

Nos. 1-14-0645 and 1-14-1829
(CONSOLIDATED)

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. 00 CR 8904
)	
HECTOR LABOY,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Dismissal of defendant's section 2-1401 petition affirmed over his claim that the *sua sponte* dismissal was premature because the State was not properly served.
- ¶ 2 Defendant, Hector Laboy, appeals the *sua sponte* dismissal of his petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). He contends that his cause should be remanded for further proceedings because the record does not establish that the petition was properly served and, thus, the *sua sponte* dismissal was premature.

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¶ 3 The record shows that defendant is serving the 60-year term of imprisonment imposed on his jury conviction of first degree murder. This court affirmed that judgment on direct appeal. *People v. Laboy*, No. 1-02-2142 (2004) (unpublished order under Illinois Supreme Court Rule 23). This court also affirmed the dismissal of defendant's subsequent *pro se* petition for relief under the Post-Conviction Hearing Act (Act) 725 ILCS 5/122-1 *et seq* (West 2012), the denial of his motion for leave to file a successive postconviction petition, and the dismissal of his first petition for relief from judgment pursuant to section 2-1401 of the Code. *People v. Laboy*, Nos. 1-05-2433, 1-06-034, 1-06-1427 (cons.) (2008) (unpublished order under Illinois Supreme Court Rule 23).

¶ 4 On November 12, 2013, defendant filed a "Motion to Vacate Void Judgment" pursuant to section 2-1401 of the Code. In his petition, defendant challenged the 25-year firearm enhancement portion of his sentence, contending that the jury did not make a finding in a special verdict form that he personally discharged a firearm that caused death, and that he was given insufficient notice of the State's intent to seek the enhanced sentence.

¶ 5 On December 3, 2013, the circuit court took defendant's petition under advisement, and on January 17, 2014, the circuit court denied it *sua sponte*, finding that defendant failed to show a cause for relief under section 2-1401. In its written order, the court determined that the trial court complied with constitutional requirements under *Apprendi* when it imposed the 25-year sentencing enhancement and that the sentence was not void.

¶ 6 On appeal, defendant raises no substantive issues regarding the claims made in his petition. Rather, he solely contends that his cause should be remanded for further proceedings

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because the trial court's dismissal of his petition before it was properly served on the State was premature.

¶ 7 The State, citing *People v. Saterfield*, 2015 IL App (1st) 132355, ¶ 18, responds, *inter alia*, that where there is no sufficient showing in the record as to whether the State was properly served, the petition is deficient and, thus, the circuit court's dismissal should be affirmed.

¶ 8 Initially, we observe that by solely challenging the *sua sponte* dismissal of his petition as premature, defendant has waived any challenge to the actual merits of his petition. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). We also observe that at the time the parties filed their briefs in this case, *People v. Carter*, 2014 IL App (1st) 122613, was pending before the supreme court, but has now been decided, and is dispositive of the issue before us. *People v. Carter*, 2015 IL 117709.

¶ 9 As pertinent to this appeal, section 2-1401(b) of the Code 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 Rules 105 and 106 (Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989), R. 106 (eff. Aug. 1, 1985)) provide that notice of the filing of the petition shall be directed to the party and must be served either by summons, prepaid certified or registered mail, or publication (*People v. Alexander*, 2014 IL App (4th) 130132, ¶ 35). 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. *People v. Vincent*, 226 Ill. 2d 1, 9-10 (2007). The circuit court may then deny the petition if it determines that the allegations contained in the petition do not provide a legal basis for relief under section 2-1401. *Id.* at 12. We review *de novo* the circuit court's *sua sponte*

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dismissal of a petition brought under section 2-1401. *Alexander*, 2014 IL App (4th) 130132, ¶ 36, and cases cited therein.

¶ 10 In this case, as the State points out and defendant concedes, there is no indication in the record of the manner in which defendant served his petition on the State. The petition was stamped "filed" in the criminal division on November 12, 2013, and first appeared on the circuit court's docket on December 2, 2013. The court denied the petition on January 17, 2014, which, we note, was more than 30 days from the filing date.

¶ 11 In *Carter*, 2015 IL 117709, ¶ 24, the supreme court held that where more than 30 days have passed between the filing of defendant's petition and the circuit court's dismissal, it is defendant's burden to show that the court's *sua sponte* dismissal was premature due to improper service on the State. To support a claim of error, defendant has the burden of providing a sufficiently complete record such that the court of review may determine whether the error occurred. *Carter*, 2015 IL 117709, ¶ 19, citing *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009). Without an adequate record showing the claimed error, this court presumes that the circuit court's order conforms with the law (*id.*), and any "doubts which may arise from the incompleteness of the record will be resolved against the appellant" (*Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)).

¶ 12 In this case, the claimed error, which is premised on allegedly deficient service, was not addressed by the circuit court, and was first raised by defendant on appeal as a means to obtain remand after the court's dismissal of his petition on the merits. *Carter*, 2015 IL 117709, ¶ 20. As such, there is no meaningful record from the circuit court to be reviewed. *Id.* What is clear is that the circuit court entered its *sua sponte* dismissal more than 30 days after the petition was filed,

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and, therefore, without an adequate record preserving the claimed error, we presume that the order was entered in accordance with the applicable law. *Id.* ¶ 24.

¶ 13 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 14 Affirmed.