarding the claim alleged in his petition. Rather, he solely contends that the circuit court’s dismissal was premature because he did not properly serve his petition on the State. Defendant argues that his petition should be remanded for further proceedings, or alternatively, that this court should modify the circuit court’s judgment so that the dismissal is without prejudice.

¶ 10 In his opening brief, defendant asserts that this court’s ruling in *People v. Carter*, 2014 IL App (1st) 122613, is “dispositive” of the issue in this case. In *Carter*, the court found that because the defendant failed to properly serve his section 2-1401 petition on the State, the circuit court’s dismissal of the petition was premature. Consequently, the appellate court vacated the circuit court’s judgment and remanded the petition for further proceedings. *Carter*, 2014 IL App (1st) 122613, ¶ 26; see also *People v. Prado*, 2012 IL App (2d) 110767 (same).

¶ 11 Defendant argues that the record here establishes that he did not properly serve the State because he mailed the notice through regular mail rather than certified or registered mail as required by the supreme court rules. He further argues that the record does not affirmatively demonstrate that the State waived service or received actual notice of his petition in open court. He therefore contends that pursuant to *Carter* and *Prado*, his petition must be remanded for further proceedings.

¶ 12 In response, the State argues that our disposition in this case is controlled by our supreme court's recent decision in *People v. Matthews*, 2016 IL 118114. Relying on the analysis and holding in *Matthews*, the State argues that defendant is estopped from claiming that service was improper based on his own failure to comply with the notice requirements. It further asserts that because service can be waived, only the State could object to the improper service in this case, and defendant could not object on behalf of the State.

¶ 13 In reply, defendant argues that the State failed to respond to the authorities he relied upon in his opening brief. Defendant maintains that pursuant to *Carter* and *Prado*, this court should remand his petition for further proceedings, or alternatively, modify the circuit court's judgment so that the dismissal of his petition is without prejudice. Defendant did not address the holding in *Matthews*.

¶ 14 As a threshold matter, we observe that by solely challenging the *sua sponte* dismissal of his petition as premature, defendant has waived any challenge to the actual merits of his petition. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *People v. Matthews*, 2016 IL 118114, ¶ 21. Accordingly, we deny defendant's request to modify the dismissal of his petition to indicate that

it is without prejudice. We review the circuit court's dismissal of defendant's section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 15 Section 2-1401(b) of the Code provides 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) provides that service of a section 2-1401 petition must comply with Supreme Court Rule 105 (eff. Jan. 1, 1989). Pursuant to Rule 105, notice of the filing of a petition must be directed at the party against whom relief is sought, and must be served either by summons, prepaid certified or registered mail, or publication. Ill. S. Ct. R. 105(b). After notice has been served, the responding party has 30 days to file an answer or otherwise appear. Ill. S. Ct. R. 105(a).

¶ 16 Our supreme court has held that where the State fails to answer the petition within the 30-day period, it is deemed to have admitted to all well-pleaded facts, and the petition is ripe for adjudication. *Vincent*, 226 Ill. 2d at 9-10. The circuit court may then deny the petition if it determines that the allegations raised therein do not provide a legal basis for relief under section 2-1401. *Id.* at 12.

¶ 17 Initially, we observe that defendant has failed to acknowledge that *Carter*, the case on which he relies, was reversed by the Illinois Supreme Court. *People v. Carter*, 2015 IL 117709. The facts of the instant case are nearly identical to those in *Carter*, and the argument defendant presents on appeal is the same as that raised in *Carter*. Under these facts and circumstances, the supreme court found that the record was insufficient to demonstrate the deficiency in service that the defendant was required to establish in order to advance his argument. *Carter*, 2015 IL 117709, ¶ 22. The record provides that the circuit court dismissed the defendant's petition on the merits more than 30 days after it had been filed. *Id.* ¶ 24. Accordingly, where nothing in the

record affirmatively established that that the State was not given proper notice, or that the circuit court's *sua sponte* dismissal was premature, the supreme court presumed that the circuit court's order conformed with the law and affirmed that judgment. *Id.* ¶¶ 23, 26. In light of our supreme court's reversal of *Carter*, defendant's reliance on that case, and the argument he raises here, are without merit.

¶ 18 Moreover, as the State correctly points out, our disposition in this case is controlled by our supreme court's recent decision in *Matthews*. In that case, the defendant mailed a section 2-1401 petition and attached a "proof/certificate of service" to his pleading stating that he had mailed it "with proper first-class postage attached thereto" through the prison mail system at Menard Correctional Center to the clerk of the circuit court and the State's Attorney's office. *Matthews*, 2016 IL 118114, ¶ 4. The circuit court dismissed the petition *sua sponte* more than 30 days after it had been filed. *Id.* The record demonstrates that at the time of the dismissal, an assistant State's Attorney was present, but did not participate in the proceedings. *Id.* On appeal, the defendant argued that the circuit court's dismissal of his petition was premature because he never properly served the State. *Id.* ¶ 5. The appellate court agreed, but found that the State received actual notice of the petition and forfeited any objection to improper service. *Id.* The court held, however, that the dismissal was premature because less than 30 days had passed from the date that the State received actual notice. *Id.* Consequently, the appellate court reversed the dismissal and remanded the petition for further proceedings. *Id.*

¶ 19 Upon further review, our supreme court noted that "[I]t is well established that an accused may not ask the trial court to proceed in a certain manner and then contend in a court of review that the order which he obtained was in error." (Internal quotation marks omitted.) *Id.*

¶ 13 (quoting *People v. Segoviano*, 189 Ill. 2d 228, 241 (2000)). The court found that by filing his proof of service, Matthews asked the court to proceed as though the State had been adequately notified. *Id.* ¶ 14. Accordingly, the court found that Matthews was “estopped” from claiming that the circuit court erred in acquiescing to his request. *Id.*

¶ 20 The court also expressed concern that if Matthews was allowed to invalidate the circuit court’s order based on his own failure to properly serve the State, future litigants may have an incentive to provide improper service to create a second opportunity to litigate their claims. *Id.*

¶ 15. The court explained that the State’s power to waive service in such cases would effectively be revoked, which would be inconsistent with the purpose of Rule 105 and notice requirements in general. *Id.* The court stated that the notice requirements were not designed to allow a petitioner to object to lack of service on behalf of the opposing party. *Id.* Consequently, the court held that a defendant cannot challenge the circuit court’s dismissal of his petition based on his own failure to properly serve the State. *Id.* The court further held that because objections to improper service and personal jurisdiction may be waived, a defendant lacks standing and “cannot object to improper service or lack of personal jurisdiction on behalf of the State.” *Id.*

¶¶ 19-21.

¶ 21 We find defendant’s reliance on *People v. Nitz*, 2012 IL App (2d) 091165, to be misplaced. In that case, which predates *Matthews*, the reviewing court held that where there was a deficiency in complying with section 2-1401, the dismissal should have been without prejudice. *Id.* ¶ 15. We observe that unlike the petition in this case, 30 days had not yet lapsed before the trial court dismissed the section 2-1401 petition *sua sponte*. *Id.* ¶¶ 4, 6. As our supreme court made clear in *Matthews*, where the 30-day period has lapsed, a petitioner is

estopped from claiming service was improper based on his own failure to comply with the requirements of Rule 105. *Matthews*, 2016 IL 118114, ¶ 23.

¶ 22 In accordance with our supreme court's decision in *Matthews*, we similarly conclude that defendant is estopped from claiming that service on the State was improper based on his own failure to comply with the service requirements in Rule 105. Furthermore, defendant is precluded from objecting to improper service on behalf of the State because only the party to whom service is owed, in this case the State, may object to improper service.

¶ 23 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.