

FOURTH DIVISION
June 9, 2016

No. 1-13-3287

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 01 CR 9787
)	
MICHAEL BANKS,)	Honorable
)	Arthur F. Hill,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Circuit court's *sua sponte* dismissal of defendant's *pro se* section 2-1401 petition affirmed where defendant did not affirmatively establish deficient service of his petition on the State.
- ¶ 2 Defendant Michael Banks appeals from the circuit court's dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS

5/2-1401 (West 2012)). On appeal, defendant contends that the circuit court dismissed his petition prematurely because he failed to properly serve it on the State, and he asks us to remand for further proceedings. For the reasons that follow, we affirm.

¶ 3 Following a jury trial, defendant was convicted of two counts of first-degree murder, and one count each of armed robbery and concealment of a homicidal death, stemming from an incident where he fatally stabbed his victim in an abandoned house on March 24, 2001. The circuit court subsequently sentenced defendant to two mandatory natural life terms, 30 years in prison and 5 years in prison, respectively. This court affirmed his convictions but ordered a correction of his mittimus to reflect only one conviction for murder because there was only one victim. *People v. Banks*, No. 1-06-2803 (2008) (unpublished order under Supreme Court Rule 23).

¶ 4 From 2007 through 2013, defendant filed and appealed multiple unsuccessful collateral challenges to his conviction, including two petitions for writs of *habeas corpus*, a postconviction petition and a motion for leave to file a successive postconviction petition. See *People v. Banks*, Nos. 1-08-1023 (2009), 1-09-2796 (2011), 1-10-1480 (2011) (unpublished orders under Supreme Court Rule 23); *People v. Banks*, 2015 IL App (1st) 132275-U.

¶ 5 On August 30, 2012, defendant mailed the instant section 2-1401 petition in which he challenged, *inter alia*, his sentence and the circuit court's jurisdiction over him. Defendant attached a "Proof/Certificate of Service" to the petition, alleging that he placed it in the "institutional mail at Menard Correctional Center, properly addressed to the parties below for mailing through the United States Postal Service." He listed as addressees, the circuit court clerk and the Cook County State's Attorney. The record shows the petition was received by the circuit

court on September 17, 2012, stamped "filed" on September 24, 2012 and scheduled to be heard on October 1, 2012.

¶ 6 On September 23, 2012, defendant mailed an amended *pro se* section 2-1401 petition. Defendant attached a "Proof/Certificate of Service" to the amended petition, alleging that he placed it in the "institutional mail at Menard Correctional Center, properly addressed to the parties below for mailing through the United States Postal Service." He listed as addressees, the circuit court clerk and the Cook County State's Attorney. The record shows the petition was received by the circuit court on October 19, 2012, stamped "filed" on October 23, 2012 and scheduled to be heard on November 2, 2012.

¶ 7 On October 1, 2012, the circuit court observed defendant had filed a section 2-1401 petition and continued the matter. On November 2, 2012, the circuit court again observed defendant had filed a section 2-1401 petition and continued the matter on multiple dates until March 25, 2013. The record does not indicate the presence of an assistant State's Attorney on any of the above court dates.

¶ 8 On March 25, 2013, an assistant State's Attorney was present, indicated that he did not have a file on defendant at the moment and requested a continuance, which the court granted. The court continued the matter again on April 12, 2013, without the presence of an assistant State's Attorney.

¶ 9 On June 3, 2013, the circuit court *sua sponte* dismissed defendant's initial petition and amended petition, finding the issues raised by him "substantively frivolous and without merit." The record does not indicate the presence of an assistant State's Attorney on this date. In the

court's written order, it noted that it treated defendant's initial section 2-1401 petition and his amended petition as one petition.

¶ 10 On July 3, 2013, defendant mailed a *pro se* "Notice Challenge of Claim of Constitutionality," which the circuit court interpreted as a motion to reconsider its dismissal of his section 2-1401 petition. On September 6, 2013, the court denied defendant's motion to reconsider. This appeal followed.

¶ 11 On appeal, defendant does not advance any substantive claims concerning his petition. Rather, his contention is solely that the circuit court prematurely dismissed the petition because he did not properly serve it on the State. Because his petition, he argues, was not ripe for adjudication, he requests that it be remanded back to the circuit court for further proceedings.

¶ 12 We review a circuit court's dismissal of a section 2-1401 petition *de novo*. *People v. Carter*, 2015 IL 117709, ¶ 13.

¶ 13 Section 2-1401(b) of the Code requires that "[a]ll parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). The relevant rule is Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). See Ill. S. Ct. R. 106 (eff. Aug. 1, 1985) (stating "[n]otice of the filing of a petition under section 2-1401 *** shall be given by the same methods provided in Rule 105"). According to Rule 105, notice of the filing of a petition must be directed at the party against whom relief is sought. Ill. S. Ct. R. 105 (eff. Jan. 1, 1989). The petition may be served either by summons, prepaid certified or registered mail, or publication. *Id.* The purpose of this rule is "to prevent a litigant from obtaining new or additional relief without first giving the defaulted party a renewed opportunity to appear and defend." *Carter*, 2015 IL 117709, ¶ 15.

Once a party's section 2-1401 petition has been served on the opposing party, the opposing party

has 30 days to either answer or otherwise appear. Ill. S. Ct. R. 105 (eff. Jan. 1, 1989); see *Carter*, 2015 IL 117709, ¶ 14.

¶ 14 In the instant case, defendant relies on *People v. Carter*, 2014 IL App (1st) 122613, to support his requested relief. In his brief, defendant asserts "[t]his case is indistinguishable from *Carter*." However, our supreme court recently reversed this court's decision in *Carter* (*Carter*, 2015 IL 117709, ¶ 26), and we find our supreme court's decision dispositive of defendant's argument.

¶ 15 In *Carter*, our supreme court held there was no meaningful record from the circuit court to be reviewed regarding defendant's claimed error, his defective service of a section 2-1401 petition on the State via regular mail. *Id.* ¶ 20. The scant record from the circuit court consisted solely of a statement in the proof of service the defendant attached to his petition, stating: "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." *Id.* The court found that the above statement did not serve as a basis for the defendant's contention of error because it only showed where the defendant mailed his petition, the institutional mail at Menard Correctional Center, and the medium through which it was to be transmitted, the United States Postal Service. *Id.* This language did not, however, affirmatively establish transmittal by regular mail, and thus, establish deficient service. *Id.* ¶¶ 20, 23. Because the defendant failed to affirmatively establish that the State was not given proper service or that the circuit court's *sua sponte* dismissal was premature, as was his burden as the appellant (*id.* ¶ 19 citing *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009)), the *Carter* court presumed the circuit court rendered its order in accordance with the applicable law. *Carter*, 2015 IL 117709,

¶¶ 24-26. The *Carter* court, accordingly, reversed this court and affirmed the circuit court's order dismissing the defendant's petition for relief from judgment. *Id.* ¶ 26.

¶ 16 Following *Carter* and based on the record of the instant case, we cannot say defendant has affirmatively established that he deficiently served his petition on the State. As in *Carter*, there is a scant record with which to review defendant's claim of deficient service, consisting solely of the "Proof/Certificate of Service" attached to his petition. This notice alleges that defendant deposited the petition in the institutional mail at Menard Correctional Center to be sent through the United States Postal Service, and it was addressed to the circuit court clerk and the Cook County State's Attorney. All we can ascertain from the notice is where defendant mailed his petition, the institutional mail at Menard Correctional Center, and the medium through which it was to be transmitted, the United States Postal Service. Defendant's mere assertion of the latter does not affirmatively demonstrate he served the State via regular mail, and thus, demonstrate deficient service. See *id.* ¶ 23. Moreover, the record demonstrates that more than 30 days elapsed since the filing of defendant's petition and the circuit court's *sua sponte* dismissal of it on the merits. See *id.* ¶ 24. Absent an affirmative showing that defendant did not properly serve the State, we must presume the circuit court rendered its order, dismissing defendant's section 2-1401 petition, in conformance with the law. See *id.* Accordingly, we find no basis in the record for reversal and affirm the order of the circuit court dismissing *sua sponte* defendant's section 2-1401 petition.

¶ 17 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶ 18 Affirmed.