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2016 IL App (3d) 140130-U

Order filed January 6, 2016

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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 13th Judicial Circuit, La Salle County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0130
	)	Circuit No. 09-CF-87
WILLIAM D. O'CONNOR,	)	Honorable
Defendant-Appellant.	)	H. Chris Ryan, Judge, Presiding.

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PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Holdridge and Wright concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Defendant has failed to affirmatively establish that he served the State with deficient service, therefore, he is unable to use his own error on appeal.
- ¶ 2 Defendant, William D. O'Connor, appeals from the *sua sponte* dismissal of his section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)), arguing that the dismissal of his petition was premature as the State was not properly served and, therefore, the petition was not ripe for adjudication. We affirm.

¶ 3

## FACTS

¶ 4

Defendant pled guilty to possession of a controlled substance, and was sentenced to 15 years' imprisonment. On December 2, 2013, 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). He filled out a "Notice of Filing" form and submitted it with the petition stating that he mailed the petition to the circuit clerk and the State's Attorney by "placing the [petition] in the U.S. MAIL BOX \*\*\* located at Danville Correctional Center in Danville, IL for delivery as 1st Class Mail." The record includes the envelope in which defendant sent his petition to the circuit court, which shows that defendant sent his petition to the court by first-class mail. The record does not include the envelope in which the defendant sent his petition to the State. The State did not file a responsive pleading, and no hearing was heard on the matter. On January 16, 2014, the court issued a written order dismissing the petition as the allegations did not provide a legal basis for the relief requested.

¶ 5

We held defendant's appeal in abeyance pending the Illinois Supreme Court's decision in *People v. Carter*, 2015 IL 117709, which was decided on December 3, 2015.

¶ 6

## ANALYSIS

¶ 7

On appeal, defendant argues that the dismissal of his section 2-1401 petition should be vacated and the cause remanded for further proceedings as the petition was not ripe for adjudication since it was not properly served on the State. In making this argument, defendant contends that his "Notice of Filing" indicates that his petition was "served by regular mail" as opposed to by prepaid certified or registered mail, summons, or publication as statute necessitates. See 735 ILCS 5/2-1401(b) (West 2012); Ill. S. Ct. R. 106 (eff. Aug. 1, 1985); Ill. S.

Ct. R. 105(b) (eff. Jan. 1, 1989). We reject this contention as neither the record nor the pleadings affirmatively prove that defendant's petition was not properly served on the State.

¶ 8 In *Carter*, defendant filed petition which was construed as a section 2-1401 petition. *Id.* ¶¶ 5-6. The proof of service showed that defendant sent the petition to the circuit clerk and the State by placing it in the institutional mail at the correctional center. *Id.* ¶ 5. He listed the addresses of the circuit clerk and the State's Attorney's office. *Id.* The State did not file any response, and the court *sua sponte* dismissed the petition on the merits. *Id.* ¶ 6. The *Carter* defendant then appealed, alleging that the dismissal of his petition was premature as it was not properly served on the State. *Id.* ¶ 7.

¶ 9 The Illinois Supreme Court held 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 in the circuit court." *Id.* ¶ 25.

In order to show deficient service, the record "must affirmatively establish that defendant mailed his petition via some means other than certified or registered mail." *Id.* ¶ 20. *Carter's* proof of service only showed that defendant mailed his petition from the correctional center and that it was to be transmitted by the United States Postal Service, which was insufficient proof of deficient service. *Id.*

¶ 10 The court further stated that:

"Though the regular return receipt for certified mail—for example—is sufficient proof of service by certified mail [citation], *the absence* of such a receipt in the record does not affirmatively establish that service by certified mail was *not*

accomplished, as it is up to the sender to file the receipt or not." (Emphases in original) *Id.* ¶ 23.

¶ 11 Here, the only two portions of the record that concern service are the "Notice of Filing" and the envelope in which the defendant sent the petition to the circuit court. The "Notice of Filing" was simply a form document that said at the bottom that defendant served the parties by "placing the [petition] in the U.S. MAIL BOX \*\*\* located at Danville Correctional Center in Danville, IL for delivery as 1st Class Mail." The defendant only had to fill in his information. As in *Carter*, this statement does not establish whether or not the petition was sent by certified or registered mail. Although it states that it was to be "for delivery as 1st Class Mail," it could have been sent certified or registered mail. Moreover, the envelope in the record only shows how the defendant sent the petition to the circuit court, not how it was sent to the State. Defendant did not include the envelope in which he mailed the petition to the State or any other evidence in his pleadings or the record that would be dispositive of this issue. Under *Carter*, defendant has not affirmatively proven that service to the State was defective. Therefore, he may not use his own alleged deficiency on appeal.

¶ 12 CONCLUSION

¶ 13 The judgment of the circuit court of La Salle County is affirmed.

¶ 14 Affirmed.