

No. 1-13-3176

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 26102
)	
ROBERT GILBERT,)	Honorable
)	Carol A. Kipperman,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

O R D E R

¶ 1 **Held:** Circuit court's *sua sponte* dismissal of defendant's *pro se* section 2-1401 petitions affirmed where defendant did not affirmatively establish improper service on the State.

¶ 2 Defendant Robert Gilbert appeals from the circuit court's dismissal of his *pro se* petitions for postjudgment relief filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends that the circuit court

dismissed his petitions prematurely because he failed to properly serve them on the State. For the reasons that follow, we affirm.

¶ 3 A jury convicted defendant of attempted first-degree murder and aggravated battery with a firearm. The circuit court subsequently sentenced him to concurrent terms of 25 years in prison. This court affirmed his conviction and sentence for attempted murder, but vacated his conviction for aggravated battery with a firearm as improper under the one-act, one-crime doctrine. *People v. Gilbert*, No. 1-06-0882 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 From 2009 through 2012, defendant filed and appealed multiple unsuccessful collateral challenges to his conviction. *People v. Gilbert*, No. 1-11-0839 (2012) (summary order); *People v. Gilbert*, No. 1-12-0021, No. 1-12-0284 (2012) (consolidated summary order); *People v. Gilbert*, No. 1-09-2316 (2011) (unpublished order under Supreme Court Rule 23); *People v. Gilbert*, No. 1-10-3132 (2011) (summary order); *People v. Gilbert*, No. 1-10-3133 (2011) (summary order); *People v. Gilbert*, No. 1-09-1553 (2010) (unpublished order under Supreme Court Rule 23).

¶ 5 In 2012, defendant filed a petition for relief under section 2-1401 of the Code, alleging that his trial counsel failed to inform him before trial that the State offered him a recommended sentence of 15 years in prison in exchange for a guilty plea. Less than 30 days after the State received defendant's petition, the circuit court *sua sponte* dismissed the petition. In *People v. Gilbert*, 2014 IL App (1st) 123734-U, this court found that the circuit court committed reversible error in doing so and remanded the matter for further proceedings.

¶ 6 In 2013, defendant filed a series of eight petitions for relief under section 2-1401 of the Code. The circuit court consolidated and dismissed them all, and this court affirmed the judgment. *People v. Gilbert*, No. 1-13-2304 (2015) (summary order).

¶ 7 Defendant filed two more petitions for relief under section 2-1401 of the Code in 2013, which are at issue here.

¶ 8 Specifically, on May 3, 2013, defendant mailed a “Motion for Relief of Judgment,” in which he requested a *Krankel* hearing (*People v. Krankel*, 102 Ill. 2d 181 (1984)) “to surface what errors [his] trial attorney committed.” Defendant attached a notice of filing to his petition, alleging that he “deposit[ed]” it “in the Danville C.C. mail.” He listed as addressees, the “clerk of the circuit court” of “1500 Maybrook Dr.[,] Danville IL, 60153,” and the “States attorney’s office” of “1500 Maybrook Drive[,], Maywood IL, 60153.” The petition was stamped “filed” by the circuit clerk on July 18, 2013.

¶ 9 On June 26, 2013, defendant mailed a “Motion to Vacate Void Proceeding,” in which he alleged that in his direct appeal “the Appellate Court did not comply to Supreme Court Rule 363 in which during the decision the Appellate [*sic*] disregarded to inspect People’s Exhibit of which a photo of a damaged desk that was pertinent to [defendant’s] evidence and theory at trial.” Defendant attached a notice of filing to his petition, alleging that he “deposit[ed]” it “in the Danville C.C. box titled mail.” He listed as addressees, the “clerk of the court” and the “States Attorney Office,” both of “1500 Maybrook Dr.[,] Maywood IL, 60153.” The petition was stamped “filed” by the circuit clerk on July 18, 2013.

¶ 10 On a July 12, 2013 court date, an assistant State's Attorney stated that defendant filed a section 2-1401 petition that was on the court's call for the first time that day. The memorandum of orders indicates that this section 2-1401 petition was defendant's "Motion for Relief of Judgment" despite not being stamped filed until July 18, 2013. The court continued defendant's matter until August 16. On a July 26, 2013 court date, the same assistant State's Attorney stated that defendant had filed a new section 2-1401 petition and asked the court to continue defendant's matter until August 16 when his other matter was on the court's call. The memorandum of orders indicates that this section 2-1401 petition was defendant's "Motion to Vacate Void Proceeding." On August 16, 2013, both matters were continued until August 21.

¶ 11 On August 21, 2013, more the 30 days after the petitions were filed, the circuit court *sua sponte* dismissed both of them. Although a different assistant State's Attorney's name appears on the cover sheet of the report of proceedings, neither of them participated in the court proceedings. This appeal followed.

¶ 12 On appeal, defendant does not advance any substantive claims concerning his petitions. Rather, he solely contends that the circuit court prematurely dismissed his petitions because he did not properly serve the petitions on the State. Because his petitions were not ripe for adjudication, he therefore requests that his petitions be remanded back to the circuit court for further proceedings, "including proper service upon the State."

¶ 13 We review a circuit court's dismissal of a section 2-1401 petition *de novo*. *People v. Carter*, 2015 IL 117709, ¶ 13.

¶ 14 Section 2-1401(b) of the Code requires that “[a]ll parties to the petition shall be notified as provided by rule.” 735 ILCS 5/2-1401(b) (West 2012). The relevant rule is Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). See Ill. S. Ct. R. 106 (eff. Aug. 1, 1985) (stating “[n]otice of the filing of a petition under section 2-1401 *** shall be given by the same methods provided in Rule 105”). According to Rule 105, notice of the filing of a petition must be directed at the party against whom relief is sought. Ill. S. Ct. R. 105 (eff. Jan. 1, 1989). The petition may be served either by summons, prepaid certified or registered mail, or publication. *Id.* The purpose of this rule is “to prevent a litigant from obtaining new or additional relief without first giving the defaulted party a renewed opportunity to appear and defend.” *Carter*, 2015 IL 117709, ¶ 15. Once a party’s section 2-1401 petition has been served on the opposing party, the opposing party has 30 days to either answer or otherwise appear. Ill. S. Ct. R. 105 (eff. Jan. 1, 1989); see *Carter*, 2015 IL 117709, ¶ 14.

¶ 15 We find *Carter* dispositive of the instant case. In *Carter*, the supreme court held there was no meaningful record from the circuit court to be reviewed regarding the defendant’s claimed error, his defective service of a section 2-1401 petition on the State via regular mail. *Carter*, 2015 IL 117709, ¶ 20. The scant record from the circuit court consisted solely of a statement in the proof of service the 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.” *Id.* The *Carter* court found that the above statement did not serve as a basis for the defendant’s contention of error because it only showed where the defendant mailed his petition, the

institutional mail, and the medium through which it was to be transmitted, the United States Postal Service. *Id.* This language in the proof of service did not, however, affirmatively establish transmittal by regular mail, and thus deficient service. *Id.* ¶¶ 20, 23. Because the defendant failed to affirmatively establish through the record that the State was not given proper service or that the circuit court's *sua sponte* dismissal was premature, as was his burden as the appellant (*Id.* ¶ 19 citing *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009)), the *Carter* court presumed the circuit court's order was rendered in accordance with the applicable law. *Carter*, 2015 IL 117709, ¶¶ 24-26. The *Carter* court, accordingly, affirmed the circuit court's judgment dismissing the defendant's petition for relief from judgment. *Id.* ¶ 26.

¶ 16 Following *Carter* and based on the record of the instant case, we cannot say defendant has affirmatively established that he deficiently served his petitions on the State. As in *Carter*, there is a scant record with which to review defendant's claim of deficient service, consisting solely of the notices of filing attached to his petitions. The notices of filing allege that defendant deposited the petitions in the Danville Correctional Center mail, and they were addressed to the clerk of the circuit court and the State's Attorney's office. All we can ascertain from these notices are where defendant mailed his petitions, the Danville Correctional Center mail. Accordingly, absent an affirmative showing that defendant did not properly serve the State, we must presume the circuit court rendered its order dismissing defendant's section 2-1401 petitions in conformance with the law. See *id.* ¶ 24.

¶ 17 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.