

2014 IL App (1st) 123734-U

No. 1-12-3734

August 6, 2014

THIRD DIVISION

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Respondent-Appellee,)	
)	
v.)	No. 04 CR 26102
)	
ROBERT GILBERT,)	
)	The Honorable
Petitioner-Appellant.)	Carol A. Kipperman,
)	Judge presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court committed reversible error when it dismissed a 2-1401 petition *sua sponte* less than 30 days after the State received the petition.

¶ 2 Robert Gilbert filed a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2012)), seeking relief from his conviction and sentence for attempted murder. The trial court dismissed the petition *sua sponte*, 28 days after the prosecutor

acknowledged receipt of the petition. Gilbert argues on appeal that the trial court dismissed the petition prematurely, because the court did not give the State 30 days to respond. We agree. We reverse and remand for further proceedings on the petition.

¶ 3

BACKGROUND

¶ 4

In 2006, a jury found Gilbert guilty of attempted murder. The trial court sentenced Gilbert to 25 years in prison. This court affirmed the conviction and sentence. *People v. Gilbert*, No. 1-06-0882 (2008) (unpublished order under Supreme Court Rule 23). From 2009 through 2011, Gilbert filed three postconviction petitions and two petitions for relief from the judgment under section 2-1401. The circuit court dismissed the postconviction petitions and denied the 2-1401 petitions. The court affirmed the circuit court's judgments. *People v. Gilbert*, No. 1-09-1553 (2010) (unpublished order under Supreme Court Rule 23); *People v. Gilbert*, No. 1-09-2316 (2011) (unpublished order under Supreme Court Rule 23); *People v. Gilbert*, No. 1-10-3132 (2011) (unpublished order under Supreme Court Rule 23); *People v. Gilbert*, No. 1-10-3133 (2011) (unpublished order under Supreme Court Rule 23); *People v. Gilbert*, No. 1-11-0839 (2012) (unpublished order under Supreme Court Rule 23).

¶ 5

Gilbert later filed yet another petition under section 2-1401, alleging, this time, that his trial counsel failed to inform him before trial that the State offered to recommend a sentence of 15 years in prison in exchange for a guilty plea. Gilbert signed and dated the proof of service for the petition on October 27, 2012, claiming only that he deposited the petition in the prison mail on that date. The clerk of court stamped the petition as received on November 6, 2012.

¶ 6 At a hearing on November 9, 2012, the assistant State's Attorney told the circuit court that she received a copy of the petition that morning. The court scheduled the petition for hearing on December 7, 2012. On December 7, the court, on its own motion, dismissed the petition without hearing any argument from the State or Gilbert. Gilbert now appeals.

¶ 7 ANALYSIS

¶ 8 Because the circuit court dismissed Gilbert's section 2-1401 petition based on the pleadings, without holding an evidentiary hearing, we review the order *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007).

¶ 9 Gilbert contends only that the circuit court dismissed his petition prematurely, as the State received the petition only 28 days before the *sua sponte* dismissal. *People v. Carter*, 2014 IL App (1st) 122613, guides our review of the circuit court's decision.

¶ 10 In *Carter*, the trial court found Carter guilty of murder and the appellate court affirmed the conviction. On May 9, 2012, Carter mailed a section 2-1401 petition seeking relief from the conviction. The clerk of the circuit court file stamped the petition on May 15, 2012. The circuit court dismissed the petition, *sua sponte*, on July 10, 2012. *Carter*, 2014 IL App (1st) 122613, ¶¶ 3-6.

¶ 11 On appeal, Carter argued that he had not properly served the petition on the State, as he had used only the mail at his prison, rather than sending the petition by prepaid certified mail or registered mail. Supreme Court rules 105 and 106 require service of section 2-1401 petitions by prepaid certified mail or registered mail, or by publication. *Carter*, 2014 IL App (1st) 122613, ¶ 11; Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989); Ill. S. Ct. R. 106 (eff. Aug. 1, 1985). Under Supreme Court Rule 101(d) (eff. May 30, 2008), the State had 30 days after it

received service to respond to the petition. Because noting in the record showed proper service on the State, or actual service prior to July 10, 2012, the circuit court could not properly dismiss the petition *sua sponte* less than 30 days after July 10, 2012, unless the State waived its right to respond. *Carter*, 2014 IL App (1st) 122613, ¶¶ 10-22.

¶ 12 The *Carter* court refused to infer waiver from the State's presence at the hearing on July 10, 2012, and the State's acquiescence in the circuit court's acts. *Carter*, 2014 IL App (1st) 122613, ¶ 21. The *Carter* court said:

"Prosecutors have a job to do and that job includes standing before the trial court and clearly and articulately stating the State's position regarding the matter at hand.

*** Judicial economy is best served when the prosecutor, in the first instance, affirmatively spreads of record whether the petition has been served and, if not, whether the State intends on waiving the required service." *Carter*, 2014 IL App (1st) 122613, ¶ 23-24.

¶ 13 Gilbert, like *Carter*, said that he placed the petition in the prison mail, and he did not indicate that he used certified or registered mail. Accordingly, we find that Gilbert, like *Carter*, did not properly serve the petition on the State by mail. The State first indicated that it actually received the petition when the assistant State's Attorney told the court, on November 9, 2012, that she received a copy of the 2-1401 petition that morning.

¶ 14 Our supreme court, in *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009), held that when the State fails to respond to a 2-1401 petition, the court lacks authority to dismiss the petition *sua sponte* less than 30 days after service of the petition on the State. Like the *Carter* court,

we will not interpret the State's silence as a waiver of the right to respond to the petition. Because the circuit court here dismissed the petition prematurely, only 28 days after the State actually received the petition, we must reverse the dismissal of the petition and remand for further proceedings on the petition.

¶ 15

CONCLUSION

¶ 16

Following *Laugharn* and *Carter*, we reverse the dismissal of Gilbert's section 2-1401 petition as premature. We remand for further proceedings.

¶ 17

Reversed and remanded.