

No. 1-13-3739

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 07 CR 18717
)	
DERRICK BARBER,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's *sua sponte* dismissal of the defendant's section 2-1401 petition is affirmed where the record on appeal failed to affirmatively demonstrate deficient service of the petition on the State. Additionally, the defendant's 19-year sentence for reckless homicide is voidable, not void, and not subject to a collateral attack.

¶ 2 The defendant, Derrick Barber, appeals from the circuit court's order dismissing his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, the defendant argues that the court's *sua sponte*

dismissal was premature because he did not properly serve the State with the petition as required by Illinois Supreme Court Rule 105(b) (eff. Jan. 1, 1989). The defendant also contends, for the first time, that his 19-year prison sentence for reckless homicide is void because it is not authorized by statute. He, therefore, requests that his cause be remanded to the circuit court where he can withdraw his guilty plea and plead anew, or proceed to trial on the charges. For the reasons that follow, we affirm.

¶ 3 The record reveals the following pertinent facts. On September 12, 2007, the State charged the defendant by indictment with two counts of aggravated driving under the influence (DUI) and one count of reckless homicide, based on a single automobile accident that resulted in the death of another person. On April 14, 2009, the defendant entered into a negotiated plea agreement with the State. At the plea hearing, defense counsel informed the circuit court that the defendant agreed to plead guilty to two counts of aggravated DUI and one count of reckless homicide in exchange for a 19-year sentence.

¶ 4 Before accepting the defendant's plea, the circuit court admonished the defendant as to the nature of the charges and the range of possible penalties. Specifically, the court told the defendant that aggravated DUI and reckless homicide are Class 2 offenses, but based on the defendant's criminal background he was subject to Class X sentencing of 6 to 30 years in prison, followed by 3 years of mandatory supervised release. The defendant confirmed that he understood the charges, the terms of the plea agreement, and the potential penalties.

¶ 5 The circuit court further advised the defendant that by pleading guilty, he would give up his right to a bench or jury trial and relinquish his rights to be confronted with the witnesses against him. The defendant said he understood these rights and that he was freely and voluntarily waiving them. The court also asked the defendant if anyone threatened or promised

him anything (aside from the negotiated plea agreement) in return for his plea of guilty and he responded in the negative. The parties stipulated to the factual basis for the plea. The court accepted the defendant's plea and sentenced him in accordance with the plea agreement to 19 years' imprisonment on each count to run concurrently. The court then admonished the defendant of his appeal rights.

¶ 6 On September 3, 2009, the defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence, but the circuit court denied the motion as untimely. The defendant did not take a direct appeal.

¶ 7 On February 5, 2010, the defendant filed a *pro se* post-conviction petition alleging, *inter alia*, ineffective assistance of counsel. The circuit court summarily dismissed the petition as frivolous and patently without merit and this court affirmed the dismissal on appeal. *People v. Barber*, 2012 IL App (1st) 101392-U (unpublished order under Supreme Court Rule 23).

¶ 8 On August 13, 2013, the defendant mailed a section 2-1401 petition in which he argued that his guilty plea was void because the circuit court improperly admonished him of his right to appeal. The defendant attached an affidavit of service to his pleading, certifying that he placed it in the institutional mail at the Danville Correctional Center where he was incarcerated. The affidavit of service listed the addresses of the clerk of the circuit court of Cook County and the Cook County State's Attorney's Office, both at "2650 S. California Ave., Chicago, Ill. 60608."

¶ 9 The record shows the clerk of the circuit court received the petition on August 20, 2013, and stamped it "received" on that same date. It was docketed on August 27, 2013, and the matter appeared on the circuit court's September 5, 2013, call. The court stated that the defendant filed a section 2-1401 petition and set the matter for status for September 13, 2013. The matter was continued several times until October 11, 2013, when the court *sua sponte* dismissed the

defendant's petition in a written order, finding that the defendant failed to raise a meritorious claim. The transcript of the proceedings does not indicate that anyone other than the judge and the court reporter were present in court. Neither party filed a post-judgment motion in the circuit court; thus, issues of sufficiency of service and notice to the State were never addressed. This appeal followed.

¶ 10 The defendant first argues that the circuit court's *sua sponte* dismissal of his section 2-1401 petition should be vacated because it was not ripe for adjudication as it was not properly served on the State. We review the dismissal of a section 2-1401 petition *de novo*. *People v. Carter*, 2015 IL 117709, ¶ 13.

¶ 11 Section 2-1401 of the Code provides a statutory procedure for the vacatur of a final judgment that is more than 30 days but less than 2 years old. 735 ILCS 5/2-1401 (West 2012). A petition brought under section 2-1401 must be filed in the same proceeding in which the challenged order or judgment was entered; however, the petition is not a continuation of the original action. 735 ILCS 5/2-1401(b) (West 2012). Pursuant to Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985), service of a section 2-1401 petition must be made by the means set out in Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). Rule 105(b) provides that notice may be served by summons, prepaid certified or registered mail, or publication. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989).

¶ 12 After notice has been served, the responding party has 30 days to answer or otherwise plead in response to the petition. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). When the responding party fails to answer the petition within the 30-day period, it is deemed to admit all well-pleaded facts and the petition is ripe for adjudication. *People v. Vincent*, 226 Ill. 2d 1, 9-10

(2007). After the 30-day period, the circuit court may deny the petition if it determines the allegations therein do not provide a legal basis for relief under section 2-1401. *Id.* at 12.

¶ 13 In this case, the defendant admits he failed to serve the State with notice by one of the means allowed by Rule 105—*i.e.*, he sent the petition via regular mail. Because he did not serve the State via one of the methods provided for in Rule 105, he contends that his petition was not ripe for adjudication and the circuit court erred in dismissing it *sua sponte*. He urges this court to vacate the dismissal and remand for further proceedings. The State responds that the record does not affirmatively demonstrate there was deficient service. Alternatively, the State argues that the defendant should not be rewarded for his own malfeasance and that the defendant lacks standing to challenge improper service on behalf of another party.

¶ 14 Our supreme court has long recognized that to support a claim of error, the appellant has the burden to present a sufficiently complete record on appeal to enable the court of review to determine whether the error claimed by the appellant exists. *Carter*, 2015 IL 117709, ¶ 19. Absent an adequate record, the reviewing court must presume the circuit court's judgment conforms with the law. *Id.* " 'Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.' " *Id.* (quoting *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)).

¶ 15 In considering whether the defendant presented a sufficiently complete record to support his claim of error, we find *Carter*, 2015 IL 117709, instructive. In *Carter*, the defendant mailed a section 2-1401 petition by placing it in the "institutional mail" at the Menard Correctional Center. Attached to his petition was a "Certificate/Proof of Service" which listed the addresses of the "Clerk of Court" and "State's Atty. Office," both of "2650 S. California Avenue," Chicago, Illinois. *Id.* ¶ 5. The circuit clerk received and docketed the defendant's pleading and the matter

appeared before the circuit court. The circuit court *sua sponte* dismissed the petition on the merits and the defendant appealed. *Id.* ¶ 6.

¶ 16 On appeal, our supreme court held that where a section 2-1401 petitioner seeks to use his own error, by way of allegedly defective service, as a means to gain reversal of a circuit court's *sua sponte* dismissal, the petitioner must affirmatively demonstrate the error via proceedings in the circuit court. *Id.* ¶ 25. The supreme court reasoned:

"In this case, the claimed error, which is premised on allegedly deficient service, was not addressed at all in the circuit court, by either party. The issue was first raised by defendant on appeal, as a means to obtain remand after his petition was dismissed by the circuit court on the merits. Thus, there is no meaningful record from the circuit court to be reviewed. What scant record there is consists of a statement in the proof of service defendant attached to his petition: 'I have placed the documents listed below in the institutional mail at Menard Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service.' To serve as a basis for defendant's contention of error, that statement must affirmatively establish that defendant mailed his petition via some means other than certified or registered mail. However, all it establishes is where defendant mailed his petition—'the institutional mail'—and the medium through which it was to be transmitted: 'the United States Postal Service.' " *Id.* ¶ 20.

The supreme court concluded that, without an adequate record preserving the claimed error, it must presume the circuit court's order conforms with the law. It refused to assume that the defendant's service upon the State was deficient. *Id.* ¶ 23.

¶ 17 Similarly here, we have examined the record and conclude it does not affirmatively establish there *was* deficient service. Just like in *Carter*, neither party in this case filed a post-judgment motion in the circuit court and, consequently, the sufficiency of service was never addressed. What we *can* discern from the record is that over 30 days had passed since the defendant filed his petition when the circuit court dismissed it, *sua sponte*, on the merits. The defendant's pleading was stamped received by the circuit clerk on August 20, 2013, docketed on August 27, 2013, and dismissed on October 11, 2013. A written order was then prepared and filed that same day, outlining the court's reasoning for the dismissal. No party filed a post-trial motion. In sum, nothing in this record affirmatively establishes that the State was not given proper notice or that the circuit court's *sua sponte* dismissal was premature. It was the defendant's burden, as the appellant, to show that service by summons, prepaid certified or registered mail, or publication, was *not* accomplished. On this record, we must presume the circuit court's order was rendered in accordance with the applicable law.

¶ 18 Accordingly, the circuit court did not err by *sua sponte* dismissing the defendant's section 2-1401 petition.

¶ 19 We next address the defendant's claim, raised for the first time on appeal, that his 19-year prison sentence for reckless homicide is not authorized by statute. He asserts that reckless homicide is a Class 3 felony (720 ILCS 5/9-3(d)(2) (West 2006)), which carries a sentencing range of two to five years. 730 ILCS 5/5-4.5-40(a) (West 2006). As such, the defendant contends that his 19-year sentence exceeds the statutory maximum, is void, and subject to collateral attack at any time.

¶ 20 The State responds by arguing that the claimed error is merely voidable—rather than void—and not subject to a collateral attack such as the instant appeal. In so arguing, the State

points out that, because the circuit court had both personal and subject matter jurisdiction in this cause, any resulting error must be considered voidable rather than void. For the reasons that follow, we agree with the State.

¶ 21 We begin by noting that our supreme court has consistently held that a judgment is void if and only if the court that entered it lacked jurisdiction. *People v. Davis*, 156 Ill. 2d 149, 155 (1993). In *Davis*, our supreme court explained Illinois's voidness doctrine as follows:

"Whether a judgment is void or voidable presents a question of jurisdiction. [Citation]. Jurisdiction is a fundamental prerequisite to a valid prosecution and conviction. Where jurisdiction is lacking, any resulting judgment rendered is void and may be attacked either directly or indirectly at any time. [Citation]. By contrast, a voidable judgment is one entered erroneously by a court having jurisdiction and is not subject to collateral attack." *Id.* at 155-56.

¶ 22 Jurisdiction consists of two elements: subject matter jurisdiction and personal jurisdiction. *In re M.W.*, 232 Ill. 2d 408, 414 (2009). Subject matter jurisdiction refers to the power of a court " 'to hear and determine cases of the general class to which the proceeding in question belongs.' " *Id.* at 415 (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 199 Ill. 2d 325, 334 (2002)). Personal jurisdiction refers to the court's power " 'to bring a person into its adjudicative process.' " *Id.* at 415 (quoting Black's Law Dictionary 870 (8th ed. 2004)).

¶ 23 In this case, the circuit court acquired jurisdiction over the parties (the State and the defendant) and over the subject matter (crimes committed in Illinois). The defendant here does not, nor could he, argue voidness on the basis of the court's lack of personal or subject matter jurisdiction. Rather, the defendant solely contends that the court lacked statutory authority to

sentence him to 19-years for reckless homicide. In support of his argument, the defendant cites *People v. Arna*, 168 Ill. 2d 107, 113 (1995), which held that "[a] sentence which does not conform to a statutory requirement is void."

¶ 24 Our supreme court in *People v. Castleberry*, 2015 IL 116916, ¶ 19, which was decided during the pendency of this appeal, abolished the void sentence rule, abrogating *Arna*. The court observed that the void sentence rule developed from prior cases which held that, in addition to subject matter and personal jurisdiction, circuit courts also possess "inherent authority" or "inherent power" to render a particular judgment or sentence. *Id.* ¶ 13. Based on this idea, a circuit court which violates a particular statutory requirement when imposing a sentence acts without "inherent power," *i.e.*, without jurisdiction, thereby rendering the sentence void. *Id.* The supreme court reasoned, however, that the "inherent power" idea of jurisdiction is at odds with the grant of jurisdiction given to the circuit courts under the Illinois Constitution and cannot be reconciled with its recent decisions in *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514 (2001), *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325 (2002), and *LVNV Funding, LLC v. Trice*, 2015 IL 116129. *Id.* ¶ 18. The supreme court explained that the circuit court is a court of general jurisdiction, which need not look to a statute for its jurisdictional authority. *Id.* ¶ 19. Consequently, only the most fundamental defects, *i.e.*, lack of personal jurisdiction or lack of subject matter jurisdiction warrant declaring a judgment void. *Id.* ¶ 15.

¶ 25 Applying the aforementioned principles to the facts of this case, we are compelled to conclude that the circuit court's order was voidable, not void. As noted above, the court had jurisdiction over the defendant as well as the subject matter. The court, therefore, had authority to enter convictions and sentences on the charged offenses, and its order sentencing the defendant to 19 years for reckless homicide was, merely, error. *Davis*, 156 Ill. 2d at 156

("jurisdiction or power to render a particular judgment *** carries with it the power to decide wrong as well as to decide right"). However, this erroneous judgment did not divest the court of its jurisdiction, and therefore the judgment was voidable and not void. As a voidable order, the defendant's sentence is not subject to collateral attack.

¶ 26 As a final matter, we note the defendant voluntarily pled guilty to two counts of aggravated DUI and one count of reckless homicide in exchange for 19 years' imprisonment. Although the defendant was improperly sentenced to 19 years for reckless homicide, he was properly sentenced to 19 years on each count of aggravated DUI. Since the sentences run concurrently, the defendant received the benefit of his bargain and any possibility of prejudice to the defendant is remote.

¶ 27 Having found that the defendant may not collaterally attack his sentence, we need not address his remaining argument that we should vacate his entire guilty plea.

¶ 28 For all of the reasons above, we affirm the circuit court's summary dismissal of the defendant's section 2-1401 petition.

¶ 29 Affirmed.