2016 IL App (3d) 120902-U

Order filed January 20, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0902 Circuit No. 03-CF-821
STEVEN D. LISLE, JR.,	)	
Defendant-Appellant.	)	Honorable Walter D. Braud, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to affirmatively demonstrate in the record his own failure of service, and is thus unable to assert that error on appeal; (2) the trial court erred in dismissing defendant's section 2-1401 petition, *sua sponte*, on the basis of timeliness; and (3) the trial court's erroneous dismissal of defendant's section 2-1401 petition was harmless error.

¶ 2 Defendant, Steven D. Lisle, Jr., challenges the trial court's *sua sponte* dismissal of his section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)). Defendant argues first that his petition was not ripe for adjudication where his service of the petition upon the State was

insufficient. In the alternative, defendant contends that the trial court erred in dismissing his petition on the basis of timeliness. We affirm the trial court's order dismissing defendant's petition.

¶ 3 FACTS

¶ 4 In 2004, a jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 2002)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2002)). The trial court sentenced defendant to terms of 27 and 10 years' imprisonment, respectively.

¶ 5 On direct appeal, this court affirmed defendant's convictions and sentences. *People v. Lisle*, 376 Ill. App. 3d 67 (2007). Defendant subsequently filed a postconviction petition, which was denied following third-stage proceedings. Defendant's attempt to attain leave to file a successive postconviction petition was likewise unsuccessful.

¶ 6 On August 23, 2012, defendant filed a "Petition For Relief From Judgment" pursuant to section 2-1401 of the Code of Civil Procedure. 735 ILCS 5/2-1401 (West 2012). Accompanying the copy of the petition sent to the circuit clerk was an "Affidavit of Service." In the affidavit, defendant certified that he had served the accompanying petition on each party "by enclosing the same in a sealed envelope plainly addressed as is disclosed by the pleadings of record herein and by depositing each of such envelopes in the box designated for United States mail at Menard Correctional Center *** on this 19[th] day of August, 2012." Though the file-stamped original envelopes for many of defendant's mailings to the circuit clerk over the course of the case appear in the record, the envelope in which defendant's section 2-1401 petition was mailed is not present.

¶ 7 In his petition, defendant asserted that Detective Steven Metscaviz of the Rock Island police department and Angela Lee "fraudulently concealed" information related to a 2001 case.

Defendant alleged that Lee had identified him as a perpetrator in that case, only to later become uncooperative and have her statements discovered as untrue. Defendant claimed that this evidence established his "innocence" in the present case. In ostensible support for these allegations, defendant attached to his petition police reports from the 2001 incident he attained pursuant to a Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2012)) request. The reports are heavily redacted, and do not at any point contain the name Angela Lee.

¶ 8 Defendant further alleged that defense counsel, Jack Schwartz, fraudulently concealed an interview with Sheliva Kimmins, an eyewitness to the murder for which defendant was convicted. Defendant alleged that had the jury in his case heard Kimmins' eyewitness testimony, he would not have been convicted of first degree murder. Defendant attached to the petition a FOIA response from the Rock Island police department stating that no police reports existed that indicate a statement was ever taken from Kimmins. Defendant also attached his own affidavit, in which he averred that defense counsel never revealed to him the existence of eyewitness statements of Kimmins. Defendant averred that he only learned of Kimmins' existence from his mother in 2008.

¶ 9 The State did not file a pleading in response to defendant's petition, nor did it otherwise appear in court. On October 4, 2012, 42 days after the filing of defendant's petition, the trial court dismissed the petition, *sua sponte*. In its order dismissing the petition, the trial court noted that the petition had been filed "well beyond" the two-year statute of limitations.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant first contends that his service of his petition upon the State was improper. Accordingly, defendant maintains, the petition was not yet ripe for adjudication, and the court's dismissal was thus erroneous. Defendant also argues that, assuming the petition was

ripe for adjudication, the dismissal was nevertheless erroneous. Specifically, defendant argues that the statute of limitations is an affirmative defense, which must be pled by the State, and that a trial court, therefore, may not *sua sponte* dismiss a section 2-1401 petition on the basis of timeliness.

¶ 12 I. Ripeness for Adjudication

¶ 13 Defendant argues that a trial court may not *sua sponte* dismiss a section 2-1401 petition where that petition has been improperly served upon the State. This result is necessary, defendant argues, because the State's 30-day time period to respond to such a petition does not begin to run until after proper service has been made. See Ill. S. Ct. R. 105(a) (eff. Jan 1, 1989). Defendant maintains that his service upon the State was lacking in that it was not made by certified or registered mail. *Id*. (requiring that service be made by certified or registered mail).

¶ 14 The State presents a number of counterarguments to defendant's position, including that defendant does not have standing to raise the trial court's lack of jurisdiction over the State flowing from his own incompetence. See *People v. Kuhn*, 2014 IL App (3d) 130092, ¶ 15. Ultimately, however, the State requested that we hold our decision in abeyance pending our supreme court's decision in *People v. Carter*, 2015 IL 117709, expecting that decision would be dispositive of this issue. We granted the State's request.

¶ 15 The supreme court subsequently decided *Carter* on its facts, rather than announce a bright-line rule as to whether defendants could benefit from their own improper service as defendant seeks to do here. *Id*. In *Carter*, the defendant attached a "Proof/Certificate of Service" to his pleading, alleging that he had placed it in the "institutional mail" at Menard Correctional Center. *Id*. ¶ 5. The court found that the certificate of service was insufficient to establish that the defendant's service upon the State had indeed been improper. *Id*. ¶ 20.

¶ 16 Citing the well-settled notion that it is an appellant's burden to provide a sufficient record from which a court may determine whether the claimed errors were made, the *Carter* court found that "[t]o serve as a basis for defendant's contention of error, [defendant] must affirmatively establish that defendant mailed his petition via some means other than certified or registered mail." *Id*. The court found that the defendant's certificate of service merely showed that it was mailed from the institutional mail at Menard Correctional Center through the United States Postal Service. *Id*. The court concluded:

> "[A]ny 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 or her petition on the merits, must affirmatively demonstrate the error via proceedings of record in the circuit court." *Id*. ¶ 25.

¶ 17 Here, the affidavit of service accompanying defendant's petition established only that the petition was placed in the box designated for United States mail at the Menard Correctional Center. This statement alone is not probative of whether the mailing was certified or registered. Moreover, the envelope in which the petition was mailed, which might indicate whether the mailing was certified or registered, is not in the record. Under *Carter*, defendant has not affirmatively demonstrated that service was improper, and, therefore, may not assert this error on appeal.

¶ 18 II. *Sua Sponte* Dismissal on Timeliness

¶ 19 Having concluded that defendant's ripeness argument must fail, we must next consider whether the trial court's *sua sponte* dismissal was nevertheless appropriate.[1] Defendant contends that the trial court erred in *sua sponte* dismissing the petition on the basis of timeliness, as the statute of limitations is an affirmative defense which must be pled by the State. We agree, but find that the error was harmless.

¶ 20 A section 2-1401 petition is designed to place before the trial court facts which, if known at the time of trial, would have precluded the entry of the contested judgment. *People v. Vincent*, 226 Ill. 2d 1, 7-8 (2007). A section 2-1401 petition must include specific factual allegations to support three elements: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting this claim or defense in the original action; and (3) due diligence in the filing of the petition. *Id*. Moreover, the petition must be supported by affidavit or other appropriate showing as to matters not of the record. *Id*. at 7. A section 2-1401 petition "must be filed not later than 2 years after the entry of the order or judgment" being challenged. 735 ILCS 5/2-1401(c) (West 2012).

¶ 21 In *People v. Malloy*, 374 Ill. App. 3d 820 (2007), this court determined that the two-year filing period is more akin to a statute of limitations than to a jurisdictional prerequisite. *Id*. at 823. Accordingly, we held that the time period must be asserted by the State as an affirmative defense, and that a trial court may not dismiss a petition *sua sponte* on the basis of timeliness. *Id*. The State concedes this point and acknowledges that the trial court in the instant case erred

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[1]In *Carter*, the defendant raised only the improper service issue on appeal. See *Carter*, 2015 IL 117709, ¶ 10. In that case, then, a ruling on the improper service issue disposed of the appeal in its entirety. Here, unlike in *Carter*, defendant has argued in the alternative that the trial court's ruling was nevertheless erroneous on its merits.

in *sua sponte* dismissing defendant's section 2-1401 petition on the basis of timeliness. The State does argue, however, that this error was harmless because defendant's petition was without merit.

¶ 22 In *Malloy*, we held that a trial court's erroneous *sua sponte* dismissal of a section 2-1401 petition on the basis of timeliness was subject to harmless error analysis. *Id*. at 824. We determined that such a dismissal is harmless where a defendant's petition lacks merit, and where no amendment to the petition would be capable of curing its lack of merit. *Id*. In that case, defendant had argued in his petition that the three-year term of mandatory supervised release (MSR) at the end of his sentence would bring his sentence over the statutory maximum. See *id*. at 821. Citing to the statute mandating the additional three-year term of MSR, we found that "[t]here seems to be no doubt in this case that defendant's position has no merit." *Id*. at 824. Indeed, we noted that defendant on appeal had not argued to the contrary.

¶ 23 Defendant's section 2-1401 petition is unquestionably without merit, lacking in each of the three elements such a petition must support. Most glaringly, the petition does not even allege what Kimmins' testimony might have been, or how that testimony would exonerate defendant. Further, the connection between the Rock Island police department's failure to interview Kimmins and defense counsel's alleged concealment of her statements is unclear. Defendant's other arguments, relating to Metscaviz and Lee, are also without merit. Though defendant asserts that the alleged fact of Lee's 2001 identification of him, and subsequent retraction, reveals his "innocence" in the present case, it is clear that the allegation does no more than raise an issue bearing on witness credibility. This is not a meritorious defense that would warrant relief from judgment. See *People v. Bannister*, 236 Ill. 2d 1, 17 (2009) (credibility determinations are the province of the finder of fact). Further, Lee's name does not appear in the

heavily redacted police reports cited as evidence by defendant, and those reports do not establish who Metscaviz spoke to or what he knew. In other words, defendant's exhibits provide no support for his allegations.

¶ 24 Moreover, defendant failed to include specific factual allegations that would establish his due diligence in bringing the claims in his original action or due diligence in filing the petition itself. Though defendant repeatedly accuses Metscaviz, Lee, and Schwartz of "fraudulently concealing" evidence—undoubtedly in an attempt to avoid the two-year time limit—he ultimately fails to allege facts that would explain when he learned of much of the information. Though defendant's FOIA request for police reports regarding his allegations about Metscaviz and Lee was answered in 2012, those reports provide no basis for his factual allegations, indicating that defendant must have "known" the facts alleged at an earlier date. Furthermore, defendant averred that he learned of Schwartz's purported fraudulent concealment in 2008. As the section 2-1401 petition was filed in 2012, this affidavit actually tends to establish defendant's *lack* of diligence.

¶ 25 In sum, defendant's section 2-1401 lacks merit on a number of separate grounds. Though the trial court's *sua sponte* dismissal on the basis of timeliness was erroneous, that error was harmless. Accordingly, we affirm the trial court's dismissal of defendant's petition.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed.

¶ 28 Affirmed.