2015 IL App (1st) 133731-U

SIXTH DIVISION
October 16, 2015

No. 1-13-3731

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. 01 CR 24718
	)	
ROGER SHARKEY,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Denial of defendant's section 2-1401 petition affirmed over his claim that the *sua sponte* denial was premature because the State was not properly served with the petition.

¶ 2 Defendant, Roger Sharkey, appeals the *sua sponte* denial of his petition for relief from judgment (petition) filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILSC 5/2-1401 (West 2010)). On appeal, defendant contends that this cause should be remanded for further proceedings because the State was never properly served with the petition and the *sua sponte* denial entered by the circuit court was, therefore, premature. We affirm.

¶ 3 Defendant was charged by indictment with four counts of first-degree murder stemming from the shooting death of Yolanda Castillo on September 7, 2001. On September 9, 2003, defendant pled guilty to two counts of first-degree murder as part of a plea agreement to testify against his co-defendants. On October 7, 2003, the trial court sentenced defendant to 27 years' imprisonment.

¶ 4 On December 19, 2012, defendant mailed his *pro se* petition from the Pontiac Correctional Center. The certificate of service indicates that the petition was sent through the United States Postal Service to the clerk of the circuit court and the office of the Cook County State's Attorney.

¶ 5 In his petition, defendant alleged that the charging instrument was invalid because the grand jury was improperly empanelled; the trial court lacked the authority to impose the three-year term of mandatory supervised release; and the underlying legislation creating the Illinois truth-in-sentencing scheme was invalid.

¶ 6 On April 10, 2013, defendant mailed from the Pontiac Correctional Facility a *pro se* "Motion/Request for leave to have Supreme Court Rule 216, admission of facts deemed admitted" (Rule 216 motion.) In the Rule 216 motion, defendant claimed that on January 17, 2013, he mailed *via* certified mail a request for admission of facts, pursuant to Supreme Court Rule 216, to a specifically named Assistant State's Attorney (ASA) because that ASA had been "assigned" to his case. Defendant also asserted that, "said individual" had been in possession of the request for more than 60 days and had not filed a reply or objection and, therefore, "said admissions, by Rule, are deemed to be admitted." The Rule 216 motion specifically stated and, thus, informed the State that defendant had filed the petition in December 2012 and indicated that the Rule 216 requests were related to the petition.

¶ 7 On July 18, 2013, the circuit court found that defendant's Rule 216 motion was moot because the State's lack of response to the petition meant the well-pled facts in the petition had been deemed admitted. As to the petition itself, the circuit court stated:

> "By operation of law if the State doesn't answer or respond, all well-plead facts are treated as true. So that's what I will do with that petition.
>
> I have read [defendant's] *** petition. And the court finds that the *** petition has no basis in fact or law. So the *** petition is denied and dismissed."

The transcript does not indicate that the State was present at the July 18 proceedings. On August 29, 2013, defendant mailed a motion to reconsider the circuit court's denial of the petition to the offices of the Cook County Clerk and the Cook County State's Attorney. On September 3, 2013, the circuit court denied the motion. Again, the transcript of proceedings from that date did not indicate that the State was present.

¶ 8 On appeal, defendant raises no substantive issues regarding the claims made in his *pro se* petition. Rather, his sole contention is that we should remand his cause for further proceedings because the circuit court denied his petition before it was properly served upon the State.

¶ 9 The State responds that the record demonstrates it had actual notice of the petition which allowed the circuit court to consider and deny the petition. The State also maintains that defendant should not be permitted to benefit from his own failure to properly serve the petition. On appeal, the State raises no objection to the service.

¶ 10 Initially, we observe that by solely challenging the *sua sponte* denial of his petition as premature, defendant has forfeited any challenge to the actual merits of the petition. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 11 As pertinent to this appeal, section 2-1401(b) of the Code provides that "[a]ll parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). Supreme Court Rule 106 "states that notice of the filing of a petition under section 2-1401 of the Civil Code 'shall be given by the same methods provided in Rule 105.' " *Id.* (citing Ill. S. Ct. R. 106 (eff. Aug. 1, 1985)). Supreme Court Rule 105(b) provides that "notice shall be directed to the party and must be served either by summons, by prepaid certified or registered mail, or by publication." *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 35 (citing Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989)).

¶ 12 After a petition has been served, the respondent has 30 days to file an answer or, otherwise, appear. Ill. S. Ct. R. 105(a) (eff. Jan. 1, 1989)). However, there is no requirement that a response be filed to a section 2-1401 petition. *People v. Vincent*, 266 Ill. 2d 1, 9 (2007). If a respondent does not answer a petition within the 30-day period, all well-pled facts are considered admitted, and the trial court may decide the case on the pleadings, affidavits, exhibits and supporting material before it, including the record of the prior proceedings. *Id.* The trial court may then deny or dismiss the petition if it determines that the allegations contained in the petition do not provide a legal basis for relief under section 2-1401. *Id.* at 12. We review *de novo* the trial court's denial or dismissal of a petition brought under section 2-1401. *Id.* at 14.

¶ 13 The trial court found that the State's failure to answer the petition here constituted an admission of all well-pled facts and, thus, implicitly found that defendant's petition was ripe for adjudication. *Id.* at 9-10. The trial court then considered the well-pled facts of defendant's petition, found them lacking, and denied the petition.

¶ 14 However, defendant argues that because he served the petition by regular mail, which is not one of the methods provided for in Rule 105, the petition was not ripe for adjudication and

his cause must be remanded. In support of his contention, defendant cites *People v. Carter*, 2014 IL App (1st) 122613 *appeal granted,* No. 117709 (Sept. 24, 2014). In *Carter*, the Second Division of this court found that the *sua sponte* denial of the defendant's section 2-1401 petition on the merits was premature in the absence of a showing that the State was properly served. *Id.* ¶¶ 25-26.

¶ 15 Acknowledging that *Carter* is pending before our supreme court, the State calls our attention to other cases, where the reviewing courts have considered the same argument raised by defendant, and declined to follow *Carter*. See *People v. Lake*, 2014 IL App (1st) 131542. In *Lake*, this court noted a number of appellate court decisions where this issue had been raised. See, e.g., *People v. Kuhn*, 2014 IL App (3d) 130092; *People v. Maiden*, 2013 IL App (2d) 120016; *People v. Miller*, 2012 IL App (5th) 110201; *People v. Nitz*, 2012 IL App (2d) 091165; *People v. Prado*, 2012 IL App (2d) 110767. We remarked that the issue, as to the consequences of a defendant's failure to properly serve a section 2-1401 petition on the State, had created a division among the districts of this court, and within the First District. In *Lake*, this court also referenced its prior decision in *People v. Ocon*, 2014 IL App (1st) 120912, where it determined that the State had actual notice of the petition, which had been served by regular mail, in that an ASA was present in court when the petition was docketed and, thus, the court's *sua sponte* dismissal of defendant's petition was proper. *Lake*, 2014 IL App (1st) 131542, ¶¶ 23-26. Under that reasoning, the court in *Lake* found that the defendant's section 2-1401 petition, although not properly served, was ripe for adjudication 30 days after it had been filed where, on one of the hearing dates for defendant's petition, an ASA was present in court and opted to not respond to the motion. *Id*. ¶ 26.

¶ 16 Under similar circumstances, in *Kuhn*, the Third District affirmed the *sua sponte* dismissal of the defendant's petition, finding that the defendant's service by regular mail, though technically noncompliant with Rule 105, provided the State with actual notice as evidenced by the State's appearance at two hearings, even though the State did not file a responsive pleading or object to the service. *Kuhn*, 2014 IL App (3d) 130092, ¶ 17.

¶ 17 Defendant claims that, since there is no registered mail receipt contained in the record, nor an indication in the reports of proceedings on July 18, 2013, when the petition was dismissed, and September 30, 2013, when the motion to reconsider was denied, that an ASA appeared before the court, there was no showing that the State had actual notice of his petition. Defendant maintains that, without this proof of actual notice, we should not follow *Lake*, and *Ocon*, and *Kuhn*, but apply the holding in *Carter*.

¶ 18 The State asserts that defendant's argument, that the State did not have actual notice of the petition, is rebutted by the record. The State was served with the petition and Rule 216 motion by regular mail. Further, in his April 10, 2013, Rule 216 motion, defendant stated that on "January 17, 2013, he had cause to send by *certified mail* a request for admission of facts" to a specifically named ASA "based on the fact that" she was assigned to defendant's cause of action. (Emphasis added.) Thus, there is evidence that the State had actual notice of the petition (beyond the service of the petition and Rule 216 motion by regular mail), at least by about January 17, 2013, when the requests to admit were served by certified mail, well before the dismissal of the petition on July 18, 2013. These circumstances distinguish the case at bar from *Carter* where, because the record did not establish that the State had actual notice of the petition until the trial court dismissed it, this court found that the 30-day period never began. *Carter*, 2014 IL App (1st) 122613, ¶ 21.

¶ 19 The State also argues that defendant's position requires this court to engage in "wholesale conjecture" and speculation as to what took place in court after the petition was docketed and prior to the denial of the petition as the record on appeal is incomplete. Here, a half-sheet included in the common law record bears a single entry dated January 31, 2013, indicating that the petition was set for a hearing on February 4, 2013. However, the next court date reflected on a separate half-sheet was July 18, 2013, showing that on that date, the circuit court denied the petition. However, in the appendix to its brief, the State has included a printout from the clerk of the circuit court showing that the cause *was* before the circuit court on February 4, and again on March 8, and May 9, 2013. But, there is no order, report of proceedings, nor other notation from those dates included in the record on appeal and, as such, the record on appeal is incomplete. We have no way of knowing whether the State appeared on the petition on those missing dates.

¶ 20 It was the responsibility of defendant, as appellant, to provide this court with a record that is sufficient to review the issues raised on appeal, and any doubts arising from the incompleteness of the record will be construed against the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Accordingly, defendant's failure to include a record of the court proceedings which took place between January 31, 2013, and July 18, 2013, requires us to presume that the circuit court " 'ruled or acted correctly' " in finding that the State had failed to respond to the petition and, by denying the petition, implicitly finding that it was ripe for adjudication. *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006) (quoting *People v. Majer*, 131 Ill. App. 3d 80, 84 (1985).

¶ 21 The State also contends that equity precludes defendant from benefitting from his own injected error. *People v. Hawkins*, 181 Ill. 2d 41, 58 (1998) (where court stated "it is manifestly unfair for a party to expect a second trial on the basis of an error which that party injected into

the proceedings"). This principle has been espoused by reviewing courts that have departed from *Carter* and declined to reward a defendant for the failure to comply with the service requirements of Rule 105. See, e.g., *Alexander*, 2014 IL App (4th) 130132, ¶¶ 47-49; *Kuhn*, 2014 IL App (3d) 130092, ¶ 17.

¶ 22 In both *Alexander* and *Kuhn*, the defendants' petitions were sent to the State by regular mail in contrast with the requirements of Rule 105. In *Kuhn*, the court noted that a party may object to improper service only on behalf of himself and, therefore, defendant lacked standing to challenge the State's lack of notice. *Id.* ¶ 16. Similarly, in *Alexander*, the Fourth District did not believe the defendant should benefit from his failure to comply with Rule 105. *Alexander*, 2014 IL App (4th) 130132, ¶ 46. The *Alexander* court, therefore, declined to follow *Carter*, finding that *Vincent* and *Laugharn* did not mandate the result reached in *Carter*. *Id.* The Fourth District explained its decision in this way:

> "The flaw in defendant's argument is that under *Laugharn*, the primary purpose of the 30–day period is to afford the State sufficient time to respond to a petitioner's claims seeking relief from judgment before a trial court may sua sponte consider the petition. [Citation.] In other words, the court must allow the State time to make its position known. However, the 30–day period does not provide a sword for a petitioner to wield once a court—as in this case—does not find in his favor, especially given that, under defendant's interpretation, the basis of his claim on appeal is his failure to comply with Rule 105. If we were to accept defendant's rationale, a prisoner who uses regular mail to effect service upon the State will—upon appeal—be rewarded with a second bite of the apple if the court denies his petition on the merits. Indeed, no practical reason would exist to comply with the provisions of Rule 105 because to do so would foreclose that avenue of review,

which effectively empowers a prisoner to persist in filing frivolous claims." *Id*. See also *People v. Donley*, 2015 IL App (4th) 130223, ¶ 34 (where court followed reasoning in *Alexander*).

¶ 23 We, likewise, agree with the reasoning expressed by this court in *Kuhn*, *Alexander*, and *Donley* that a defendant " 'should not be able to serve a party incorrectly and then rely on the incorrect service to seek reversal.' " *Id*. ¶ 34 (quoting *Alexander*, 2014 IL App (4th) 130132, ¶ 47).

¶ 24 For the reasons stated, we affirm the circuit court's *sua sponte* denial of defendant's petition for relief from judgment.

¶ 25 Affirmed.