

2017 IL App (1st) 133805-UC

No. 1-13-3805

July 27, 2017

Fourth 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
Plaintiff-Appellee,) Cook County.
)
v.) No. 05 CR 14868
)
ISAAC VILLAREAL,) Honorable
) Kevin M. Sheehan,
Defendant-Appellant.) Judge, presiding.

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

ORDER

- ¶ 1 *Held:* Pursuant to *People v. Matthews*, 2016 IL 118114, defendant cannot use his own failure to comply with Illinois Supreme Court Rule 105(a) to seek reversal of the circuit court's dismissal of his section 2-1401 petition (735 ILCS 5/2-1401 (West 2012)).
- ¶ 2 Defendant Isaac Villareal appeals from the circuit court's *sua sponte* dismissal of his petition for relief from judgment filed under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)). On appeal, defendant argued this case should be

remanded for further proceedings because the State was not served with notice of his petition and, thus, the petition was not ripe for adjudication when it was dismissed by the circuit court.

¶ 3 On November 12, 2015, this court issued an order vacating the circuit court's dismissal of defendant's petition and remanding for further proceedings. *People v. Villareal*, 2015 IL App (1st) 133805-U. We then vacated that decision pursuant to the Illinois Supreme Court's supervisory order directing this court to reconsider in light of *People v. Carter*, 2015 IL 117709. *People v. Villareal*, No. 120234 (March 30, 2016) (supervisory order). After doing so, this court again vacated the circuit court's judgment and remanded for further proceedings. *People v. Villareal*, 2016 IL App (1st) 133805-U. Most recently, we vacated our 2016 decision pursuant to the supreme court's order directing us to reconsider in light of *People v. Matthews*, 2016 IL 118114. *People v. Villareal*, No. 121228 (Jan. 25, 2017) (supervisory order). Based on *Matthews*, we now affirm the circuit court's *sua sponte* dismissal of defendant's petition.

¶ 4 Pursuant to a guilty plea in 2008, defendant was convicted of aggravated kidnapping and was sentenced to 14 years in prison. Defendant did not file a motion to withdraw his plea or file a direct appeal.

¶ 5 In August 2013, defendant filed a petition pursuant to section 2-1401 to vacate the circuit court's judgment. That petition is the subject of this appeal. Defendant asserted therein that his waiver of a presentence investigation was invalid because the trial court did not make a specific finding as to his criminal history. Defendant also claimed his sentence was void because the trial court failed to admonish him that he would be subject to a term of mandatory supervised release.

¶ 6 On October 17, 2013, the circuit court dismissed defendant's petition *sua sponte*. The report of proceedings for that date indicates that only the judge and a court reporter were present in court when the petition was dismissed.

¶ 7 Defendant contends on appeal that the dismissal of his petition was premature because the petition had not been properly served on the State. A defendant filing a petition under section 2-1401 must provide notice to the opposing party of the petition's filing by service in person, by mail or by publication, in accordance with Illinois Supreme Court Rule 105(a) (eff. Jan. 1, 1989). See also Ill. S. Ct. R. 106 (eff. Aug. 1, 1985) (stating that the service procedures in Rule 105 apply to section 2-1401 petitions). If the opposing party fails to respond to notice of the petition within 30 days, the petition is treated as properly stating a cause of action. *People v. Vincent*, 226 Ill. 2d 1, 8 (2007). The circuit court cannot dismiss a petition *sua sponte* before the 30-day response period has expired. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009).

¶ 8 Our 2016 decision addressed the supreme court's decision in *Carter* affirming the circuit court's dismissal of a section 2-1401 petition where the record did not demonstrate the defendant's service was deficient. *Carter*, 2015 IL 117709, ¶ 24. We found *Carter* distinguishable because the record in this case affirmatively demonstrated that defendant did not mail a copy of his petition to all parties required to receive service; accordingly, we vacated the circuit court's dismissal of the petition and remanded for further proceedings. *Villareal*, 2016 IL App (1st) 133805-U, ¶ 13. The supreme court in *Carter* did not reach the issue of whether the defendant could challenge his own improper service.

¶ 9 That question has been answered in *Matthews*. There, the supreme court held that the defendant could not challenge the validity of the circuit court's order dismissing his section 2-

1401 petition based on the defendant's claim of his own improper service on the State. *Matthews*, 2016 IL 118114, ¶ 15. Noting that the 30-day window for the State's response provides it with the opportunity to answer the petition or otherwise plead, the supreme court observed that "[n]one of the notice requirements at issue were designed to allow a petitioner to object to lack of service on behalf of the opposing party." *Id.* The supreme court also rejected the defendant's alternative assertion that the court lacked personal jurisdiction over the parties, finding that the defendant could not raise that objection on the State's behalf. *Id.* ¶ 20. The supreme court affirmed the judgment of the circuit court and dismissed defendant's petition with prejudice. *Id.* ¶ 23.

¶ 10 For the reasons stated in *Matthews*, defendant cannot challenge the circuit court's dismissal of his section 2-1401 petition on the grounds of his own improper service. Accordingly, the circuit court's dismissal of defendant's petition is affirmed.

¶ 11 Affirmed.