2015 IL App (3d) 130149-U

Order filed December 18, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal Nos. 3-13-0149 & 3-13-0213
v.	)	Circuit No. 09-CF-367
	)	
ERNEST MONROE,	)	Honorable
	)	H. Chris Ryan,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice McDade and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant's section 2-1401 petition for relief from judgment.

¶ 2 Defendant, Ernest Monroe, appealed the denial of his petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)), arguing that the petition was not ripe for adjudication because defendant did not properly serve the State with the petition. We vacate the trial court's order and remand for further proceedings.

¶ 3 FACTS

¶ 4 Defendant pled guilty to unlawful delivery of a controlled substance (720 ILCS 570/401(a)(1)(A) (West 2008)) in exchange for the State's agreement to recommend no more than 16 years' imprisonment. The trial court sentenced defendant to 14 years' imprisonment. Defendant subsequently filed a *pro se* postconviction petition, which was denied.

¶ 5 On January 18, 2013, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)). The notice of filing and affidavit of service filed contemporaneously with the petition shows that two copies of the petition were mailed to the court, with one copy designated as "for the State." The record contains a copy of the envelope in which defendant sent his petition to the court. The postmark on the envelope indicates that it was sent via first class mail. The envelope contained no indication that it was sent via certified or registered mail.

¶ 6 On February 26, 2013, the trial court entered a written order *sua sponte* denying the petition on the merits with prejudice. The docket sheet does not show that there was ever a hearing in open court on the petition.

¶ 7 On March 12, 2013, the La Salle County circuit clerk filed defendant's motion for default judgment, which the trial court denied, referencing its order of February 26, 2013. Defendant appeals that court's ruling of February 26, 2013.

¶ 8 ANALYSIS

¶ 9 Defendant argues that the trial court erred in *sua sponte* denying his section 2-1401 petition for relief from judgment on the merits before the State received proper service of process. Due to lack of service on the State, defendant argues, the matter was not ripe for adjudication when the trial court considered the merits of the petition on February 26, 2013. We

review a trial court's judgment on the pleadings or dismissal of a section 2-1401 petition by applying a *de novo* standard of review. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 10 Section 2-1401 of the Code provides a statutory procedure for vacatur of final orders, judgments, and decrees after 30 days from their entry. 735 ILCS 5/2-1401 (West 2012). A section 2-1401 petition must be filed in the same proceeding in which the order or judgment is entered, but the section 2-1401 petition is not a continuation of that proceeding. 735 ILCS 5/2-1401(b) (West 2012).

¶ 11 The notice requirements for section 2-1401 petitions are governed by Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985). Under Rule 106, notice of filing of a section 2-1401 petition may be served in the same manner as service according to Supreme Court Rule 105: by summons, prepaid certified or registered mail, or publication. Ill. S. Ct. R. 105 (eff. Jan. 1, 1989); Ill. S. Ct. R. 106 (eff. Aug.1, 1985). If a notice is served via registered or certified mail, it must be addressed to the party on which it is being served. Ill. S. Ct. R. 105(b)(2) (eff. Jan. 1, 1989).

¶ 12 After notice has been served, the responding party has 30 days to file an answer or otherwise appear. *Id.* There is no requirement that the State file a responsive pleading to a section 2-1401 petition. *Vincent*, 226 Ill. 2d at 9. However, the State's failure to file an answer or otherwise appear within 30 days after service constitutes an admission of all well-pleaded facts and renders the section 2-1401 petition ripe for adjudication. *Id.* at 9-10; *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). A trial court may only *sua sponte* dismiss or deny a section 2-1401 petition on the merits after the expiration of the required 30-day response period. *Laugharn*, 233 Ill. 2d at 323.

¶ 13 In this case, we find that defendant's attempt at service failed to comply with the notice requirements found in Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). Specifically, defendant's section 2-1401 petition was sent to the court by regular mail, rather than registered or certified mail as required by Rule 105. Defendant's notice of filing indicated that he included a copy of the petition "for the State" with the materials he sent to the court. However, the notice of filing did not indicate that defendant sent a copy directly to the State, as required by Rule 105. There is no indication in the record that the State actually received a copy of the petition. The State did not file a responsive pleading and did not appear before the court when the judge considered the merits of the petition.

¶ 14 We note that our supreme court recently held in *People v. Carter* that:

> "[A]ny section 2-1401 petitioner who seeks to use, on appeal, his own error, by way of allegedly defective service, in an effort to gain reversal of a circuit court's sua sponte dismissal of his or her petition on the merits must affirmatively demonstrate the error via proceedings of record in the circuit court." *People v. Carter*, 2015 IL 117709, ¶ 25.

The *Carter* court held that the record in that case did not affirmatively establish a service error where the record established that an affidavit of service attached to the section 2-1401 petition listed the circuit court and the State's Attorney's office as addressees and stated that the defendant had placed the petition in the "institutional mail at Menard Correctional Center properly addressed to the parties listed above for mailing through the United States Postal Service." *Id.* ¶ 20. The *Carter* court reasoned that the language of the proof of service did not affirmatively establish that the petition was sent to the State by regular mail rather than registered or certified mail. *Id.* ¶ 20.

¶ 15 In this case, unlike the facts in *Carter*, the notice of filing and affidavit of service affirmatively established that defendant did not properly serve the State. Here, the language of the notice of filing shows that defendant did not mail a copy of the petition directly to the State. Instead, defendant indicated that a copy of the petition was designated "for the State" in the materials he sent to the court by first class mail. Additionally, unlike in *Carter*, the record in this case does not indicate that the petition was dismissed in open court in the presence of an assistant State's Attorney. See *Id.* ¶ 24.

¶ 16 Citing our holding in *People v. Kuhn, 2*014 IL App (3d) 130092, ¶ 16, the State argues on appeal that defendant lacks standing to object to his failure to effect personal service on the State in compliance with Supreme Court Rule 106. In *Kuhn*, the respondent served a section 2-1401 petition on the State by regular mail, rather than certified or registered mail as required by Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). *Id.* at ¶ 17. The State did not file a responsive pleading but personally appeared before the court twice in connection with the section 2-1401 petition. *Id.* In *Kuhn*, unlike in this case, the record showed that the State had actual notice of the section 2-1401 petition and appeared before the court after failing to file a responsive pleading. *Id.* In such a situation, we held that a defendant does not have standing to object to his defective service and thereby benefit from his own error. *Id.*

¶ 17 In this case, unlike *Kuhn*, the petition was not served on the State, and the State did not appear in connection with the petition. Nothing in the record indicates that the State was even aware of the petition. Consequently, the trial court could not conclude from the State's lack of response that the State admitted all well-pleaded facts in the petition and proceeded to deny the petition on its merits. Here, the trial court could have *sua sponte* scheduled the defendant's section 2-1401 petition for a hearing on the merits and provided notice to each party of the

hearing date. Then, if the State appeared before the court on the hearing date without filing a prior responsive pleading, our decision in *Kuhn* would be much more analogous.

¶ 18 Accordingly, we vacate the order denying the section 2-1401 petition on the merits and remand for further proceedings.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of La Salle County is vacated, and the cause is remanded for further proceedings.

¶ 21 Judgment vacated; cause remanded for further proceedings.