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2016 IL App (3d) 130884-U

Order filed January 26, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0884
v.	)	Circuit No. 04-CF-902
	)	
LORENZO DAVIS, JR.,	)	Honorable
	)	Walter D. Braud,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justice McDade concurred in the judgment.  
Presiding Justice O'Brien specially concurred.

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**ORDER**

¶ 1 *Held:* The record is inadequate to determine whether defendant failed to comply with Illinois Supreme Court Rule 105 when he served his section 2-1401 petition on the State, and we affirm the trial court's dismissal.

¶ 2 Defendant, Lorenzo Davis, Jr., appeals from the dismissal of his section 2-1401 petition for relief from judgment. 735 ILCS 5-2-1401 (West 2012). We affirm.

¶ 3

## FACTS

¶ 4

The State charged defendant by information with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2004)). The evidence from defendant's jury trial established that defendant shot and killed Susan Burge after she hit him in the back of the head. Following the jury finding defendant guilty of first degree murder, the trial court sentenced defendant to 65 years' imprisonment.

¶ 5

On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Davis*, No. 3-06-0279 (2007) (unpublished order under Supreme Court Rule 23). Next, defendant filed a postconviction petition, which the circuit court dismissed, in part, and denied, in part. Defendant appealed the circuit court's decision and this court affirmed. *People v. Davis*, 2013 IL App (3d) 120469-U.

¶ 6

On July 15, 2013, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)). The "Notice of Filing/Affidavit of Service" accompanying the petition states that on July 10, 2013, defendant placed the petition in the institutional mail at Menard Correctional Center for mailing through the United States Postal Service with copies properly addressed to the circuit court clerk and the Rock Island State's Attorney's Office. The circuit court's corresponding entry in the record indicates the clerk received and filed copies of the above documents on July 15, 2013, and forwarded copies of the documents to the State. The State did not file a pleading after July 15, 2013. On October 31, 2013, the circuit court entered an order dismissing defendant's petition, *sua sponte*, as an untimely petition.

¶ 7

## ANALYSIS

¶ 8

On appeal, defendant contends the petition was not ripe for adjudication and, therefore, the circuit court prematurely dismissed the petition on October 31, 2013, before the State was properly served by certified or registered mail as required by Illinois Supreme Court Rule 105(b) (eff. Jan. 1, 1989).

¶ 9

At the outset, we note that "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 or her petition on the merits, must affirmatively demonstrate the error via proceedings of record." *People v. Carter*, 2015 IL 117709, ¶ 25. Further, without an adequate record preserving the claimed error, this court must presume the circuit court's order conforms with the law. *Id.* ¶ 19.

¶ 10

In the present case, the record establishes that more than 30 days passed from the date of filing on July 15 until October 31, 2013, the date the circuit court dismissed defendant's petition, *sua sponte*. It is defendant's burden to affirmatively establish from the record that the circuit court's *sua sponte* dismissal was premature. *Carter*, 2015 IL 117709, ¶ 25. The record before this court does not affirmatively establish that service was not effected by certified mail or that the circuit court prematurely dismissed his petition.

¶ 11

## CONCLUSION

¶ 12

The judgment of the circuit court of Rock Island County is affirmed.

¶ 13

Affirmed.

¶ 14

PRESIDING JUSTICE O'BRIEN, specially concurring.

¶ 15 I concur in the majority's overall resolution of this case, but I write separately as I would affirm the trial court's dismissal on grounds that defendant lacked standing to challenge the purported improper service of the section 2-1401 petition on the State.

¶ 16 While I acknowledge that our supreme court has resolved this issue on the adequacy of the record grounds (*Carter*, 2015 IL 117709, ¶ 23), I believe that the alternative approach is to analyze defendant's standing to assert that the State was not served in compliance with Supreme Court Rule 105 (eff. Jan. 1, 1989). See *People v. Kuhn*, 2014 IL App (3d) 130092, ¶ 16. Here, defendant argues that the trial court's dismissal was premature as the State did not receive notice of the petition in accordance with the Rule 105 filing requirements. As the opposing party, defendant does not have standing to object to his own improper service of process on behalf of the State. See *In re M.W.*, 232 Ill. 2d 408, 427 (2009) (noting a party may object to improper service only on behalf of himself).

¶ 17 I note that *Carter* does not foreclose this analysis, and therefore, I would affirm the trial court's dismissal on grounds that defendant does not have standing to assert a violation of the State's right to proper service.