

FIFTH DIVISION

April 29, 2016

No. 1-14-1808

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. 02 CR 617
)	
NESTOR MEDINA,)	Honorable
)	William H. Hooks,
Defendant-Appellant.)	Judge Presiding.

JUSTICE Burke delivered the judgment of the court.

Presiding Justice Reyes and Justice Gordon 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 circuit court's *sua sponte* dismissal was premature because the State was not properly served and that his sentence is void; we lack jurisdiction to consider defendant's claims regarding the circuit court's denial of leave to file a successive postconviction petition.

¶ 2 Defendant, Nestor Medina, appeals the *sua sponte* dismissal of his *pro se* 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)), and the denial of his *pro se* motion for leave to file a successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq* (West 2010)). He contends that his sentence is void and that his cause should be remanded for further proceedings on his 2-1401 petition because the record does not show that the petition was properly served and, thus, the *sua sponte* dismissal was premature. He also contends that the court erred in denying his motion for leave to file a successive petition.

¶ 3 The record shows that following a 2003 jury trial, defendant was found guilty of aggravated criminal sexual assault, aggravated kidnapping, and aggravated false personation of a police officer. The trial court subsequently sentenced defendant to consecutive prison terms of 50 years for aggravated criminal sexual assault and 30 years for aggravated kidnapping, to run concurrent to a 5-year term for aggravated false personation of a police officer. This court affirmed that judgment on direct appeal. *People v. Medina*, No. 1-03-3702 (2005) (unpublished order under Supreme Court Rule 23). This court subsequently affirmed the summary dismissal of defendant's 2006 *pro se* petition for relief under the Act. *People v. Medina*, No. 1-07-0511 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 On October 28, 2010, defendant filed a "2-1401(F) Petition for Relief from a Void Judgment" pursuant to section 2-1401 of the Code. In his petition, defendant contended that the trial court erred when it "used a single prior conviction as an aggravating factor to give a harsher sentence than [it] otherwise would have given, and also to give extended term sentences to both offenses which made both sentences double enhanced sentences." He further asserted that his 50-year and 30-year sentences were impermissible because they were enhanced based on the same

prior conviction and that his 5-year sentence was improper because the court considered factors implicit in the offense as an aggravating factor in sentencing.

¶ 5 On June 24, 2011, defendant filed a successive petition for relief under the Act, claiming that his sentence was void and that the dismissal of his original postconviction petition was improper. On September 23, 2013, defendant filed a "motion for relief based on inordinate delay," after which the circuit court transferred the case to the presiding judge of the criminal division.

¶ 6 On April 4, 2014, the circuit court, in the presence of an assistant State's Attorney, dismissed defendant's section 2-1401 petition and denied him leave to file a successive postconviction petition. The court read its ruling into the record, finding that defendant "failed to show the existence of a meritorious defense or claim or due diligence in pursuing this defense or claim to the circuit court in the original action and due diligence in filing the Section 2-1401 petition for relief." The assistant State's Attorney then reminded the court that defendant had also filed a request for leave to file a successive petition. The court denied defendant's request and stated that it would issue a written order. On April 9, 2014, the circuit court entered a written order, which referred only to defendant's section 2-1401 petition, and did not address his request for leave to file a successive postconviction petition.

¶ 7 On May 19, 2014, the clerk of the circuit court sent a written notice to defendant informing him that the court had denied his section 2-1401 petition with a copy of the written April 9 order. On July 3, 2014, this court granted defendant's motion for leave to file late notice of appeal from the order of April 9, 2014. On July 11, 2014, defendant filed a *pro se* late notice of appeal from the "Dismissal of Petition for Relief from a Void Judgment pursuant to 735 ILCS 5/2-1401," and on August 1, 2014, the State Appellate Defender was appointed to represent him.

¶ 8 On August 11, 2015, defendant filed a motion for a supervisory order in the supreme court contending that it should order this court to allow him leave to file a late notice of appeal from the circuit court's order denying him leave to file a successive postconviction petition.¹ On August 18, 2015, the State Appellate Defender filed its brief in this court on defendant's behalf, solely contending that the circuit court erred in dismissing defendant's section 2-1401 petition because it was not properly served on the State. On September 2, 2015, the State submitted its response, and the State Appellate Defender filed its reply brief on September 11, 2015. On September 30, 2015, the supreme court denied defendant's motion for a supervisory order.

¶ 9 On October 8, 2015, this court granted defendant's motion for leave to file a *pro se* supplemental brief and to withdraw the State Appellate Defender as his counsel. In his supplemental brief, defendant adopted the arguments made by the State Appellate Defender in its brief, and further raised arguments concerning the merits of his section 2-1401 petition and the circuit court's denial of leave to file a successive petition.

¶ 10 Before we can address defendant's arguments, as the State correctly points out, there is potential jurisdictional defect that would preclude our review of defendant's contentions regarding his successive postconviction petition. Here, defendant's late notice of appeal referred only to the circuit court's judgment on his section 2-1401 petition. Thus, this raises the threshold

¹ We note that although defendant's motion and the supreme court's ruling are not included in the record filed on appeal, we may nonetheless take judicial notice of these filings because they are public documents that are kept on file with the supreme court and are thus readily verifiable from sources of indisputable accuracy. See *People v. Alvarez-Garcia*, 395 Ill. 3d 719, 726-27 (2009), citing *People v. Mata*, 217 Ill. 2d 535, 539-40 (2006). We also note that both parties included in the appendices of their briefs a series of correspondences between defendant and the Office of the State Appellate Defender that are not otherwise included in the record filed on appeal. Attachments to briefs not included in the record are not properly before the court and cannot be used to supplement the record. *People v. Garvin*, 2013 IL App (1st) 113095, ¶ 23, citing *Carroll v. Faust*, 311 Ill. App. 3d 679, 683 (2000).

question of whether we have jurisdiction to consider defendant's claims with regard to his successive postconviction petition.

¶ 11 Unless there is a properly filed notice of appeal, a reviewing court has no jurisdiction over the appeal and is obliged to dismiss it. *People v. Smith*, 228 Ill. 2d 95, 104 (2008). A notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. June 4, 2008). The purpose of a notice of appeal is to inform the prevailing party in the trial court that the other party seeks review of that judgment. *Smith*, 228 Ill. 2d at 104.

¶ 12 Defendant's notice of appeal in this case references only the circuit court's dismissal of his section 2-1401 petition and thus cannot be said to have fairly and adequately set out the judgment now complained of, *i.e.*, the circuit court's denial of leave to file a successive postconviction petition, or the relief sought. See *Smith*, 228 Ill. 2d at 105, citing *Lang v. Consumers Ins. Service, Inc.*, 222 Ill. App. 3d 226, 229 (1991). There is no other notice of appeal in the record that references the circuit court's ruling on his motion for leave to file a successive postconviction petition, and the supreme court denied defendant's motion for a supervisory order directing this court to allow his late notice of appeal on that issue. Defendant claims that this ruling denied him his constitutional rights to access the court, and that this court has the power to "remedy the deprivation" of his constitutional rights. However, it is well-settled that this court does not have the authority to overrule the supreme court or modify its decisions. *People v. Denson*, 139 Ill. App. 3d 914, 926 (1985). Accordingly, we lack jurisdiction to consider defendant's claims concerning his successive postconviction petition. See *Smith*, 228 Ill. 2d at 105.

¶ 13 We may, however, consider defendant's claims with respect to his section 2-1401 petition. On appeal, defendant adopts the argument made by the State Appellate Defender in its brief, contending that his cause should be remanded for further proceedings because the circuit court's dismissal of his petition before it was properly served on the State was premature. He also contends that the circuit court erred in dismissing his petition because his sentences were void.

¶ 14 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* dismissal of a petition brought under section 2-1401 of the Code. See, e.g., *Alexander*, 2014 IL App (4th) 130132, ¶ 36.

¶ 15 In this case, there is no indication in the record of the manner in which defendant served his petition on the State. The proof of service for his petition states that on October 28, 2010, defendant placed the petition in the "institutional mail at Menard Correctional Center, properly addressed to the [clerk of the circuit court and the State's Attorney's office] for mailing through the United States Postal Service." The petition was file stamped on November 1, 2010, and first listed on the memorandum of orders on November 8, 2010. The matter was before the court on

November 16, 2010, and the court denied the petition on April 4, 2014, which, we note, was more than 30 days from the filing date.

¶ 16 In *People v. 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 (*Carter*, 2015 IL 117709, ¶ 19), 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)).

¶ 17 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, 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.

¶ 18 Finally, defendant contends that his 50-year and 30-year sentences were impermissible and void because they were enhanced based on the same prior conviction and that his 5-year sentence was improper because the court considered factors implicit in the offense as an

aggravating factor in sentencing. The State responds that defendant's sentences fell within the prescribed sentencing range and were upheld on direct appeal.

¶ 19 Generally, a petition for relief from judgment made under section 2-1401 must be filed within two years after entry of the judgment being challenged. *People v. Gosier*, 205 Ill. 2d 198, 206 (2001). Nevertheless, the supreme court has held that defendant may seek relief beyond the two-year limitation where the judgment being challenged is void. *Id.* Recently, however, the supreme court abolished the void sentence rule. *People v. Castleberry*, 2015 IL 116916, ¶ 19. Therefore, defendant's argument that this court may consider his petition despite being filed outside the two-year limitation because his sentences are void is no longer valid (*People v. Thompson*, 2015 IL 118151, ¶ 33), and defendant's petition, filed seven years after the entry of his sentence, must fail.

¶ 20 Moreover, this court previously addressed defendant's claim that his sentences were excessive on direct appeal and found no abuse of discretion. *Medina*, No. 1-03-3702 order at 17. Defendant again challenged the constitutionality of his sentences in his initial postconviction petition, and this court affirmed the circuit court's summary dismissal of that petition. *Medina*, No. 1-07-0511. Points previously raised in other collateral proceedings cannot form the basis of a section 2-1401 petition for relief. *People v. Haynes*, 192 Ill. 2d 437, 461 (2000), citing *People v. Berland*, 74 Ill. 2d 286, 314-15 (1972). Thus, the circuit court properly dismissed defendant's petition where he previously, and unsuccessfully, raised these same claims in an earlier proceeding. *People v. Addison*, 371 Ill. App. 3d 941, 945 (2007).

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 22 Affirmed.