

No. 1-09-3430

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 89 CR 7496
)	
DANIEL MAKIEL,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

- ¶ 1 *Held:* Appeal dismissed for lack of jurisdiction where defendant failed to provide proof of mailing in accordance with Supreme Court Rule 12(b)(3), and his notice of appeal was therefore untimely.
- ¶ 2 On October 16, 2009, the circuit court of Cook County dismissed defendant's *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)), and his *pro se* motion for "re-sentence and correct mittimus." Defendant filed a *pro se* notice of appeal from both orders, but in this court, solely contends that we should remand

his resentencing motion for proceedings under section 2-1401 which, he maintains, is designed to correct errors where there is no other recognized remedy.

¶ 3 This court previously affirmed defendant's jury convictions for first degree murder and armed robbery and his consecutive sentences of natural life in prison and 60 years' imprisonment which the circuit court ordered to be served consecutive to a 40-year sentence imposed for an attempted murder in Indiana. *People v. Makiel*, No. 1-97-2140 (1998) (unpublished order under Supreme Court Rule 23). This court also affirmed the denial of defendant's subsequent postconviction petition after an evidentiary hearing, and the denial of his further request for leave to file a successive post-conviction petition. *People v. Makiel*, Nos. 1-08-0921, 1-10-0718 (2011) (unpublished orders under Supreme Court Rule 23).

¶ 4 On May 20, 2009, defendant filed a *pro se* motion for "re-sentence and correct mittimus," requesting a new sentencing hearing and that the mittimus be corrected to reflect the change in credit time afforded him. In this motion, defendant maintained that he should be resentenced because his prior Indiana conviction for attempted murder, which the court had relied on as an aggravating factor in sentencing him in this case, had been reversed in 2000. Defendant indicated that he was unsure of which statute applied to his motion, and that section 5-3 of the Unified Code of Corrections (730 ILCS 5/5-5-3 (West 2010)) should authorize the circuit court to grant it.

¶ 5 On the same date, defendant filed a *pro se* section 2-1401 motion for relief from judgment alleging that his sentences were void. He specifically alleged that the circuit court had relied on a prior Indiana conviction for attempted murder as aggravation, but since that conviction was reversed in 2000, he maintained that the Indiana conviction could not be used as an aggravating factor. He thus requested, *inter alia*, that his natural life sentence be vacated and that the sentence on his murder conviction be reduced to 60 years' imprisonment.

¶ 6 On October 16, 2009, the circuit court dismissed defendant's *pro se* section 2-1401 motion as untimely, and also denied his *pro se* motion for "re-sentence and correct mittimus." Defendant filed a *pro se* notice of appeal from both rulings on November 23, 2009, but in this court he has not raised any argument on the denial of the section 2-1401 petition, thereby abandoning it. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 7 Instead, defendant focuses on his sentencing motion requesting this court to recharacterize it as a section 2-1401 motion, and to remand for further proceedings in the circuit court. He maintains that section 2-1401 provides for relief of the sentencing error alleged where there is no other recognized remedy.

¶ 8 The State responds that defendant is not requesting this court to review the correctness of the denial of his resentencing motion, but, instead, is seeking a purely equitable remand to the circuit court for further proceedings under section 2-1401, relief which this court is without any supervisory authority to bestow. Since defendant has not presented any justiciable case or controversy for this court to adjudicate, the State maintains that his appeal must be dismissed. In the alternative, the State maintains that this court should affirm the denial of his motion for resentencing because the circuit court did not have jurisdiction to hear defendant's motion for resentencing which was filed 18 years after the circuit court's direct authority to vacate or modify the final judgment ended.

¶ 9 First, we must address whether the appellate court has jurisdiction over this appeal. *People v. Zoph*, 381 Ill. App. 3d 435, 449 (2008). The appellate court's jurisdiction to review a trial court's judgment in a criminal matter is governed by Supreme Court Rule 606 (eff. March 20, 2009). That rule specifically provides that the notice of appeal must be filed within 30 days after entry of the final judgment appealed from. Ill. S. Ct. R. 606(b).

¶ 10 In this case, the court entered its orders on October 16, 2009, and defendant's notice of appeal is file-stamped November 23, 2009.

¶ 11 In his jurisdictional statement, defendant maintains that his notice of appeal was timely mailed on November 5, 2009, and received by the circuit court on November 9, 2009.

¶ 12 As evidence, defendant has supplemented the record with a photocopy of an envelope that is postmarked November 5, 2009, sent to "the clerk of the court criminal division" in Markham, Illinois, and file-stamped November 23, 2009. He has also included another photocopy, purportedly the backside of the envelope which is stamped November 9, 2009.

¶ 13 In supplementing the record in this manner, defendant is apparently relying on the mailing rule to show that his notice of appeal was timely filed.

¶ 14 The origin of the date of mailing rule is found in Supreme Court Rule 373 (eff. Feb. 1, 1994 (change eff. Dec. 29, 2009, to provide for sending documents via third-party commercial carriers)) which provides that "[i]f [the necessary papers are] received after the due date, the time of mailing shall be deemed the time of filing. Proof of mailing shall be as provided in Rule 12(b)(3). This rule also applies to the notice of appeal filed in the trial court." Supreme Court Rule 12(b)(3) (eff. Nov. 15, 1992 (change eff. Dec. 29, 2009, to provide for sending documents via third-party commercial carriers)) requires a defendant to file an affidavit stating the time and place of mailing, the complete address on the envelope and the fact that proper postage was prepaid.

¶ 15 In *People v. Tlatenchi*, 391 Ill. App. 3d 705 (2009), defendant relied on the "date of mailing" rule to establish that his motion to withdraw his guilty plea was timely filed, and this court considered whether his mailing was sufficient to prove a timely filing date. In doing so, this court reviewed the case law pertaining to the "date of mailing" rule, and determined that proof of mailing is established by filing a proof of service in compliance with the requirement of Rule 12(b)(3).

Tlatenchi, 391 Ill. App. 3d at 712-13, citing *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 377 Ill. App. 3d 536, 539 (2007); accord *People v. Smith*, 2011 IL App (4th) 100430, ¶16. This court concluded that defendant failed to provide the affidavit as required by Rule 12(b)(3) to get a timely filing. *Tlatenchi*, 391 Ill. App. 3d at 716.

¶ 16 In *People v. Lugo*, 391 Ill. App. 3d 995 (2009), the Second District considered these filing rules in the context of a notice of appeal. In that case, the court noted that Rule 373 specifically provides that it applies to notices of appeals filed in the trial court and that the proof of mailing "shall be" as provided in Rule 12(b)(3). *Lugo*, 391 Ill. App. 3d at 998. The court then held that proof of mailing must be by certificate or affidavit of mailing, and since a postmark is neither, it is insufficient proof of mailing. *Lugo*, 391 Ill. App. 3d at 998, 1002. The same court observed that it had no authority to excuse the filing requirements of the supreme court rules governing appeals, and determined that defendant's postmarked envelope did not meet the proof mailing requirement; and, as a result, his notice of appeal was untimely and the court lacked jurisdiction over the appeal. *Lugo*, 391 Ill. App. 3d at 1003.

¶ 17 Here, the notice of appeal was filed on November 23, 2009, which is more than 30 days after the circuit court entered its judgment on October 16, 2009. Although the record contains an envelope that is postmarked November 5, 2009, there is no clear indication that this envelope contained the notice of appeal. More importantly, defendant did not provide an affidavit or certificate as required by Rule 12(b)(3), and thus failed to establish the proof of mailing date to invoke the date of mailing rule announced in Rule 373. *Tlatenchi*, 391 Ill. App. 3d at 712-13; *Lugo*, 391 Ill. App. 3d at 1003. As a result, we lack jurisdiction over the appeal.

¶ 18 In reaching this conclusion, we are aware that in *People v. Hansen*, 2011 IL App (2d) 081226, ¶14, another panel of the Second District appellate court specifically held that the postmark

on an envelope containing the notice of appeal from a summary dismissal of a defendant's postconviction petition was sufficient to establish the date the appeal was mailed for purposes of the date of mailing rule where the postmark was legible. The court in *Hansen* entered this ruling despite the requirement of Rule 12(b)(3), that an affidavit or certification of mailing be filed, claiming that the rule was "corroborative redundancy" where the postmark on the envelope is legible. *Hansen*, ¶14. We note that the *Hansen* court's analysis departs from the well reasoned decision in *Lugo*, and relies on the dissent filed in *Lugo*, which has no precedential value. *People v. Smythe*, 352 Ill. App. 3d 1056, 1061 (2004). In addition, *Hansen* overlooks the filing requirements of the supreme court rules governing appeals. *Lugo*, 391 Ill. App. 3d at 1003. Accordingly, we find that *Hansen* provides no basis for departing from our decision in *Tlatenchi*, where we observed that, each time the supreme court has applied the date of mailing rule, it has required that the proof of mailing shall be as provided by Rule 12. *Tlatenchi*, 391 Ill. App. 3d at 712-13.

¶ 19 In light of the above, we conclude that defendant's notice of appeal was untimely where the plain language of Rule 373 required proof of mailing in the form of a certificate or affidavit of mailing, and defendant failed to do either. Therefore, we do not have jurisdiction to consider this appeal, and dismiss it for lack of jurisdiction.

¶ 20 Appeal dismissed.