2016 IL App (4th) 140350-U

NO. 4-14-0350

FILED
March 2, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
TONY BRUMMETT,	)	No. 13CF373
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's *sua sponte* dismissal of defendant's petition for relief from judgment.

¶ 2 In September 2013, defendant, Tony Brummett, entered a negotiated plea of guilty to the charge of aggravated driving with a blood-alcohol concentration of 0.08 or more (625 ILCS 5/11-501(d)(2)(C) (West 2012)) in exchange for four years' imprisonment. In February 2014, defendant filed a petition for relief pursuant to section 2-1401(f) of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401(f) (West 2012)), requesting the trial court modify his prison sentence after he failed to receive any good-conduct credit toward his sentence. Defendant's certificate of service stated he placed the petition in the institutional mail system for mailing through the United States Postal Service. The record does not show the State

received a copy of the petition. In April 2014, the trial court, *sua sponte*, dismissed defendant's claim as meritless.

¶ 3 Defendant appeals, asserting the court's *sua sponte* dismissal of his section 2-1401(f) petition should be vacated because the petition was not ripe for adjudication, as it had never been served on the State. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In September 2013, defendant entered a negotiated plea of guilty to the Class 2 felony of aggravated driving with a blood-alcohol concentration of 0.08 or more, where defendant had three prior convictions for the same. See 625 ILCS 5/11-501(d)(2)(C) (West 2012). The State advised the trial court the parties had reached an agreement in which defendant would serve a sentence of four years' imprisonment followed by a two-year period of mandatory supervised release. The court then asked defendant, "Has anyone promised you anything else?" Defendant responded, "No, sir." The court accepted defendant's plea agreement and imposed the negotiated sentence.

¶ 6 In February 2014, defendant filed a "Motion for Specific Performance of the Plea Agreement," citing section 2-1401(f) of the Civil Code (735 ILCS 5/2-1401(f) (West 2012)). Defendant asserted he was deprived of the benefit of his bargain because he failed to receive any good-conduct credit. He asserted he had been misled by his attorney and the State regarding the amount of time he would actually serve. Defendant had expected to serve approximately 18 months' imprisonment after receiving day-for-day credit and six months' good-conduct credit. Instead, he was scheduled to serve two years in prison because he did not receive the six months' good-conduct credit as expected. Defendant asserted he did not wish to vacate his plea but,

rather, sought modification of his sentence to three years so he would receive the 18 months' imprisonment for which he bargained.

¶ 7 Attached to his petition, defendant included a certificate of service addressed to the State's Attorney's office and circuit clerk, which stated he placed his petition "in the institutional mail at Taylorville Correctional Center, properly addressed to the parties listed above for mailing through the United States Postal Service." Defendant left blank the date in which he placed his petition in the institutional mail system; however, at the bottom of the page, he signed a verification statement and dated it February 21, 2014. On February 26, 2014, the circuit clerk filed the petition. Nothing in the record shows the State was served with a copy of the petition.

¶ 8 On April 15, 2014, the trial court, *sua sponte*, dismissed defendant's petition. The court found defendant's disagreement as to the method by which the Department of Corrections calculated his release date did not state a basis for modification of the judgment.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant asserts the trial court's *sua sponte* dismissal of his section 2-1401(f) petition should be vacated because the petition was not ripe for adjudication, as it had never been served on the State.

¶ 12 We review *de novo* the trial court's dismissal of defendant's section 2-1401 petition. *People v. Laugharn*, 233 Ill. 2d 318, 322, 909 N.E.2d 802, 804 (2009). Section 2-1401 of the Civil Code (735 ILCS 5/2-1401 (West 2012)) provides relief from judgment in instances where more than 30 days have passed since the trial court's final order. When the defendant files such a petition, section 2-1401(b) requires, "[a]ll parties to the petition shall be notified as

provided by rule." 735 ILCS 5/2-1401(b) (West 2012). The "rule" referenced in section 2-1401(b) requires the defendant to comply with Illinois Supreme Court Rules 105 (eff. Jan. 1, 1989) and 106 (eff. Aug. 1, 1985). See *Laugharn*, 233 Ill. 2d at 323, 909 N.E.2d at 805. Rules 105 and 106 require a defendant to effect service on all parties by (1) summons, (2) registered mail, or (3) publication with affidavit. See Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989); Ill. S. Ct. R. 106 (eff. Aug. 1, 1985). In this instance, defendant's certificate of service indicates he sent his petition through institutional mail. Moreover, the record does not demonstrate defendant served the State with a copy of the petition, nor did the State respond to defendant's petition.

¶ 13 Defendant argues, without proper service, the trial court's dismissal of his petition was premature, relying on *People v. Carter*, 2014 IL App (1st) 122613, ¶ 12, 8 N.E.3d 441 (*Carter I*). The procedural facts are substantially similar to the present case. In *Carter I*, the First District determined the trial court prematurely dismissed the defendant's petition *sua sponte* where the State had never been served. *Id.* ¶ 25, 8 N.E.3d 441. The court reasoned, "[b]ecause a case is not ripe for adjudication until 30 days after service, the circuit court in this case prematurely dismissed defendant's petition *sua sponte* where service was never effectuated." *Id.*

¶ 14 However, during the pendency of this appeal, the supreme court issued its decision in *People v. Carter*, 2015 IL 117709, __ N.E.3d __ (*Carter II*), which reversed the appellate court's decision in *Carter I*. In *Carter II*, the supreme court noted the decision in *Carter I* was improperly premised on the assumption the defendant had failed to comply with Rules 105 and 106 rather than requiring defendant to make an affirmative showing of deficient service. *Id.* ¶ 18. The court emphasized the burden falls upon the appellant to present a sufficiently complete record upon which the reviewing court can make a decision. *Id.* ¶ 19. In reaching its decision, the supreme court stated:

> "What scant record there is consists of a statement in the proof of service defendant attached to his petition: 'I have 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.' To serve as a basis for defendant's contention of error, that statement must affirmatively establish that defendant mailed his petition via some means other than certified or registered mail. However, all it establishes is *where* defendant mailed his petition—'the institutional mail'—and the medium through which it was to be transmitted: 'the United States Postal Service.' The appellate court's assumption that the language of the proof of service affirmatively established transmittal by regular mail, and thus deficient service [citation], is unwarranted on this record." (Emphasis in original.) *Id.* ¶ 20.

¶ 15 We asked the parties to submit supplemental briefings discussing the impact of *Carter II* on the present case. Based on the supreme court's decision in *Carter II*, defendant concedes the record fails to affirmatively establish insufficient service of his section 2-1401 petition on the State. We accept defendant's concession.

¶ 16 Similarly to the defendant in *Carter II*, defendant's certificate of service in this case establishes where he mailed his petition—through the institutional mail—and the medium through which it was to be transmitted—the United States Postal Service. This certificate does not affirmatively establish whether the section 2-1401 petition was sent through regular,

certified, or registered mail. Thus, this court may not assume the language in the certificate of service affirmatively established deficient service. Rather, as defendant concedes, he bears the burden of demonstrating deficient service, a burden which has not been met in this case. See *id.* ¶ 19.

¶ 17 Accordingly, we conclude the trial court did not err in dismissing *sua sponte* defendant's section 2-1401 petition.

¶ 18 III. CONCLUSION

¶ 19 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 20 Affirmed.