2016 IL App (1st) 140202-U

FIRST DIVISION
January 4, 2016

No. 1-14-0202

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. 97 CR 16978
	)	
LEE WILLIAMS,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Liu and Justice Connors concurred in the judgment.

O R D E R

¶ 1 ***Held:*** *Sua sponte* dismissal of defendant's section 2-1401 petition affirmed over his contention that the State was not properly served; assessment of $105 frivolous filing fee proper.

¶ 2 Defendant Lee Williams appeals the *sua sponte* 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)) by the circuit court of Cook County. He contends that the dismissal on the merits

was premature because he did not properly serve the petition on the State, and the petition was thus not ripe for adjudication. He also contends that the circuit court erred in assessing a frivolous filing fee because the instant petition was his first section 2-1401 petition.

¶ 3 This court ultimately affirmed defendant's 2000 jury convictions for first degree murder and armed robbery and respective, consecutive sentences of 70 and 30 years' imprisonment. *People v. Williams*, Nos. 1-00-1390 (2002), 1-03-3133 (2005) (unpublished orders under Supreme Court Rule 23). We also affirmed the dismissals of defendant's subsequent post-conviction petitions. *People v. Williams*, No. 1-06-0908 (2008) (unpublished order under Supreme Court Rule 23); *People v. Williams*, 2014 IL App (1st) 120079-U.

¶ 4 On March 9, 2012, defendant filed his first *pro se* section 2-1401 petition, a copy of which was not included in the record filed on appeal. However, the record shows that on April 24, 2012, the circuit court dismissed that petition in a written order.

¶ 5 On June 13, 2013, defendant mailed the instant *pro se* section 2-1401 petition to the State and the clerk of the circuit court of Cook County. In his proof of service, defendant stated that he mailed the section 2-1401 petition by placing it in the institutional mail at Pontiac Correctional Center, properly addressed to the parties for mailing through the United States Postal Service. In his section 2-1401 petition, defendant alleged that his consecutive sentences were void because he did not inflict severe bodily injury.

¶ 6 The record shows that on July 8, 12, 15, and 26, 2013, the matter appeared before the court and was continued without any parties present. On August 1, 2013, defendant moved for a default judgment based on the State's failure to answer his petition. In his motion, he stated that he placed the section 2-1401 petition in the postal service mail at Pontiac Correctional Center to be sent as "Certified Mail."

¶ 7 On August 14 and 30, 2013, and November 12, 2013, the matter again appeared before the court without any parties present. However, on November 19, 2013, when the matter was called before the court, the State was indicated as present on the cover page of the transcript.

¶ 8 On December 4, 2013, the State was again indicated as present on the cover page of the transcript, and the circuit court dismissed defendant's petition *sua sponte*. In its written order, the court first noted that defendant's claim is a matter entirely within the trial record that could have been raised in his earlier proceedings, and as such, was waived. The court further noted that the consecutive sentences were proper because there was more than sufficient evidence that defendant inflicted severe bodily injury where he pistol-whipped the victim five or six times over the head and hand. The court also assessed defendant a $105 frivolous filing fee pursuant to section 22-105 of the Code (735 ILCS 5/22-105 (West 2012)).

¶ 9 On appeal, defendant first contends that the dismissal of his section 2-1401 petition on the merits was premature because he did not properly serve the petition on the State, and, therefore, the petition was not ripe for adjudication. The State responds, *inter alia*, that it had notice of the petition where defendant indicated in his motion for a default judgment that it was sent via certified mail and more than 30 days had passed before the court dismissed the petition. The State further asserts that defendant has failed to affirmatively show error, namely, that he did not serve the petition via certified mail.

¶ 10 Section 2-1401 of the Code establishes a comprehensive procedure for allowing the vacatur of final judgments more than 30 days after their entry. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Once a section 2-1401 petition has been filed, the opposing party has 30 days to answer or otherwise plead in response to the petition. *People v. Laugharn*, 233 Ill. 2d 318, 323 (2009).

¶ 11 Service of a petition under section 2-1401 must comply with Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989), which mandates service either by summons, prepaid certified or registered mail, or publication. *People v. Prado*, 2012 IL App (2d) 110767, ¶6, citing Ill. S. Ct. R. 105(b). The purpose of the rule is to notify a party of pending litigation in order to secure his presence. *People v. Ocon*, 2014 IL App (1st) 120912, ¶23. *Sua sponte* dismissal of an insufficient petition is permitted after 30 days. *Laugharn*, 233 Ill. 2d at 322.

¶ 12 In this case, defendant relies on *People v. Carter*, 2014 IL App (1st) 122613, ¶25, and its progeny in support of his claim that reversal is required because he failed to properly serve the State, and thus his petition was not ripe for adjudication. We observe, however, that the supreme court has reversed the decision in *Carter*, holding that the record on appeal did not affirmatively demonstrate that there *was* deficient service. (Emphasis in original.) *People v. Carter*, 2015 IL 11709, ¶18. The court explained that where the record only shows where defendant mailed his petition, "the institutional mail," and the medium through which it was transmitted, "the United State Postal Service," the record did not establish that there was deficient service. *Carter*, 2015 IL 11709, ¶20. The court further explained that the alleged deficient service claim was not addressed at all in the circuit court, and thus there was no meaningful record from the circuit court to be reviewed. *Id.* ¶20.

¶ 13 The supreme court further observed in *Carter* that the only thing it could discern from the record is that well over 30 days had passed since the filing of defendant's petition when the circuit court dismissed it, *sua sponte*, on the merits, and in sum, nothing in the record affirmatively established that the State was not given proper notice or that the circuit court's *sua sponte* dismissal was premature. *Id.* ¶24. The supreme court found that without an adequate record preserving the claim of error, it must presume that the circuit court's order conformed with

the law. *Id*. The court further 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 petition on the merits, must affirmatively demonstrate the error via proceedings of record in the circuit court. *Id.* ¶25.

¶ 14 Here, the record, as in *Carter*, shows that defendant stated in his proof of service that he mailed his petition by placing it in the institutional mail at Pontiac Correctional Center, properly addressed to the parties for mailing through the United States Postal Service, and subsequently in his motion for a default judgment stated his section 2-1401 petition was sent via certified mail. Whether we accept this statement as true or not, as requested by defendant, we find that the record does not affirmatively demonstrate an error in service. *Id.* ¶25. The record only affirmatively shows where defendant mailed his petition, "the institutional mail," and the medium through which it was transmitted, "the United State Postal Service," and not deficient service. *Id.* ¶20.

¶ 15 In light of the inadequate record, we presume that the circuit court's order was rendered in accordance with the applicable law, and cannot assume that defendant's service upon the State was deficient. *Id.* ¶23. Moreover, we discern from the record that more than 30 days passed since the filing of defendant's petition to the circuit court's *sua sponte* dismissal of his petition on the merits, and that an Assistant State's Attorney was present and voiced no objection when the court dismissed defendant's petition. *Id.* ¶24. In addition, no further action was taken by the parties and defendant filed a timely notice of appeal and listed the State's Attorney as a recipient. *Id.* Under these circumstances, we find no basis for reversal, and affirm the order of the circuit court dismissing defendant's section 2-1401 petition *sua sponte*.

¶ 16 Defendant next contends, and the State concedes that the $105 frivolous filing fee should be vacated because the instant petition is his first section 2-1401 petition, and section 22-105 of the Code (735 ILCS 5/22-105 (West 2012)) applies only to subsequent or second petitions for relief from judgment. We note initially that we need not accept the concession of the parties. *Carter*, 2015 IL 11709, ¶22.

¶ 17 Here, the record shows that on March 9, 2012, defendant filed his first section 2-1401 petition, and the circuit court dismissed it on April 24, 2012. Accordingly, the instant section 2-1401 petition is a second petition for relief from judgment, and, therefore, the $105 frivolous filing fee was properly assessed against defendant. 735 ILCS 5/22-105 (West 2012).

¶ 18 In light of the foregoing, we affirm the order of the circuit court of Cook County.

¶ 19 Affirmed.