

NOTICE

Decision filed 05/13/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0454

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

KENNETH M. FRY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Jefferson County.
)	
v.)	No. 10-MR-33
)	
DAVID REDNOUR, ¹ Warden,)	Honorable
)	Terry H. Gamber,
Defendant-Appellee.)	Judge, presiding.

JUSTICE WEXSTTEN delivered the judgment of the court.
Justices Donovan and Stewart concurred in the judgment.

R U L E 2 3 O R D E R

Held: Where there is no proof of service on record and the plaintiff does not state a claim entitling him to immediate release, the circuit court's denial of his motion for a default judgment and the dismissal of the plaintiff's *habeas corpus* complaint is affirmed.

The plaintiff, Kenneth M. Fry, appeals the circuit court's denial of his motion for a default judgment and the dismissal of his *habeas corpus* complaint. He argues that the court improperly denied his motion for a default judgment. He also argues that the circuit court erred when it recharacterized his section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)) as a postconviction petition. Fry requests that this court reverse the circuit court's denial of

¹David Rednour has replaced Donald Gaetz as the warden of Menard Correctional Center where the plaintiff is incarcerated. Pursuant to section 10-107 of the Code of Civil Procedure (735 ILCS 5/10-107 (West 2008)), Rednour should be substituted as the defendant in this action. See *Hennings v. Chandler*, 229 Ill. 2d 18, 23-24 n.2 (2008) (the proper defendant in a *habeas corpus* case is the plaintiff's current custodian).

his motion for a default judgment and the dismissal of his *habeas corpus* complaint. For the following reasons, we affirm.

BACKGROUND

Fry was convicted of first-degree murder, and he was sentenced to 30 years of imprisonment. The judgment was affirmed on direct appeal (*People v. Fry*, No. 5-04-0202 (Aug. 31, 2005) (unpublished order pursuant to Supreme Court Rule 23 (eff. July 1, 1994))), and the Illinois Supreme Court denied his petition for leave to appeal (*People v. Fry*, 217 Ill. 2d 576 (2005) (table)).

Subsequently, Fry filed a "document" that alleged that his constitutional rights had been violated at the trial by the introduction of photographs of the victim. The circuit court held that the petition stated the gist of a constitutional claim and appointed counsel. The appointed counsel filed an amended postconviction petition. The defendant filed a motion to dismiss that was granted by the circuit court. The dismissal was affirmed on appeal. *People v. Fry*, No. 5-07-0324 (Apr. 15, 2008) (unpublished order pursuant to Supreme Court Rule 23 (eff. July 1, 1994)).

In April 2010, Fry filed a *habeas corpus* complaint alleging that the circuit court committed error when it recharacterized his section 2-1401 petition as a postconviction petition. The defendant did not respond. On May 26, 2010, Fry filed a motion for a default judgment.

On August 10, 2010, the defendant filed a motion to dismiss the complaint under section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2008)) and a response to Fry's motion for a default judgment.

On August 17, 2010, the circuit court dismissed the *habeas corpus* complaint and denied the motion for a default judgment. Fry filed a motion to reconsider that was also denied by the circuit court. Fry filed this timely appeal.

ANALYSIS

On appeal, Fry argues that the court committed judicial error in denying his motion for a default judgment. Fry further makes conclusory arguments that judicial error makes his judgment void and entitles him to immediate release from prison and that his claim is not barred by *res judicata*. However, none of these arguments is supported by any concrete analysis.

Therefore, we note that Fry's brief does not comply with the guidelines set forth by Supreme Court Rule 341(h) (eff. July 1, 2008). The brief contains merely conclusory arguments with no supporting analysis. When a brief does not conform to the proper requirements, the court has the authority to dismiss the appeal. *Zadrozny v. City Colleges of Chicago*, 220 Ill. App. 3d 290, 292 (1991). This is not a limitation on the court's authority to consider the case on its merits, but rather an admonishment on the noncompliant party. *Id.* at 292. However, it is still within the discretion of the court to consider the appeal where the appellee's brief is sufficient to guide the court through the arguments of the appellant. *Id.* Accordingly, we find the appellee's brief and the appellant's *habeas corpus* complaint sufficient to guide us through the analysis of the appellant's arguments, and this case will be considered on its merits.

In response to Fry's arguments, the defendant argues that the motion for a default judgment was correctly denied because there was no proof of service. Moreover, the defendant argues that Fry failed to state a proper claim for which *habeas corpus* relief can be granted.

I. Default Judgment

First we address the denial of Fry's motion for a default judgment. The circuit court has considerable discretion in denying a motion for a default judgment because the outcome of a default is so severe. *Schoonover v. American Family Insurance Group*, 230 Ill. App.

3d 65, 70 (1992).

In the instant case, the court denied the motion for a default judgment because there was no record of proof of service on the defendant. Because the record contradicts the motion, we conclude that the denial of the motion for a default judgment should be affirmed.

II. *Habeas Corpus* Complaint

Next, we turn to the dismissal of the *habeas corpus* complaint. A motion to dismiss under section 2-615 of the Code (735 ILCS 5/2-615 (West 2008)) admits all well-pleaded facts and tests the legal sufficiency of the complaint, and a ruling on the motion is subject to *de novo* review. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). As a general rule, we may affirm the circuit court's decision on a *habeas corpus* complaint on any legal basis that is supported by the record. *People v. Boswell*, 148 Ill. App. 3d 915, 918 (1986).

"The sole remedy or relief authorized by a writ of *habeas corpus* is the prisoner's immediate release from custody." *Faircloth v. Sternes*, 367 Ill. App. 3d 123, 125 (2006). The remedy is available only if (1) a lack of jurisdiction exists over the subject matter or the person in the circuit court or (2) some postconviction occurrence happens that entitles an inmate to his immediate release from custody. *People v. Gosier*, 205 Ill. 2d 198, 205 (2001). "Although a void order or judgment may be attacked 'at any time or in any court, either directly or collaterally' [citation], including a *habeas* proceeding [citations], the remedy of *habeas corpus* is not available to review errors which only render a judgment voidable and are of a nonjurisdictional nature." *Beacham v. Walker*, 231 Ill. 2d 51, 58-59 (2008).

In the instant case, Fry argues in his postconviction petition that the court committed judicial error by recharacterizing his section 2-1401 petition as a postconviction petition. However, even assuming that this allegation is true, he would still not be entitled to immediate release from prison. Fry has not argued that the court lacked jurisdiction, and he has not provided any support for the proposition that a postconviction event has entitled him

to *habeas corpus* relief. Moreover, the alleged judicial error cited by Fry in his postconviction petition would merely allow Fry to file a successive postconviction petition if he so chooses. See *People v. Shellstrom*, 216 Ill. 2d 45, 58 (2005). Since Fry has not stated a claim that would allow him to be immediately released from prison, we conclude that the circuit court correctly dismissed his *habeas corpus* complaint.

CONCLUSION

For the foregoing reasons, we conclude that the circuit court correctly dismissed the *habeas corpus* complaint and properly denied the motion for a default judgment.

Affirmed.