2016 IL App (1st) 141665-U

SIXTH DIVISION
Order filed: March 31, 2016

No. 1-14-1665

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 07 CR 11790
	)	
LOUIS BANKS,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's *sua sponte* dismissal of the defendant's section 2-1401 petition is affirmed where the record on appeal failed to affirmatively demonstrate deficient service of the petition on the State. Additionally, because the State defended this issue on appeal, it is entitled to its section 4-2002.1(a) fee.

¶ 2 The defendant, Louis Banks, appeals from the circuit court of Cook County's order dismissing his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). On appeal, he argues that the court's *sua sponte* dismissal was premature because he did not serve the petition on the State in accordance

Illinois Supreme Court Rule 105(b) (eff. Jan. 1, 1989). He also argues—in his reply brief—that the State is not entitled to the $100 fee provided by section 4-2002.1(a) of the Counties Code (55 ILCS 5/4-2002.1(a) (West 2016)) because the State's defense of this appeal would not have been necessary if *People v. Carter*, 2015 IL 117709, was published before he filed his appellant brief. For the following reasons, we affirm the judgment of the circuit court and assess a fee of $100 against the defendant.

¶ 3 Based upon a May 2007 robbery and shooting incident, the defendant was tried in a bench trial and found guilty of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2006)) and armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2006)). The circuit court sentenced him to concurrent terms of 40 years' imprisonment for the attempted murder conviction and 20 years' imprisonment for the armed robbery conviction. This court upheld his convictions and sentence on appeal. *People v. Banks*, 2011 IL App (1st) 092670-U (unpublished order under Supreme Court Rule 23). The defendant subsequently filed a *pro se* post-conviction petition, which the circuit court dismissed. On appeal, the State Appellate Defender sought leave to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and this court allowed the motion and affirmed the circuit court's dismissal. *People v. Banks*, 2014 IL App (1st) 130365-U (unpublished order under Supreme Court Rule 23).

¶ 4 The record shows that, on February 4, 2014, the clerk of the circuit court of Cook County received from the defendant a *pro se* section 2-1401 petition for relief from judgment. On February 18, 2014, the petition was filed. No proof of service was attached to the petition. The matter appeared on the circuit court's February 25, 2014, call, but was continued in order for the court to obtain more information from the court file. On March 12, 2014, the court noted that the defendant filed a section 2-1401 petition and again continued the cause "in case there is input

from the State." On April 16, 2014, the court *sua sponte* dismissed the defendant's petition by written order, finding that the petition was frivolous and patently without merit. This appeal followed.

¶ 5 On appeal, the defendant contends that, because he did not properly serve the State with his section 2-1401 petition, it was not ripe for adjudication and the circuit court's *sua sponte* dismissal of it should be reversed. We review the dismissal of a section 2-1401 petition *de novo. People v. Carter*, 2015 IL 117709, ¶ 13.

¶ 6 Section 2-1401 of the Code permits the vacatur of a final judgment that is more than 30 days but less than 2 years old. 735 ILCS 5/2-1401 (West 2014). A section 2-1401 petition "must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof." 735 ILCS 5/2-1401(b) (West 2014). Illinois Supreme Court Rule 106 (eff. Aug. 1, 1985) provides that service of a section 2-1401 petition must be in accordance with the methods laid out in Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). Rule 105(b) provides that a party may be served by: (1) summons; (2) prepaid certified or registered mail; or (3) publication. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989).

¶ 7 After a party has been served with notice of the section 2-1401 petition, it has 30 days to respond. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009). If it fails to respond, all well-pled facts are deemed admitted and the petition is ripe for adjudication. *People v. Vincent*, 226 Ill. 2d 1, 9-10 (2007). The circuit court may dismiss the petition after the 30-day period if it determines that there is no basis for relief under section 2-1401. *Id.* at 12.

¶ 8 Here, the defendant acknowledges that he improperly served the State with notice of his section 2-1401 petition because "[t]here is no summons, no certified or registered mail receipt, and no proof of publication" in the record. According to the defendant, his failure to properly

serve the State is also apparent because "the reports of the proceedings *** fail to reflect the presence of any representative from the State's Attorney's Office." Because of this, he argues that his petition was not ripe for adjudication and the circuit court erred in dismissing it. To rectify this alleged error, the defendant asks this court to reverse the circuit court's decision and remand for further proceedings. In response, the State points out that one of the cases that the defendant primarily relies upon in his brief—*People v. Carter*, 2014 IL App (1st) 122613—has recently been decided by our supreme court. Based upon the supreme court's decision in *Carter*, 2015 IL 117709, the State argues that this cause should be affirmed because the record does not affirmatively demonstrate that there was deficient service. We agree with the State.

¶ 9 In an appeal, the appellant carries the burden of presenting a "sufficiently complete record" to the reviewing court so that the court may determine whether the claimed error exists. *Carter*, 2015 IL 117709, ¶ 19. If the record is not adequate, the reviewing court must presume that the circuit court's judgment was not erroneous or conforms with the law. *Id.* " 'Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.' " *Id.* (quoting *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984)).

¶ 10 The supreme court's recent decision in *Carter*, 2015 IL 117709, guides us in determining whether the defendant in this case met his burden of presenting a sufficiently complete record on appeal. In *Carter*, the court explained:

> "any section 2-1401 petitioner 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 *** petition on the merits must affirmatively demonstrate the error via proceedings of record in the circuit court." *Carter*, 2015 IL 117709, ¶ 25.

Neither party in *Carter* filed a post-judgment motion in the circuit court to address the allegedly deficient service on the State. *Id.* ¶ 20. The record contained an affidavit of service attached to the defendant's section 2-1401 petition, listing the circuit court and the State's Attorney's office addressees and stating that the defendant sent the petition to those parties in the "institutional mail at Menard Correctional Center *** for mailing through the United States Postal Service." *Id.* The supreme court held that the language of the proof of service did not affirmatively establish that the petition was sent to the State via regular mail rather than certified or registered mail; thus, the record did not affirmatively establish that service was deficient. *Id.*

¶ 11 After examining the record in this case, we find that, like the record in *Carter*, it does not affirmatively establish that there was deficient service. Similar to *Carter*, neither the State nor the defendant in this case filed a post-judgment motion below; thus, the sufficiency of service on the State was not addressed. The record conveys the following facts related to service of the section 2-1401 petition on the State. First, the circuit court *sua sponte* dismissed the petition more than 30 days after the defendant filed it (the defendant's petition was received by the circuit clerk on February 4, 2014, docketed on February 25, 2014, and dismissed on April 16, 2014, with a written order that outlined the court's reasoning). Second, although the case was on the court's call on March 12, 2014, less than 30 days after the defendant filed his petition, the court continued the case to wait for "input from the State." Third, the report of proceedings does not indicate the presence of an assistant State's Attorney. Finally, we also note that the defendant failed to attach proof of service to his petition, and the record is silent as to whom the petition was addressed and whether it was sent via certified or registered mail, or some other mode of delivery. The record in this case fails to establish that the State was not notified of the

defendant's section 2-1401 petition as provided in Rule 105(b). In point of fact, the record here is more deficient than the record in *Carter*.

¶ 12 The defendant, as the appellant, had the burden of showing that he did not serve the State via summons, prepaid certified or registered mail, or publication. *Carter*, 2015 IL 117709, ¶¶ 20, 23. We cannot assume that the absence of (1) proof of service, or (2) an assistant State's Attorney from the proceedings affirmatively establishes the defendant's failure to properly serve the State by the methods provided in Rule 105(b). Based upon this insufficient record, we must presume that the circuit court's order complies with the law. *Id.* Accordingly, we affirm the court's *sua sponte* dismissal of the defendant's section 2-1401 petition.

¶ 13 In its response brief, the State requests that $100 be assessed against the defendant pursuant to section 4-2002.1(a) of the Counties Code, which entitles the State's Attorney to this fee "[f]or each case of appeal taken from his county *** to the *** Appellate Court when prosecuted or defended by him." 55 ILCS 5/4-2002.1(a) (West 2016). The defendant argues that he should not be required to pay this fee because the supreme court published *Carter*, 2015 IL 117709, after he filed his appellant brief. We disagree.

¶ 14 Our supreme court has held that the defendant must successfully challenge every aspect of the relief he seeks in order to prevent the State from assessing the section 4-2002.1(a) fee against him. *People v. Williams*, 235 Ill. 2d 286, 297 (2009). Here, for the reasons stated above, the defendant was unsuccessful in challenging the one issue that he raised on appeal. Accordingly, we grant the State's request for the section 4-2002.1(a) fee of $100.

¶ 15 For the foregoing reasons, we affirm the circuit court's *sua sponte* dismissal the defendant's section 2-1401 petition. As part of our judgment, we grant the State's request that the defendant be assessed $100 as costs for this appeal.

¶ 16 Affirmed.