FOURTH DIVISION
May 26, 2016

No. 1-14-1801

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 26406
	)	
PEDRO ALAMILLO,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS 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 because defendant could not affirmatively establish, based upon the record on appeal, improper service on the State.

¶ 2 Defendant Pedro Alamillo 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 trial court's order dismissing the petition was "premature" and should be vacated. We affirm.

¶ 3 Following a bench trial, defendant was found guilty of attempted first degree murder and aggravated possession of a stolen motor vehicle. He was sentenced to 22 years in prison for the attempted first degree murder conviction and to a concurrent 6-year prison term for the aggravated possession of a stolen motor vehicle conviction. This judgment was affirmed on direct appeal. See *People v. Alamillo,* No. 1-01-4021 (2003) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed an unsuccessful collateral attack upon his convictions. See *People v. Alamillo,* No. 1-04-2456 (2006) (unpublished order under Supreme Court Rule 23).

¶ 4 Defendant then filed a *pro se* petition for relief from judgment alleging, *inter alia,* that the Department of Corrections improperly usurped "Judicial Function" when it added a term of mandatory supervised release (MSR) to his sentence and therefore, the term of MSR he must serve upon his release from prison is void. The petition was signed by defendant and dated April 10, 2013. The "Proof/Certificate of Service" indicated that the attached petition for relief from judgment was placed "in the institutional mail at Dixon Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service." The "To" fields on the "Proof/Certificate of Service" are blank.

¶ 5 The clerk of the circuit court stamped the petition "received" on March 19, 2014, and "filed" on March 26, 2014. The petition was first considered by the trial court on April 3, 2014, where it was entered and continued.[1] On May 1, 2014, the trial court denied defendant relief in a written order.

[1] Although the transcript bears the date of March 3, 2014, the half-sheet indicates April 3, 2014 "Petition E & C."

¶ 6 On appeal, defendant contends that because "the record does not reflect that the State was ever properly served" with the instant petition, the trial court's *sua sponte* dismissal of the petition was premature. Defendant therefore concludes that 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 Initially, we note that by solely challenging the *sua sponte* dismissal of his petition as premature because the State was not properly served, defendant has waived any challenge to the substantive merits of his petition. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 8 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.

¶ 9 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 dismissal of a section 2-1401 petition is *de novo*. *Id.* at 322.

¶ 10 *People v. Carter*, 2015 IL 117709, is dispositive. In *Carter*, 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 dismissal was premature because the petition was never properly served on the State. *Id*. ¶ 7.

¶ 11 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 court presumed the circuit court's order dismissing the petition was rendered in accordance with applicable law. *Id.* ¶¶ 19, 23-24.

¶ 12 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 the instant petition which indicates that the petition was placed "in the institutional mail at Dixon Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service." In other words, nothing in the record on appeal indicates whether the instant petition was actually mailed via regular, certified, or registered mail. Our supreme court has held that 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 section 2-1401 petition "must affirmatively demonstrate the error via proceedings of record." See *Id*. ¶¶ 19, 25. In the case at bar, for the same reasons stated by our supreme court in *Carter*, we must find that defendant has failed to satisfy his burden to present a sufficient record showing that his means of service was, in fact, improper. See *Id*. ¶ 25.

¶ 13 Here, the record establishes that more than 30 days passed from the date that the instant petition was "filed" on March 26, 2014, until May 1, 2014, when the trial court *sua sponte* dismissed the petition. It is defendant's burden to affirmatively establish from the record that the trial court's *sua sponte* dismissal was premature. *Id*. Because the record before this court does not affirmatively show that defendant did not properly serve the State, the dismissal of defendant's section 2-1401 petition is therefore affirmed. *Id*. ¶ 23.

¶ 14 For the reasons listed above, we affirm the judgment of the circuit court of Cook County.

¶ 15 Affirmed.