

No. 1-14-1017

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 85 C 8448
	)	
DONZELL HARRIS,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.  
Justices Howse and Cobbs concurred in the judgment.

**O R D E R**

- ¶ 1 *Held:* The circuit court's *sua sponte* dismissal of the defendant's *pro se* section 2-1401 petition is affirmed where the defendant did not affirmatively establish improper service on the State.
- ¶ 2 Defendant Donzell Harris appeals from the *sua sponte* dismissal of his *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant contends that the circuit court's dismissal of his petition was premature because he did not properly serve his petition on the State.

¶ 3 Following a bench trial in 1986, defendant was convicted of the first-degree murder of his wife. Defendant was sentenced to natural life in prison based on the trial judge's findings that the crime was brutal and heinous and was committed by defendant due to battery complaints that the victim had filed against him. On direct appeal, this court affirmed. *People v. Harris*, No. 1-86-1595 (1988) (unpublished order under Supreme Court Rule 23).

¶ 4 Since 1992, defendant has filed numerous petitions for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 1992)), under *habeas corpus* principles, and pursuant to section 2-1401 of the Code. The only modification to defendant's conviction and sentence occurred when the mittimus was corrected in 1997 to merge the two counts of first-degree murder on which defendant had been convicted into one count to reflect the single victim in the case. *People v. Harris*, Nos. 1-06-1765, 1-06-0910 (cons.), slip op. at 5 (2009).

¶ 5 On October 17, 2013, defendant mailed a section 2-1401 petition to the clerk of the circuit court of Cook County and the Cook County State's Attorney, both at 2650 South California Avenue, Chicago. The attached "Proof/Affidavit of Service" indicated that defendant "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: Motion for Relief from Judgment 735 ILCS 5/2-1401(f)." The clerk of the circuit court received the petition on October 22, 2013, and stamped it "filed" on November 26, 2013. The matter appeared on the circuit court's call on December 5, 2013, and January 10, 2014.

¶ 6 The cover page of the transcript of the next court date, February 28, 2014, does not indicate that any one was present, other than the court. The court *sua sponte* dismissed defendant's petition, stating:

"THE COURT: Mr. Harris has filed a petition to vacate judgment pursuant to section 1401. Court has read the petition, finds it frivolous and patently without merit. Therefore the motion is dismissed. Off call."

¶ 7 On appeal, defendant contends this case must be remanded for further proceedings because the circuit court dismissed his section 2-1401 petition before it was properly served on the State. He contends the record does not indicate that "the State ever received actual notice of the filing" of his petition. Defendant makes no substantive arguments about the claims raised in his petition. Therefore, by only raising a challenge to the dismissal of his petition as premature, defendant has waived any challenge to the merits of the petition. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 8 Defendant relies largely on *People v. Carter*, 2014 IL App (1st) 122613, in which this court found that because the defendant failed to properly serve his petition on the State, the circuit court's dismissal of the petition was premature. In response, the State points out that in the time since defendant filed his opening brief, that appellate decision has been overruled in *People v. Carter*, 2015 IL 117709. We find *Carter* to govern our disposition of this case.

¶ 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. 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 expiration of the 30-day period for a response. Where the State fails to answer the petition within the 30-day period, the State is deemed to admit all well-pleaded facts, and the petition is ripe for adjudication. *Laugharn*, 233 Ill. 2d at 323; *Vincent*, 226 Ill. 2d at 9-10. Our review of the denial of a section 2-1401 petition is *de novo*. *Laugharn*, 233 Ill. 2d at 322.

¶ 10 The facts of *Carter* are identical to those presented here. 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 court in *Carter* 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, *i.e.*, in the "institutional mail" and the medium through which it was to be transmitted,

namely, the United States Postal Service. *Id.* The court in *Carter* held that the language in the proof of service did not affirmatively establish transmittal by regular mail and that it could not be presumed that the defendant's service upon the State was deficient. *Id.* ¶¶ 20, 23. Because the defendant, as the appellant, failed to meet his burden of affirmatively establishing through the record that the State was not given proper service or that the circuit court's *sua sponte* dismissal was premature, the supreme court in *Carter* presumed that the circuit court's order was rendered in accordance with applicable law. *Id.* ¶¶ 19, 24-26. Accordingly, the supreme court affirmed the circuit court's judgment dismissing the defendant's petition. *Id.* ¶ 26.

¶ 12 Here, as in *Carter*, the record does not affirmatively establish that defendant's service upon the State was deficient. As in *Carter*, this case presents a "scant record" by which to review defendant's claim of deficient service. The only evidence of service in this case is the "Proof/Affidavit of Service" attached to defendant's petition, which alleges that defendant 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." As in *Carter*, the only information that can be gleaned from that document is that defendant mailed his petition and the medium through which it was transmitted. However, nothing in defendant's petition or the proof of service indicates whether the petition was mailed by regular, certified or registered mail. Absent an affirmative showing that defendant did not properly serve the State, we must presume that 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) 113123, ¶ 36 (affirming the dismissal of a section 2-1401 petition where the defendant failed to satisfy his

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burden of presenting a sufficient record that his means of service was improper). Under *Carter*, defendant cannot prevail in this appeal.

¶ 13 Accordingly, for the reasons set out above, the judgment of the circuit court is affirmed.

¶ 14 Affirmed.