

No. 1-13-1939

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. 04 CR 10830 |
| |) | |
| DERRICK CAMPBELL, |) | Honorable |
| |) | Domenica A. Stephenson, |
| Defendant-Appellant. |) | Judge Presiding. |

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

O R D E R

- ¶ 1 *Held:* Trial court's *sua sponte* dismissal of defendant's petition for relief from judgment was presumed to be in accordance with the law because defendant failed to present a complete record on appeal.
- ¶ 2 Defendant Derrick Campbell appeals from the trial court's dismissal of his *pro se* petition for postjudgment relief filed pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant solely contends that the court's *sua sponte* dismissal of his petition was premature because he failed to properly serve the State,

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relying on *People v. Carter*, 2014 IL App (1st) 122613, *pet. for leave to appeal granted*, No. 117709 (Sept. 24, 2014). We affirm.

¶ 3 Defendant was charged with unlawful use of a weapon by a felon. At his bench trial, the evidence established that Chicago police officers Zubeck and Jackovac received a call regarding an armed robbery on April 12, 2004. Zubeck spoke with witnesses at the scene who gave a description of the alleged robber. On April 19, 2004, the officers were on patrol in a marked vehicle when they observed defendant, who matched the witnesses' description. When they attempted to stop defendant, he fled. As the officers chased him, Zubeck observed defendant carrying a gun. Another officer in the area witnessed defendant run past and toss an object under a parked automobile. Defendant was eventually stopped and arrested. Officers found a handgun under the parked vehicle. The State entered into evidence a certified copy of defendant's prior robbery conviction.

¶ 4 The trial court found defendant guilty and sentenced him as a Class X offender to 27 years' incarceration.

¶ 5 On direct appeal, defendant challenged his sentence as excessive and this court affirmed. *People v. Campbell*, No. 1-07-1484 (2008) (unpublished order under Supreme Court Rule 23). This court also affirmed the trial court's dismissal of defendant's first *pro se* section 2-1401 petition for relief from judgment after granting appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Campbell*, No. 1-09-0802 (2010) (unpublished order under Supreme Court Rule 23).

¶ 6 On January 15, 2013, defendant filed a second *pro se* section 2-1401 petition which is the subject of the current appeal. In the petition, defendant alleges that a three-year term of

mandatory supervised release was unlawfully added to his sentence by the Illinois Department of Corrections. A certificate of service attached to the petition states that defendant served copies of the petition on the State and clerk of the circuit court, by placing them in the "United States Mailbox" at the correctional center on December 4, 2012. The petition bears a stamp indicating it was received by the clerk of the circuit court on December 12, 2012.

¶ 7 On February 22, 2013, defendant's petition appeared before Judge Jagielski and was transferred to Presiding Judge Biebel. On March 1, 2013, the presiding judge transferred the case to Judge Domenica A. Stephenson. While both of these dates are reflected in the memorandum of orders in the common law record, there is not a report of proceedings for either day in the record on appeal.

¶ 8 On May 6, 2013, the court stated that it had prepared a written order dismissing defendant's petition. There is no indication in the report of proceedings that the State was present for the court's ruling. In the order, the court held that the petition was without merit. Defendant appeals.

¶ 9 Defendant solely contends that the court's *sua sponte* dismissal of his petition was premature because he failed to properly serve the State. He notes that the certificate of service indicates that he sent his petition through the U.S. mail box at the prison, rather than by certified mail. The State responds that defendant has not met his burden to provide this court with a complete record on appeal. It argues that defendant failed to include reports of proceedings for February 22, 2013, and March 1, 2013, and thus this court must presume that a representative of the State was present in court to take actual notice of the petition. The State further argues that

this court should not reward defendant for his failure to ensure proper service and that remand of his meritless petition would waste judicial resources.

¶ 10 Section 2-1401 provides a procedure for vacating final judgments more than 30 days but less than 2 years after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Once a party has filed a petition pursuant to section 2-1401, the opposing party has 30 days to respond. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). We review the dismissal of a section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d at 18.

¶ 11 Service of the petition must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which mandates service either by summons, prepaid certified or registered mail, or publication. *People v. Prado*, 2012 IL App (2d) 110767, ¶ 6. The rule does not provide for service by regular mail. *Carter*, 2014 IL App (1st) 122613, ¶¶ 13-14.

¶ 12 In *Laugharn*, the supreme court explained the procedure for the dismissal of a section 2-1401 petition. In that case, the defendant filed a *pro se* section 2-1401 petition eight years after his conviction. *Laugharn*, 233 Ill. 2d at 320-21. Seven court days later, the circuit court *sua sponte* dismissed the petition as untimely. *Laugharn*, 233 Ill. 2d at 321. On appeal, the court concluded that the circuit court's *sua sponte* dismissal of the petition was not "ripe for adjudication" because it was dismissed prior to the expiration of the 30-day period for a response. *Laugharn*, 233 Ill. 2d at 323. It explained that the dismissal "short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead." *Laugharn*, 233 Ill. 2d at 323. The court further held that although circuit courts may dismiss section 2-1401 petitions *sua sponte*, they may not do so prior to the expiration of the State's 30-day response period. *Laugharn*, 233 Ill. 2d at 323.

¶ 13 Defendant relies on *People v. Carter*, 2014 IL App (1st) 122613, *pet. for leave to appeal granted*, No. 117709 (Sept. 24, 2014). In *Carter*, the circuit court *sua sponte* dismissed the defendant's section 2-1401 petition without input from the State, although an assistant State's Attorney was present in court at the time of dismissal. *Carter*, 2014 IL App (1st) 122613, ¶¶ 15-16. A panel of the First District reasoned that because *Laugharn* demands that a reviewing court base its determination as to whether the circuit court prematurely dismissed a section 2-1401 petition by looking at the date of service, a proper dismissal cannot be achieved without service or an affirmative showing that proper service was waived. *Carter*, 2014 IL App (1st) 122613, ¶ 25. The court declined to assume that the State had knowledge of the petition and waived service simply because a prosecutor was shown as present in court on the cover page of the transcript of the proceedings. *Carter*, 2014 IL App (1st) 122613, ¶ 21.

¶ 14 The State relies on *People v. Ocon*, 2014 IL App (1st) 120912. In that case, a different panel of this court determined that although it was unclear whether the defendant properly served the State with his section 2-1401 petition, the record indicated that an assistant State's Attorney was in court on the date the petition was docketed. *Ocon*, 2014 IL App (1st) 120912, ¶ 31. The reviewing court held that the attorney's presence constituted actual notice to the State of the petition as of that date. *Ocon*, 2014 IL App (1st) 120912, ¶ 31. Therefore, the court determined that the trial court's *sua sponte* dismissal of the petition was not premature when it occurred more than 30 days after the State received actual notice. *Ocon*, 2014 IL App (1st) 120912, ¶¶ 35, 41.

¶ 15 Before addressing the merits of defendant's claim, we turn to the State's argument that the record on appeal is incomplete. Defendant has not included reports of proceedings for the dates of February 22, 2013, and March 1, 2013, where the petition was transferred between judges.

Defendant, as appellant, bears the burden of presenting an adequate record to support his claim of error. *People v. Hunt*, 234 Ill. 2d 49, 58 (2009). In the absence of a complete record, we must presume that the trial court's order was in conformity with the law and had a sufficient factual basis. *People v. Lopez*, 229 Ill. 2d 322, 344 (2008) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). Any doubts that may arise from the partial record must be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392.

¶ 16 In the case at bar, both *Carter* and *Ocon* lead to the same result. The court dates on February 22, 2013, and March 1, 2013, are both more than 30 days before the dismissal of defendant's petition on May 6, 2013. Therefore, under the reasoning of *Ocon*, the presence of a State representative during either court date would be dispositive to defendant's claim that the dismissal was premature. However, without a record of proceedings for either day, we are unable to determine whether or not the State was present to receive actual notice of the petition. Because defendant has failed to meet his burden of providing a complete record, we must presume that a representative of the State was present in court during one of the court dates to receive actual notice of the petition and the trial court's *sua sponte* dismissal more than 30 days later was in full accordance with the law. *Carter* does not change this result, as the *Carter* court distinguished *Ocon* by noting that in *Carter*, there was no indication that an assistant State's Attorney was present at the time that the defendant's petition was docketed. See *Carter*, 2014 IL App (1st) 122613, ¶ 21. Thus, there was no evidence that the State had knowledge of the petition and had knowingly waived proper service. *Carter*, 2014 IL App (1st) 122613, ¶ 21. Here, by contrast, as noted, we must presume that a representative of the State was present in court at the time the defendant's petition was docketed and service was waived.

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¶ 17 We note that defendant does not argue that he attempted to procure some record of the February 22, 2013, and March 1, 2013, court dates and failed to do so through no fault of his own. *Cf. People v. Appelgren*, 377 Ill. App. 3d 137, 142-43 (2007) (appellant's burden to provide complete record "is relaxed where the incomplete record results through no fault of the defendant") Instead, defendant argues "it is unlikely that any prosecutor appeared on those court dates, especially where they were not in front of the judge hearing the petition." However, we must resolve any doubts regarding the incomplete record against defendant. *Foutch*, 99 Ill. 2d at 392. Whether or not the State's presence was likely, it was not so improbable or impossible that it prevents our presumption that the trial court acted in full accordance with the law.

¶ 18 We find that the defendant has failed to provide this court with a complete record on appeal. Therefore, we presume that the trial court's *sua sponte* dismissal of defendant's section 2-1401 petition was in conformity with the law. Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 19 Affirmed.