2016 IL App (1st) 141592-U

SECOND DIVISION
March 29, 2016

No. 1-14-1592

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.	)	Nos. 89 CR 26483
	)	90 CR 20635
	)	
FREDRICK BROOKS,	)	
	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman 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 because defendant could not affirmatively establish improper service on the State with an incomplete record.

¶ 2 Frederick Brooks, the defendant, 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 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. We affirm.

¶ 3 In 1991, defendant entered pleas of guilty to first degree murder and attempted murder. He was sentenced to 30 years in prison for the murder and to a consecutive 20-year sentence for the attempted murder. Defendant filed an unsuccessful collateral attack upon his convictions. See *People v. Brooks*, No 1-92-0896 (1994) (unpublished order under Supreme Court Rule 23).

¶ 4 On October 18, 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. Specifically, the "Proof/Certificate of Service" indicated that the attached petition for relief from judgment was to be "sent via the United States mail, with proper postage having been paid at the Hill Correctional Center." (Emphasis in original.) The petition alleged that defendant was denied the benefit of his bargain with the State because no one told him that he must serve a period of mandatory supervised release (MSR), upon his release from prison.

¶ 5 The clerk of the circuit court stamped the petition "received" on October 28, 2013. The petition was docketed on December 16, 2013. The matter appeared on the trial court's call on January 2, 2014, and February 19, 2014. At the February hearing, the court stated that the *pro se* petition was filed more than 30 days earlier and that the court had reviewed the petition. The court stated that it had "given the State time to respond," but that there were "no pleadings from the State." The court then dismissed defendant's petition *sua sponte* in a written order finding, in pertinent part, that although defendant sought to take advantage of our supreme court's decision in *People v. Whitfield*, 217 Ill. 2d 177 (2005), to challenge the period of MSR he must serve upon his release from prison, the rule announced in *Whitfield* did not apply retroactively to cases on collateral review. See *People v. Morris*, 236 Ill. 2d 345, 365-66 (2010). Because defendant's

case was "finalized long before" *Whitfield*, the trial court denied defendant relief and dismissed the petition.

¶ 6 On appeal, defendant contends that because he did not properly serve his section 2-1401 petition on the State, there is no way to know if the State ever received the petition. He concludes, therefore, that the petition was not ripe for adjudication when the trial court *sua sponte* dismissed it, and, consequently, the dismissal must be vacated and the cause remanded for further proceedings. Defendant makes no argument on appeal regarding the merits of his petition.

¶ 7 Section 2-1401 of the Code 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) states that "[a]ll parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). Supreme Court Rule 106 (eff. Aug. 1, 1985), states that service of a section 2-1401 petition must comply with Supreme Court Rule 105 (eff. Jan. 1, 1989), which in turn mandates service either by summons, prepaid certified or registered mail, or publication.

¶ 8 Pursuant to Supreme Court 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. Our supreme court has determined that a petition is not ripe for adjudication before the 30-day period for a response expires. See *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). In those cases 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. *Id*. Our review of the denial of a section 2-1401 petition is *de novo*. *Id.* at 322.

¶ 9 *People v. Carter*, 2015 IL 117709, is dispositive. In that case, the defendant filed a motion to vacate the judgment and attached a certificate of service indicating that he had placed the motion in the institutional mail at the facility where he was incarcerated. The circuit court dismissed the pleading *sua sponte*. On appeal, the defendant claimed that the court's dismissal of his section 2-1401 petition was premature because the petition was never properly served on the State. *Id*. ¶ 7.

¶ 10 Our supreme court determined that there was no meaningful record from the circuit court to be reviewed regarding the defendant's alleged error, *i.e.*, 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 found that this statement could not serve as a basis for the defendant's allegation of error on appeal because it only showed where the defendant mailed his petition, the correctional facility's 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 affirmatively establish transmittal by regular mail, and the court declined to assume, based upon the record before it, that the defendant's service on the State was deficient. *Id*. ¶¶ 20, 23. Because the defendant, as the appellant, failed to affirmatively establish through the record on appeal that the State was not properly served, the supreme court presumed the circuit court's order dismissing the petition was rendered in accordance with applicable law. *Id.* ¶¶ 19, 25.

¶ 11 Here, as in *Carter*, this court cannot conclude that the record on appeal affirmatively establishes that defendant's service upon the State was deficient. Similarly to *Carter*, there is a "scant record" with which to review defendant's claim of deficient service. The only evidence of

service in the record on appeal is the "Proof/Certificate of Service" attached to defendant's section 2-1401 petition which stated that the attached petition for relief from judgment was to be "sent via the United States mail, with proper postage having been paid at the Hill Correctional Center." (Emphasis in original.) The proof of service was addressed to the clerk of the circuit court and the State's Attorney's office. Nothing in defendant's petition or the proof of service indicates whether his petition was actually mailed via regular, certified, or registered mail. Accordingly, absent an affirmative showing in the record that defendant did not properly serve the State, we must presume the trial court's order dismissing defendant's section 2-1401 petition was in conformance with the law. See *Id.* ¶¶19, 25 (a defendant who "seeks to use, on appeal, his own error, by way of allegedly defective service, in an effort to gain reversal of a circuit court's *sua sponte* dismissal of his or her petition on the merits, must affirmatively demonstrate the error via proceedings of record"). See also *People v. Jones*, 2015 IL App (1st) 133123, ¶ 36 (Dec. 31, 2015) (affirming the dismissal of section 2-1401 petition because the defendant failed to satisfy his burden, as the appellant, to present a sufficient record showing that his means of service was improper).

¶ 12 The record establishes that more than 30 days passed from the date that the petition was docketed on December 16, 2013 until February 19, 2014, when the trial court *sua sponte* dismissed the petition. It is defendant's burden to affirmatively establish with documents or reports of proceedings in the record that the trial court's *sua sponte* dismissal was premature. *Carter*, 2015 IL 117709, ¶ 25. Because the record fails to affirmatively establish that service was not effected by certified mail, the dismissal of defendant's section 2-1401 petition is therefore affirmed.

¶ 13 We affirm the judgment of the circuit court of Cook County.

¶ 14 Affirmed.