2016 IL App (1st) 140130-U

FOURTH DIVISION
February 18, 2016

No. 1-14-0130

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. 07 CR 6585
	)	
DARRYL WASHINGTON,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court's *sua sponte* dismissal of defendant's *pro se* section 2-1401 petition

is affirmed where defendant did not affirmatively establish improper service on the State.

¶ 2 Defendant Darryl Washington appeals from the *sua sponte* dismissal of his *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends that because he did not serve his section 2-1401 petition on the State, the petition was not ripe for adjudication at the time the trial court dismissed it. For the reasons that follow, we affirm the trial court's judgment dismissing defendant's petition.

¶ 3 Following a 2010 bench trial, defendant was convicted of murder and sentenced to 30 years in prison. On appeal, this court affirmed his conviction and sentence, but ordered the mittimus corrected to reflect 1,482 days of presentence custody credit. *People v. Washington*, 2012 IL App (1st) 103229-U. In 2012, defendant filed a postconviction petition, which was summarily dismissed by the trial court. We reversed the dismissal and remanded for second-stage postconviction proceedings. *People v. Washington*, No. 1-13-0933 (2014) (dispositional order).

¶ 4 On June 4, 2013, while the appeal of the summary dismissal of his postconviction petition was pending, defendant mailed a section 2-1401 petition to the clerk of the circuit court of Cook County and the Cook County State's Attorney. Specifically, the attached "Proof of Service" indicated that defendant "placed the attached Petition to Vacate Judgment and Motion to Appoint Counsel in the prison mail system at Menard Correctional Center to be mailed as indicated above." The clerk of the circuit court received the petition on June 7, 2013, and

stamped it "filed" on June 19, 2013. The matter appeared on the circuit court's call on July 9, July 23, August 6, August 20, and August 27, 2013. The transcripts of proceedings from all those dates except August 6, 2013, indicate that only the judge and court reporter were present. The transcript from August 6, 2013, indicates that the State's Attorney was present when the trial court stated, "Darryl Washington, that's a postconviction. Order of court, August 20."

¶ 5 On September 17, 2013, the circuit court dismissed defendant's petition *sua sponte* in a written order, finding that because the petition was filed more than two years after judgment, all of defendant's claims were time barred, and that because defendant had not alleged his sentence was void, he had not "circumnavigate[d] the two-year limitations period." The circuit court additionally ruled on the merits of several claims defendant raised in the petition, finding each of them meritless. Finally, the circuit court stated that based on its finding that the petition was frivolous, it was imposing costs and fees pursuant to section 22-105 of the Code of Civil Procedure. 735 ILCS 5/22-105(a) (West 2012). A separate order filed the same day specified that the court was imposing a $90 fee for filing the frivolous section 2-1401 petition and a $15 fee for mailing, to be deducted from defendant's account at the correctional facility where he was imprisoned.

¶ 6 Defendant thereafter filed a "petition to reconsider," which the circuit court denied on November 26, 2013. On that same date, the circuit court entered a written order, identical to its order of September 17, 2013, indicating that it was imposing a $90 fee for filing a frivolous petition for relief from judgment and a $15 mailing fee.

¶ 7 Defendant appealed, contending that (1) because he did not properly serve his section 2-1401 petition on the State, the petition was not ripe for adjudication at the time the trial court dismissed it, and (2) the trial court lacked statutory authorization to impose a frivolous filing fee on what was his first section 2-1401 petition, and the Department of Corrections had erroneously seized this unauthorized fee from his trust fund account twice. On October 21, 2015, we issued a dispositional order addressing defendant's second contention. *People v. Washington,* No. 1-14-0130 (2015) (dispositional order). We observed that section 22-105(a) of the Code of Civil Procedure (735 ILCS 5/22-105(a) (West 2012)) permits a court to hold a petitioner responsible for the full payment of filing fees and actual court costs of a frivolous "second or subsequent" section 2-1401 petition, but that because the petition at issue in the instant case was defendant's *first* section 2-1401 petition, section 22-105(a) did not apply. Pursuant to our authority under Supreme Court Rule 615 (eff. Aug. 27, 1999), we vacated any fees imposed pursuant to section 22-105(a). We remanded the cause and directed the circuit court to conduct a hearing to determine the amount deducted from defendant's trust fund account for the erroneously imposed fees and to issue an order restoring the full amount of those funds to defendant's account immediately. However, we retained jurisdiction of defendant's appeal of the trial court's *sua sponte* judgment dismissing his section 2-1401 petition. We now address his remaining contention.

¶ 8 As noted above, defendant contends that because he did not properly serve his section 2-1401 petition on the State, there is no assurance in the record that the State had a fair opportunity to review the petition and the petition was not ripe for adjudication at the time the trial court

dismissed it. Defendant asserts that the dismissal must be vacated and that the cause must be remanded for further proceedings.

¶ 9 Section 2-1401 establishes a comprehensive procedure for allowing the vacatur of final judgments more than 30 days after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Section 2-1401(b) provides that "[a]ll parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985) provides that service of a section 2-1401 petition must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which in turn mandates service either by summons, prepaid certified or registered mail, or publication. Under Rule 105(a) (eff. Jan. 1, 1989), a party responding to a section 2-1401 petition has 30 days after notice has been served in which to file an answer or otherwise appear. In *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009), our supreme court determined that a petition is not ripe for adjudication before the 30-day period for a response expires. Where the State 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. *Laugharn*, 233 Ill. 2d at 323; *People v. Vincent*, 266 Ill. 2d 1, 9-10 (2007). Our review of the denial of a section 2-1401 petition is *de novo*. *Laugharn*, 233 Ill. 2d at 322.

¶ 10 In the instant case, we find dispositive our supreme court's recent decision in *People v. Carter*, 2015 IL 117709. In *Carter*, the defendant filed a "Motion to Vacate Judgment" and attached a certificate of service indicating that he had placed it in the "institutional mail" at the correctional center where he was incarcerated. *Id.* ¶ 5. The circuit court dismissed the pleading *sua sponte*. *Id.* ¶ 6. On appeal, the defendant claimed that the circuit court's dismissal of his

section 2-1401 petition was premature given that the petition was not properly served on the State. *Id*. ¶ 7. This court vacated the circuit court's judgment and remanded for further proceedings. *Id*. ¶ 11.

¶ 11 On further review, our supreme court held that there was no meaningful record from the circuit court to be reviewed regarding the defendant's claimed error of defective service. *Id*. ¶ 20. The "scant record" from the circuit court consisted solely of the defendant's statement in the proof of service that he "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 this 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*. The 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, which was the defendant's burden as the appellant, the *Carter* court presumed the circuit court's order was rendered in accordance with applicable law. *Carter*, 2015 IL 117709, ¶¶ 19, 24-26. Accordingly, the *Carter* court affirmed the circuit court's judgment dismissing the defendant's petition. *Id*. ¶ 26.

¶ 12 As in *Carter*, we cannot say in the instant case that the record affirmatively establishes that defendant's service upon the State was deficient. Here, as in *Carter*, there is a scant record

with which to review defendant's claim of deficient service. The sole evidence of service is the "Proof of Service" attached to defendant's petition, which alleges that defendant placed the petition in the "prison mail system at Menard Correctional Center," and that it was addressed to the clerk of the circuit court and the State's Attorney's office. The only information we are able to ascertain from this document is where defendant mailed his petition: the Menard Correctional Center. The notice of filing in the instant case is actually less informative than the certificate of service in *Carter*, as it does not specify "the medium through which it was to be transmitted," which in *Carter* was listed as the United States Postal Service. *Id.* ¶ 20. Nothing in defendant's petition or the proof of service indicates whether his petition was mailed via regular, certified, or registered mail. 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 petition in conformance with the law. See *id.* ¶ 24; see also *People v. Jones*, 2015 IL App (1st) 133123, ¶ 36 (affirming the dismissal of section 2-1401 petition where the defendant failed to satisfy his burden to present a sufficient record showing that his means of service was improper). Defendant's contention fails.

¶ 13 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 14 Affirmed.