

No. 1-13-0697

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 97 CR 25837
)	
OMAR JOHNSON,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Appeal dismissed.

¶ 2 Defendant, Omar Johnson, appeals from an order of the circuit court of Cook County dismissing his successive section 2-1401 (735 ILCS 5/2-1401 (West 2012)) petition. Here, defendant argues that the circuit court erred in dismissing the petition because his extended-term sentences are void. For the following reasons, we lack jurisdiction to consider defendant's claim and dismiss his appeal.

¶ 3 Defendant is currently serving a life sentence imposed on his 1999 conviction of first degree murder, 60-year terms imposed on his convictions of aggravated kidnapping, armed robbery, aggravated vehicular hijacking, and a 10-year sentence for his concealment of a homicidal death. This court affirmed those judgments on direct appeal (*People v. Johnson*, No. 1-99-1989 (2004) (unpublished order under Supreme Court Rule 23)), as well as the denial of his subsequent *pro se* post-conviction and section 2-1401 (735 ILCS 5/2-1401 (West 2012)) petitions (*People v. Johnson*, Nos. 1-99-1989 (2006), 1-05-3285 (2006) (unpublished orders under Supreme Court Rule 23)). We also ultimately affirmed the State's motion to dismiss defendant's second section 2-1401 petition (*People v. Johnson*, 2012 IL App (1st) 111378); however, in accordance with the directive of the supreme court in *People v. Johnson*, 2013 IL 114639, we vacated the assessment of a \$50 State's Attorney fee. We also affirmed the denial of leave to file defendant's successive postconviction petition (*People v. Johnson*, 2015 IL App (1st) 131079-U).

¶ 4 On October 16, 2012, defendant filed another petition for relief from judgment pursuant to section 2-1401 (735 ILCS 5/2-1401 (West 2012)), alleging that his extended-term sentences were void. Specifically, he asserted that he was sentenced to natural life for first degree murder and also received extended-term sentences on three other offenses and argued that those three other offenses arose from a related course of conduct and were not the most serious offense of which he was convicted because he had been convicted of murder.

¶ 5 Defendant filed a motion to amend the successive section 2-1401 petition on November 1, 2012, to include the claim that the 60-year sentence imposed on the aggravated kidnapping count rendered the sentence void because the court did not have the authority to impose the

maximum extended-term sentence of 60 years for a Class X felony. The court allowed the amendment. After the State indicated that it would not file a response to the petition, the court found that defendant was not entitled to relief and dismissed the petition on December 7, 2012. On December 14, 2012, the court denied defendant's second motion to amend the section 2-1401 petition received on December 12, 2012, stating that defendant's section 2-1401 petition had already been dismissed.

¶ 6 On January 3, 2013, defendant filed a motion for reconsideration of the court's December 7, 2012 order. The court denied the motion on January 25, 2013. It is from this order that defendant now appeals.

¶ 7 At the forefront, we must address the State's argument that this court does not have jurisdiction to consider defendant's claims. Section 2–1401 of the Code of Civil Procedure “establishes a comprehensive, statutory procedure that allows for the vacatur of a final judgment older than 30 days.” *People v. Vincent*, 226 Ill.2d 1, 7 (2007) (citing 735 ILCS 5/2–1401 (West 2002)). “Section 2–1401 requires that the petition be filed in the same proceeding in which the order or judgment was entered, but it is not a continuation of the original action.” *Id.* “[S]ection 2–1401 is a civil remedy that extends to criminal cases as well as to civil cases.” *Id.* at 8.

¶ 6 Illinois Supreme Court Rule 303(a) (eff. June 4, 2008) requires that a notice of appeal be filed within 30 days of an order granting or denying relief pursuant to section 2–1401, unless a motion to reconsider or vacate the grant or denial of section 2–1401 relief is filed within 30 days of the court's ruling on the section 2–1401 petition. *Burnicka v. Marquette National Bank*, 88 Ill. 2d 527, 530-31 (1982). In that case, the time for appeal is 30 days after the denial of the motion to reconsider. *Id.*; *Harris Bank, N.A. v. Harris*, 2015 IL App (1st) 133017, ¶ 46. Thus,

defendant had 30 days after the court's denial of his motion to reconsider to file his notice of appeal, or until February 25, 2013. In this case, defendant's notice of appeal was filed on February 26, 2013, one day late.

¶ 7 Pursuant to Illinois Supreme Court Rule 303(d) (eff. June 4, 2008), defendant could have filed a motion to extend the time to file the notice of appeal, “supported by a showing of reasonable excuse for failure to file a notice of appeal on time,” on or before February 25, 2013. Defendant did not file a motion for leave to file a late notice of appeal within the time period for seeking an extension of time. See Ill. S.Ct. R. 303(d) (eff. June 4, 2008).

¶ 8 In his reply brief, defendant stated that we should construe his notice of appeal as being filed within the 30-day period through the application of the mailbox rule. According to the mailbox rule, notices of appeal are considered timely filed on the day they are placed in the prison mail system by an incarcerated defendant. *People v. Kellerman*, 341 Ill. App. 3d 1019 (2003).

¶ 9 “To rely on the date of mailing as the filing date, a defendant must provide proof of mailing by filing a proof of service that complies with the requirements of Illinois Supreme Court Rule 12(b)(3) (eff. Dec. 29, 2009).” *People v. Shines*, 2015 IL App (1st) 121070, ¶ 33. Rule 12(b)(3) requires a defendant to file an affidavit stating the time and place of mailing, the address on the envelope, and the fact that proper postage was prepaid. *Id.* Defendant's notice of appeal included no affidavit establishing compliance with Rule 12(b)(3). Defendant did not file the affidavit with his document and therefore may not avail himself of the mailbox rule.

¶ 10 Defendant also asserts that his filing was timely under a common sense application of the mailbox rule because it was file stamped on February 26, 2013, at 11:59 a.m., 11 hours and 59

minutes after the due date. According to defendant, common sense dictates that the clerk of the circuit court in Maywood did not receive his notice of appeal, which travelled over 300 miles from Menard Correctional Center, in 11 hours and 59 minutes. Defendant urges that the only possible way the clerk's office in Maywood received and file stamped his notice of appeal on February 26, 2013, was if it was placed in the prison mail system at the very latest on February 25, 2013, and asks us to infer that the notice was filed in a timely fashion. "The mailbox rule, however, does not allow for an inference." *Shines*, 2015 IL App (1st) 121070, ¶ 32.

¶ 11 Defendant points to the Illinois Department of Corrections DOC0296, which is an "Offender Authorization for Payment" form that he included in the appendix to his brief. Defendant argues that this form establishes his compliance with Rule 12(b)(3). Unfortunately, this document is not included in the record on appeal. Documents that this court may consider must be included in the record on appeal, and not simply in an appendix. *Wilson v. Brant*, 374 Ill. App. 3d 306, 308 (2007). Therefore, we cannot consider whether DOC0296 establishes compliance with Rule 12(b)(3).

¶ 12 Even if we were to consider defendant's argument that DOC0296 showed his compliance with Rule 12(b)(3), DOC0296 does not cure the jurisdictional problem here. DOC0296 is not an affidavit, it does not show the time and place of mailing or the address on the envelope. Contrary to defendant's argument, DOC0296 does not establish his compliance with Rule 12(b)(3).

¶ 13 As it stands, defendant's notice was filed one day beyond the 30-day deadline. Given these circumstances, this court lacks jurisdiction to review the denial of defendant's successive section 2–1401 petition to vacate. We likewise lack jurisdiction to consider defendant's motion

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"for leave to apply for mandamus as relief as an alternative method of relief" that was filed in this court and taken with the case.

¶ 14 Appeal dismissed.