

NOTICE
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2012 IL App (4th) 110343-U

Filed 9/6/12

NO. 4-11-0343

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
EARNEST STAGNER,)	No. 92CF306
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court dismissed defendant's appeal for lack of jurisdiction.

¶ 2 In May 1993, a jury convicted defendant, Earnest Stagner, of four counts of aggravated criminal sexual assault (720 ILCS 5/12-14(b)(1) (West 1992)) and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1) (West 1992)). Defendant appealed his conviction, and this court affirmed. *People v. Stagner*, No. 4-93-0643 (July 25, 1995) (unpublished order under Supreme Court Rule 23). In May 2010, defendant filed a motion for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)), and the trial court dismissed the petition for want of prosecution. Defendant appeals the trial court's dismissal of his section 2-1401 petition.

¶ 3 I. BACKGROUND

¶ 4 In June 1993, following defendant's conviction, the trial court sentenced defendant to consecutive 10-year terms of imprisonment for each of the four counts of aggravated criminal sexual assault, and concurrent 8-year terms of imprisonment for each of the two counts of aggravated criminal sexual abuse, with credit for 439 days previously served. Defendant appealed his conviction, and this court affirmed on appeal. *Stagner*, No. 4-93-0643, slip order at 14.

¶ 5 In April 1996, defendant filed a postconviction petition, and the trial court dismissed that petition at the first stage. Defendant appealed, and defendant's counsel on appeal filed a motion to withdraw as counsel in conformity with *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court granted appellate counsel's motion to withdraw, concluding defendant could not raise any meritorious issues on appeal. *People v. Stagner*, No. 4-96-0447 (Nov. 14, 1997) (unpublished order under Supreme Court Rule 23).

¶ 6 On May 24, 2010, defendant filed a section 2-1401 petition (735 ILCS 5/2-1401 (West 2010)). Defendant mailed his section 2-1401 petition to the circuit clerk's office and the State's Attorney's office from his place of imprisonment, the Dixon Correctional Center (Dixon). The proof of service included with defendant's petition, on a form revised in January 2002, listed the offices of the McLean County clerk of the court and State's Attorney but failed to include the names and addresses. Defendant also failed to complete the blank in the proof of service document identifying the date upon which he placed his motion in the mail. A notary public notarized defendant's proof of service, but defendant did not file an affidavit as required by Rule 12(b)(3). See Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009) (requiring the filing of an affidavit for proof of service by mail). See also *People v. Blalock*, 2012 IL App (4th) 110041, ¶ 7 (concluding

service by mail must be proved by the requirements of Rule 12(b)(3), which includes a notarized affidavit); *People v. Smith*, 2011 IL App (4th) 100430, ¶ 18, 960 N.E.2d 595 (concluding a defendant must comply with Rule 12(b)(3) when proving service by mail).

¶ 7 On July 13, 2010, the trial court sent defendant a letter, notifying him his petition had been filed but the petition lacked proof of proper service. The court informed defendant "Rule 105 [(Ill. S. Ct. R. 105 (eff. Jan. 1, 1989))] sets forth the requirements that must be included in the notice, and further provides three methods for service of the notice. You have not complied with Rule 105's service requirements." The court further informed defendant he would be given 30 days to obtain proper service or his petition would be dismissed for want of prosecution. The court also advised defendant to consult an attorney if he had any questions.

¶ 8 On July 23, 2010, defendant filed the following with the circuit clerk's office: (1) a copy of the proof of service accompanying his original section 2-1401 petition, and (2) a copy of the July 13, 2010, letter sent from the court. On September 13, 2010, the court dismissed defendant's May 24, 2010, section 2-1401 petition for want of prosecution. The dismissal was recorded on the court's docket sheet. A September 15, 2010, docket entry shows "[c]opy of record sheet mailed to Deft. [*sic*]." The record on appeal, however, does not contain a copy of the notice the clerk office's mailed to defendant.

¶ 9 On September 27, 2010, defendant filed another section 2-1401 petition. This petition was also mailed to the circuit clerk's office and State's Attorney's office from Dixon. The proof of service—on a different form without any "under penalty of perjury language"—included with defendant's petition stated defendant placed a document in the mail on September 21, 2010. However, the proof of service did not indicate what document defendant placed in the

mail and again lacked the names of the clerk of the court and the State's Attorney but provided addresses. A notary public notarized defendant's proof of service, but defendant did not file an affidavit under Rule 12(b)(3).

¶ 10 On October 28, 2010, the trial court dismissed defendant's section 2-1401 petition by docket entry "for want of prosecution—no proof of proper service." A November 1, 2010, docket entry shows "[c]opy of 10/28/10 record sheet entry mailed to Deft. [*sic*]." The record on appeal, however, does not contain a copy of the notice the clerk office's mailed to defendant, notifying him his petition had been dismissed.

¶ 11 On December 23, 2010, defendant filed his section 2-1401 petition for the third time. The proof of service—again on a form without an "under penalty of perjury" section—indicated the petition was mailed on December 20, 2010, to the circuit clerk's office and State's Attorney's office. On the third attempt, the proof of service properly specified what document was mailed, identified the clerk and State's Attorney by name and provided the addresses of the clerk and State's Attorney. A notary public notarized defendant's proof of service, but defendant did not file an affidavit under Rule 12(b)(3). See Ill. S. Ct. R. 12(b)(3) (eff. Dec. 29, 2009) ("or affidavit *** stating the time and place of mailing ***, the complete address which appeared on the envelope ***, and the fact that proper postage or the delivery charge was prepaid").

¶ 12 On January 28, 2011, the trial court again dismissed defendant's petition by docket entry "for want of prosecution—no proof of proper service." A January 31, 2011, docket entry indicates "[c]opy of this record sheet mailed to Deft [*sic*]." Again, the record on appeal does not contain a copy of the notice the clerk's office mailed to defendant.

¶ 13 On April 13, 2011, defendant filed a *pro se* notice of appeal. On April 25, 2011,

this court appointed the office of the State Appellate Defender (OSAD) to represent defendant. On June 23, 2011, OSAD filed a motion for leave to file a late notice of appeal on defendant's behalf. This court granted that motion on June 28, 2011.

¶ 14

I. ANALYSIS

¶ 15 On appeal, defendant argues the trial court erred in dismissing his section 2-1401 petition for inadequate service. Defendant argues he should be excused from the requirement of Rule 106 (Ill. S. Ct. R. 106 (eff. Aug. 1, 1985)) that service be accomplished by certified mail because he is a *pro se* incarcerated defendant. The State argues the trial court properly dismissed defendant's petition for improper service. However, the State first argues defendant's notice of appeal and late notice of appeal were both untimely filed and this court improvidently granted defendant leave to file a late notice of appeal. Thus, the State argues, we do not have jurisdiction to hear defendant's appeal. We agree with the State.

¶ 16 In OSAD's motion for leave to file a late notice of appeal, OSAD asserted defendant's appeal was a criminal matter and defendant was allowed to file a late notice of appeal within six months following the entry of final judgment pursuant to Rule 606(c) (Ill. S. Ct. R. 606(c) (eff. Mar. 20, 2009)). Defendant appealed the January 28, 2011, dismissal of his section 2-1401 petition. Thus, OSAD argued, the deadline for filing a late notice of appeal would have been August 28, 2011.

¶ 17 In support of its leave to file a late notice of appeal motion, OSAD argued the record did not affirmatively show defendant was provided with a notice of adverse judgment as required by Rule 651(b) (Ill. S. Ct. R. 651(b) (eff. Dec. 1, 1984)). Rule 651(b) requires the circuit clerk, "[u]pon the entry of a judgment adverse to a petitioner in a post-conviction

proceeding," to inform defendant that to preserve his right to appeal, a notice of appeal must be filed within 30 days from the date the order was entered. Although the record stated "[c]opy of this record sheet mailed to Deft. [sic][,]" the record is lacking a copy of any notice of adverse judgment sent from the clerk's office. Thus, OSAD argued, the record is unclear as to whether the notice was mailed to the proper address or the clerk complied with the requirements of Rule 651(b). OSAD further asserted, when the record is lacking proof the clerk provided defendant with such notice, "Illinois courts have consistently found that defendant should be permitted to pursue his appeal, despite any untimeliness in the filing of his notice of appeal." For this assertion, OSAD cited *People v. Brown*, 54 Ill. 2d 25, 294 N.E.2d 267 (1973); *People v. Lilly*, 291 Ill. App. 3d 662, 687 N.E.2d 1070 (1997); *People v. Fikara*, 345 Ill. App. 3d 144, 802 N.E.2d 260 (2003); *People v. Clark*, 374 Ill. App. 3d 50, 869 N.E.2d 1019 (2007).

¶ 18 The State argues defendant's untimeliness cannot be excused because this is not a criminal appeal and Rule 651(b) does not apply to defendant. We agree. "[S]ection 2-1401 is a civil remedy that extends to criminal cases." *People v. Vincent*, 226 Ill. 2d 1, 8, 871 N.E.2d 17, 22-23 (2007). Our supreme court "has consistently held that proceedings under section 2-1401 are subject to the usual rules of civil practice." *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23. Article III of the Illinois Supreme Court Rules governs "Civil Appeals Rules." Rule 651(b), however, is found in article VI, which governs "Appeals in Criminal Cases, Post-Conviction Cases, and Juvenile Court Proceedings." Rule 651 is titled "Appeals in Post-Conviction Proceedings," and the text of the rule specifically speaks to adverse judgments in "post-conviction proceedings." Thus, Rule 651(b) does not apply to defendant's section 2-1401 petition, and the line of cases cited by OSAD, excusing untimely appeals based on a circuit

clerk's failure to comply with Rule 651(b), equally do not apply to defendant.

¶ 19 As this is a civil matter and not a criminal appeal, Rule 606 does not apply to defendant as OSAD asserted in its motion for leave to file a late notice of appeal. Rather, defendant was required to comply with Rule 303(a) (Ill. S. Ct. R. 303(a) (eff. June 4, 2008)), which provides a notice of appeal must be filed within 30 days after entry of final judgment. See *People v. Tapp*, 2012 IL App (4th) 100664, ¶ 4, 2012 WL 341923, at *2 (concluding supreme court rules applicable to appeals in civil cases, not supreme court rules applicable to appeals in criminal cases, applies in civil proceedings). Defendant appealed the January 28, 2011, dismissal of his section 2-1401 petition and was therefore required to file a notice of appeal by February 28, 2011. Defendant's notice was untimely as it was filed on April 13, 2011, well beyond the 30-day period.

¶ 20 Rule 303(d) allows a defendant to make a motion for the filing of a late notice of appeal "within 30 days after expiration of the time for filing a notice of appeal" with a showing of a reasonable excuse for failing to file on time. Ill. S. Ct. R. 303(d) (eff. June 4, 2008). Therefore, any late notice of appeal filed by defendant should have been filed by March 28, 2011. Defendant, however, did not file a motion for leave to file a late notice of appeal until June 23, 2011, well after the additional 30-day time period. "Since the 30-day period of Rule 303(d) had expired when defendant filed his request for leave to file a late notice of appeal in this court, we did not have jurisdiction to entertain defendant's [June 23, 2011], request for leave to file a late notice of appeal." *Tapp*, 2012 IL App (4th) 100664, ¶ 7, 2012 WL 341923, at *3. We therefore do not have jurisdiction over this case, as it is lacking a timely notice of appeal.

¶ 21

III. CONCLUSION

¶ 22 For the reasons stated, we dismiss defendant's appeal. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal.

¶ 23 Appeal dismissed.