

2019 IL App (1st) 170321-U

No. 1-17-0321

Order filed June 13, 2019

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. 10 CR 6767
)	
HECTOR MASSAS,)	Honorable
)	William T. O'Brien,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's *sua sponte* dismissal of defendant's section 2-1401 petition is affirmed where defendant failed to properly serve the State with notice of his petition and file proof of service, and therefore, could not establish the dismissal was untimely.

¶ 2 Defendant appeals from the circuit court's *sua sponte* dismissal of his *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2016)). Defendant contends that the circuit court's *sua sponte* dismissal of

his petition was premature because it occurred within 30 days after the petition's filing, and therefore must be vacated. We affirm.

¶ 3 Defendant was charged by indictment with two counts of armed robbery (720 ILCS 5/18-2(a)(1), (2) (West 2010)) and two counts of aggravated unlawful restraint (720 ILCS 5/10-3.1 (West 2010)), arising from an incident in Chicago on March 16, 2010. The State proceeded on one count of armed robbery (720 ILCS 5/18-2(a)(1) (West 2010)), and nol-prossed the remaining counts.

¶ 4 On October 8, 2010, defendant entered a negotiated guilty plea to the armed robbery count and was sentenced to 15 years' imprisonment with 3 years of mandatory supervised release (MSR).¹ As a factual basis for the guilty plea, defendant stipulated that on March 16, 2010, he entered a store in Chicago, displayed a firearm, demanded money from a clerk, and took \$550 from the cash register.

¶ 5 On October 21, 2016, defendant mailed this section 2-1401 petition for relief from judgment, arguing that the three years of MSR should have been included in, and not added onto, his 15-year sentence. A "Notice of Motion/Proof of Service" stated the petition was sent to the clerk of the circuit court of Cook County (clerk) and the State's Attorney. The petition included a notarized certification of service, dated October 21, 2016, which stated:

"I, Hector Massas, swear under penalty of perjury that I served the above attached motion for Post-Judgement [*sic*] Relief by placing said documents in the United States

¹ Also on October 8, 2010, defendant entered a negotiated guilty plea to armed robbery in a separate case, No. 10 CR 6766, and received a sentence to run concurrently with the sentence imposed in the case on appeal.

mail box, first class postage, prepaid at the Centralia C. C., located at PO Box 7711 / Centralia, IL 62801 on the date signed herein by the Notary Public.”

¶ 6 The clerk stamped defendant’s petition “received” on November 2, 2016, and “filed” on November 22, 2016. The record does not contain a return receipt from service on the State.

¶ 7 On December 9, 2016, the circuit court orally denied defendant’s petition, stating it was “confident that [defendant] was admonished as to his *** mandatory supervised release period repeatedly.” The transcript states that an off-record discussion occurred while the court delivered its ruling, but does not identify who was involved in the conversation. Additionally, the record does not reflect that defendant, defense counsel, or any representative for the State was present during the court’s ruling, or that the State filed any responsive pleadings to defendant’s petition.

¶ 8 On appeal, defendant argues that the circuit court prematurely dismissed his section 2-1401 petition. As the record does not show when the State received service, defendant contends the 30-day period before his petition could be dismissed began on November 22, 2016, the date the Clerk stamped it “filed.” As the State did not file a responsive pleading or waive the time for responding, defendant maintains the December 9, 2016 dismissal was improper.

¶ 9 “Section 2-1401 establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days.” *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). The section provides a civil remedy extending to criminal cases, and section 2-1401 proceedings “are subject to the usual rules of civil practice.” *Vincent*, 226 Ill. 2d at 8.

¶ 10 Illinois Supreme Court Rule 105(a) (eff. Jan. 1, 1989) and Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985) govern the procedures for serving notice of section 2-1401 petitions. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). Rule 106 provides that service of a section 2-

1401 petition must comply with Rule 105. Ill. S. Ct. R. 106 (eff. Aug. 1, 1985). Rule 105(b) requires that notice of a petition's filing be served either by summons, prepaid certified or registered mail, or publication. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989). Once notice has been served, the responding party must "[file] an answer or otherwise [file] an appearance in the office of the clerk of the court within 30 days." Ill. S. Ct. R. 105(a) (eff. Jan. 1, 1989).

¶ 11 The State's failure to timely answer or otherwise plead in response to a defendant's section 2-1401 petition will result in " 'an admission of all well-pleaded facts,' " rendering the petition " 'ripe for adjudication.' " *Laugharn*, 233 Ill. 2d at 323 (quoting *Vincent*, 226 Ill. 2d at 10). At that point, the circuit court may *sua sponte* dismiss the petition and "render judgment on the pleadings alone." *Vincent*, 226 Ill. 2d at 11-12, 14. The court can dismiss a section 2-1401 petition "despite a lack of responsive pleading if the petition is deficient as a matter of law." *People v. Matthews*, 2016 IL 118114, ¶ 8. We review the dismissal of a section 2-1401 petition *de novo*. *Matthews*, 2016 IL 118114, ¶ 9.

¶ 12 In applying these principles, our supreme court's decisions in *People v. Carter*, 2015 IL 117709, and *Matthews* are instructive.

¶ 13 In *Carter*, the defendant mailed a " 'Motion to Vacate Judgment' " with a " 'Proof/Certificate of Service,' " which stated that he placed copies of the petition in the prison mail on May 9, 2012, and addressed them to the clerk and State's Attorney. *Carter*, 2015 IL 117709, ¶ 5. The certificate did not specify whether the defendant used regular, certified, or registered mail, and he did not file a return receipt for service on the State. *Carter*, 2015 IL 117709, ¶¶ 20, 23. The clerk stamped the motion "received" on May 15, 2012, and docketed it on May 29, 2012. *Carter*, 2015 IL 117709, ¶ 5. On July 10, 2012, more than one month after the

clerk stamped and docketed the motion, the circuit court dismissed it *sua sponte*. *Carter*, 2015 IL 117709, ¶ 6. On appeal, the defendant argued that the dismissal of his motion as a section 2-1401 petition was premature because the State was not properly served. *Carter*, 2015 IL 117709, ¶ 7. The supreme court disagreed, finding that the absence of a return receipt did “not affirmatively establish that service by certified mail was not accomplished, as it is up to the sender to file the receipt or not.” *Carter*, 2015 IL 117709, ¶ 23. As the dismissal occurred more than 30 days after the Clerk received and docketed the motion, “nothing in [the] record affirmatively establishe[d] that the State was not given proper notice or that the circuit court’s *sua sponte* dismissal was premature.” *Carter*, 2015 IL 117709, ¶ 24.

¶ 14 In *Matthews*, the defendant mailed a section 2-1401 petition with a “ ‘proof/certificate of service,’ ” stating the petition was mailed to the clerk and the State’s Attorney on March 25, 2012, “ ‘with proper first-class postage attached thereto’ via the prison mail system.” *Matthews*, 2016 IL 118114, ¶ 4. The Clerk stamped the motion “received” on April 11, 2012, and “file-marked and docketed” on April 23, 2012. *Matthews*, 2016 IL 118114, ¶ 4. The circuit court *sua sponte* dismissed the petition on May 24, 2012. *Matthews*, 2016 IL 118114, ¶ 4. On appeal, the defendant argued that because he did not correctly serve the State, the 30-day period for filing a response did not expire and the dismissal was premature. *Matthews*, 2016 IL 118114, ¶ 5. The supreme court affirmed the dismissal, concluding “that defendant cannot challenge the trial court order based on his own failure to properly serve the State.” *Matthews*, 2016 IL 118114, ¶ 15. The court further cautioned that if the defendant could invalidate the circuit court’s *sua sponte* dismissal on that basis, “future litigants may have an incentive to improperly serve respondents

or provide incomplete certificates of service to create a second opportunity to litigate their claims.” *Matthews*, 2016 IL 118114, ¶ 15.

¶ 15 In the present case, the notice of motion and certification of service that defendant included with his petition state that he sent the petition from prison on October 21, 2016, with copies to the clerk and State’s Attorney. The certification further states that defendant mailed the documents “first class postage, prepaid,” not through certified or registered mail, and the record does not contain a return receipt from either the State or the clerk. The petition was stamped “received” by the clerk on November 2, 2016, and filed on November 22, 2016. The circuit court *sua sponte* dismissed defendant’s petition on December 9, 2016, when none of the parties were present and the State had not filed a response.

¶ 16 Applying *Carter* and *Matthews*, the record here does not support a finding that the circuit court’s *sua sponte* dismissal was premature. By his own certification, defendant failed to serve the State through certified or registered mail. Due to defendant’s failure to properly serve the State and file a return receipt, the record does not affirmatively show the State did not receive service at least 30 days before the dismissal. Defendant cannot now use his improper service to his benefit in challenging the circuit court’s *sua sponte* dismissal. *Matthews*, 2016 IL 118114, ¶ 14 (“By filing the ‘proof/certificate of service,’ defendant asked the court to proceed as though the State had been adequately notified of the proceedings” and “is now estopped from alleging the court erred in acquiescing to this request.”).

¶ 17 Nevertheless, defendant contends that because the record does not show when the State received service, the 30-day period must begin with the date his petition was filed in the circuit court. In support of his theory, defendant notes that, in *Carter*, the supreme court observed that

“well over 30 days had passed since the filing of defendant’s petition when the circuit court dismissed defendant’s petition.” *Carter*, 2015 IL 117709, ¶ 24. Yet, as discussed, the court in *Carter* focused on the defendant’s failure to affirmatively show the State was improperly served. *Carter*, 2015 IL 117709, ¶¶ 23-25. The supreme court’s observation that the petition was filed more than 30 days before the court’s dismissal order only bolstered the court’s position that, where a service deficiency was not affirmatively demonstrated in the record, the reviewing court could not assume the State’s service was deficient. *Carter*, 2015 IL 117709, ¶¶ 20, 24 (“In sum, nothing in this record affirmatively establishes that the State was not given proper notice or that the circuit court’s *sua sponte* dismissal was premature.”).

¶ 18 Moreover, the record suggests that the State had notice of defendant’s petition more than 30 days before its dismissal on December 9, 2016. Defendant’s certification stated that he mailed the petition on October 21, 2016. The clerk, one of the petition’s two recipients, stamped the petition “received” on November 2, 2016, more than 30 days before the court’s ruling. Under these circumstances, we cannot presume that the circuit court’s *sua sponte* dismissal was premature. *People v. Saterfield*, 2015 IL App (1st) 132355, ¶ 19 (finding the court’s *sua sponte* dismissal was not premature, where the record did not clearly show whether or when the State received service, but the petition was “received” by the court more than 30 days before its dismissal).

¶ 19 Defendant notes *Matthews*, *Carter*, and *Saterfield* involved *sua sponte* dismissals that occurred in the presence of an assistant State’s Attorney, and contends that the State’s presence during the proceedings established that it had notice of the petitions and an opportunity to respond. However, this detail was not material to the holdings in any of those cases. *Carter*, 2015

IL 117709, ¶ 6 (“the transcript does not show that the assistant State’s Attorney took any action”); *Matthews*, 2016 IL 118114, ¶ 4 (“the transcript reveals no active participation by the State’s Attorney’s office”); *Saterfield*, 2015 IL App (1st) 132355, ¶ 7 (the assistant State’s Attorney did not speak “on the record”). Rather, in each case, the dismissals were affirmed on the basis that, as here, a defendant cannot attack the circuit court’s dismissal based on his own failure to properly serve the State (*Matthews*, 2016 IL 118114, ¶ 15; *Saterfield*, 2015 IL App (1st) 132355, ¶ 27), or present a sufficient record on appeal (*Carter*, 2015 IL 117709, ¶¶ 23-25).

¶ 20 For this reason, we also reject defendant’s reliance on *People v. Gray*, 2011 IL App (1st) 091689, and *People v. Clemons*, 2011 IL App (1st) 102329. Defendant asserts that these cases show the 30-day period for dismissing section 2-1401 petitions begins on the court’s date of filing. However, there is no indication in these cases that the court was distinguishing the date of filing from the date of service, and neither case contains any discussion of service of process. *Gray*, 2011 IL App (1st) 091689, ¶¶ 8-9; *Clemons*, 2011 IL App (1st) 102329, ¶¶ 5-6. Moreover, both cases predate the supreme court’s more recent holdings in *Carter* and *Matthews*. Accordingly, we find that *Carter* and *Matthews* more clearly address the issue on appeal. Defendant’s failure to properly serve the State and file proof of service cannot be used to escape the dismissal of his petition. *Matthews*, 2016 IL 118114, ¶¶ 13-15. Therefore, we affirm the circuit court’s *sua sponte* dismissal of defendant’s section 2-1401 petition.

¶ 21 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 22 Affirmed.