FOURTH DIVISION
June 2, 2016

No. 1-14-1375

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. 07 CR 17327
	)	
DAMEN TOY,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and 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 improper service on the State.

¶ 2 Defendant Damen Toy appeals from an order of the circuit court of Cook County dismissing *sua sponte* his *pro se* petition for relief from judgment filed pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). On appeal, defendant solely contends that because he did not properly serve his petition on the State, the

circuit court's dismissal was premature, and thus, his petition must be remanded for further proceedings. We affirm.

¶ 3 Following a 2007 jury trial, at which defendant represented himself *pro se*, defendant was convicted of two counts of aggravated criminal sexual assault with a firearm and two counts of attempted armed robbery. The trial court sentenced defendant to consecutive prison terms of 45 years and 30 years for the two counts of aggravated criminal sexual assault. Each of these sentences included a 15-year sentencing enhancement because the jury found that defendant was armed with a firearm. The court also imposed concurrent terms of 10 years' imprisonment for each count of attempted armed robbery, and a consecutive term of 6 months' imprisonment for contempt of court, for an aggregate sentence of 75 years and 6 months' imprisonment. On direct appeal, this court affirmed that judgment. *People v. Toy*, 407 Ill. App. 3d 272 (2011).

¶ 4 In November 2011, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)) which was summarily dismissed by the circuit court. On appeal, defendant asserted for the first time that his sentences for aggravated criminal sexual assault, which included the 15-year firearm sentencing enhancements, violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) because armed violence based on a sexual assault consisted of identical elements, but the offenses had different penalties. This court found that, in light of our supreme court's holding in *People v. Hauschild*, 226 Ill. 2d 63 (2007), which was followed by this court in *People v. Hampton*, 406 Ill. App. 3d 925 (2010), defendant's 15-year sentencing enhancements violated the proportionate penalties clause and were unconstitutional. *People v. Toy*, 2013 IL App (1st)

120580, ¶ 29. Rather than remand the case to the circuit court for second-stage postconviction proceedings, this court invoked its supervisory authority under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999) and reversed the dismissal of defendant's postconviction petition, granted the petition on the issue raised on appeal, vacated his sentences for aggravated criminal sexual assault, and remanded the case for resentencing on those two counts. *Id.* at ¶ 30.

¶ 5 On September 16, 2013, while the above appeal was pending, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code alleging that, in light of the proportionate penalties argument above, his waiver of counsel prior to trial was invalid because the trial court failed to properly admonish him about the minimum and maximum sentences he faced if convicted. The circuit court found that defendant previously raised the same issue challenging his waiver of counsel on direct appeal, that his argument was considered and rejected by this court, and thus, his claim was barred by the doctrine of *res judicata*. Accordingly, the circuit court dismissed defendant's petition. Defendant's appeal of that judgment is currently pending before this court in case number 1-14-1374.

¶ 6 On February 7, 2014, the clerk of circuit court received the instant *pro se* petition for relief from judgment filed by defendant pursuant to section 2-1401 of the Code. In this petition, defendant solely alleges that "the purported grand jury lacked jurisdiction to act." Defendant asserts that the common law record fails to show the impaneling and swearing in of the grand jury which issued his indictment, and thus, he concludes that the grand jury was never properly impaneled by the court to conduct an investigation, and the resulting indictment was void for

want of jurisdiction. Defendant attached to his petition a motion for appointment of counsel, and the cover page of his indictment.

¶ 7 The record on appeal contains no proof or certificate of service indicating who defendant served with his petition, where it was sent, or the medium through which it was transmitted. The only information we can gleam from the record is that defendant's petition was stamped "RECEIVED" by the clerk of the circuit court on February 7, 2014.

¶ 8 The report of proceedings shows that on March 14, 2014, the circuit court discussed defendant's September 2013 petition with defense counsel, who had been appointed by the court to represent him on that petition. The court also noted that defendant had just filed the instant 2-1401 petition that was received on February 7, 2014. The court told counsel that she was not appointed to represent him on the February petition. The record shows that the State's Attorney was present in court on this date, but does not specifically name an assistant State's Attorney, and no one from that office spoke on the record.

¶ 9 On April 16, 2014, both defense counsel and an assistant State's attorney were present in court and acknowledged that they had received the presentence investigation report for the new sentencing hearing. The State also filed a motion to dismiss defendant's September 2013 petition. The court then addressed defendant's instant 2-1401 petition, noting that it was received by the clerk's office on February 7, 2014, and docketed and entered into the court's computer on February 27, 2014. The court stated that defendant's petition was "entirely frivolous," and handed defendant a written order dismissing the petition *sua sponte*. The court also assessed defendant $105 in court costs and fees for filing a frivolous petition (735 ILCS 5/22-105 (West 2014)).

¶ 10 In its written dismissal order, the circuit court found that defendant failed to support his allegation that his indictment was invalid, and failed to show that there was an error on the face of the indictment. The court noted that, although the Code of Criminal Procedure mandates that the grand jury be impaneled and sworn by the court (725 ILCS 5/112-2 (West 2014)), the indictment is not required to show compliance with the statute. *People v. Cleveland*, 104 Ill. App. 2d 415, 417-18 (1969). The court further found that defendant's allegation was "entirely conclusory," and that he provided no evidence that the grand jury was not sworn. Accordingly, the court concluded that defendant's 2-1401 petition was frivolous and without merit, and dismissed the petition *sua sponte*.

¶ 11 On appeal, defendant raises no substantive issues regarding the claim alleged in his petition. Rather, he solely contends that because he did not properly serve his petition on the State, the circuit court's dismissal was premature, and thus, his petition must be remanded for further proceedings.

¶ 12 In his brief, defendant relies primarily on *People v. Prado*, 2012 IL App (2d) 110767, where the court found that because the defendant failed to properly serve his section 2-1401 petition on the State, the circuit court's dismissal of the petition was premature. Consequently, the appellate court vacated the circuit court's judgment and remanded the petition for further proceedings. *Prado*, 2012 IL App (2d) 110767, ¶ 1. Defendant argues that the appellate court's decision in *Prado* is dispositive of the issue here, where there is no evidence in the record that he served his petition on the State. Defendant points out that the record does not contain a

summons, certified or registered mail receipt, proof of publication, or any other indication that the State ever received notice of his petition.

¶ 13 Defendant further notes that the decision in *Prado* was followed by this court in *People v. Carter*, 2014 IL App (1st) 122613, and that the appeal from *Carter* was pending before our supreme court when defendant filed his brief. Defendant has requested that if the supreme court reversed *Carter*, this court should modify the dismissal of his petition to indicate that it is without prejudice.

¶ 14 In response, the State points out that since defendant filed his brief, the Illinois Supreme Court overruled the appellate court's opinion in *Carter*. *People v. Carter*, 2015 IL 117709. Relying on the supreme court's analysis and holding in *Carter*, the State argues that defendant failed to present a sufficient record for this court to determine whether an error in service occurred, and thus, he failed to affirmatively establish that he did not properly serve the State.

¶ 15 Initially, we observe that by solely challenging the *sua sponte* dismissal of his petition as premature, defendant has waived any challenge to the actual merits of his petition. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). Accordingly, we deny defendant's request to modify the dismissal of his petition to indicate that it is without prejudice. We review the circuit court's dismissal of defendant's section 2-1401 petition *de novo*. *Carter*, 2015 IL 117709, ¶ 13.

¶ 16 Section 2-1401(b) of the Code provides that "[a]ll parties to the petition shall be notified as provided by rule." 735 ILCS 5/2-1401(b) (West 2012). Supreme Court Rule 106 (eff. Aug. 1, 1985) provides that service of a section 2-1401 petition must comply with Supreme Court Rule

105 (eff. Jan. 1, 1989). Pursuant to Rule 105, notice of the filing of a petition must be directed at the party against whom relief is sought, and must be served either by summons, prepaid certified or registered mail, or publication. Ill. S. Ct. R. 105(b). After notice has been served, the responding party has 30 days to file an answer or otherwise appear. Ill. S. Ct. R. 105(a).

¶ 17 Our supreme court has held that where the State fails to answer the petition within the 30-day period, it is deemed to have admitted to all well-pleaded facts, and the petition is ripe for adjudication. *People v. Vincent*, 226 Ill. 2d 1, 9-10 (2007). The circuit court may then deny the petition if is determines that the allegations raised therein do not provide a legal basis for relief under section 2-1401. *Id.* at 12.

¶ 18 We find that the supreme court's recent decision in *Carter* is dispositive of this case. In *Carter*, the defendant mailed a "Motion to Vacate Judgment" and attached a "Proof/Certificate of Service" to his pleading stating that he had placed it in the "institutional mail" at the Menard Correctional Center for mailing through the United States Postal Service, addressed to the clerk of the court and the State's Attorney's Office, both at 2650 S. California in Chicago, Illinois. *Carter*, 2015 IL 117709, ¶¶ 5, 20. The circuit court dismissed the petition *sua sponte* more than 30 days after it had been filed. *Id.* at ¶ 6. On appeal, the defendant argued that the circuit court's dismissal of his petition was premature because it was never properly served on the State. *Id.* at ¶ 7. The appellate court agreed, reversed the dismissal, and remanded the petition for further proceedings. *Id.* at ¶ 10.

¶ 19 Upon further review, our supreme court pointed out that the claimed error of deficient service was never raised or addressed in the circuit court, and thus, there was no meaningful

record from the circuit court to be reviewed. *Id*. at ¶ 20. The court found that the defendant's proof of service merely established where he mailed his petition, through the institutional mail, and the medium through which it was transmitted, *i.e*., the United States Postal Service, but that it did not affirmatively establish that he had transmitted his petition via regular mail. *Id*. Consequently, the supreme court found that the record was insufficient to demonstrate the deficiency in service that the defendant was required to establish in order to advance his argument. *Id*. at ¶ 22. However, the record did show that the circuit court dismissed the petition *sua sponte* on the merits more than 30 days after the defendant had filed it. *Id*. at 24. Accordingly, where 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, the supreme court presumed that the circuit court's order conformed with the law and affirmed that judgment. *Id*. at ¶¶ 23, 26.

¶ 20 As in *Carter*, in this case, defendant's claimed error of deficient service was not raised in the circuit court, and thus, there is no meaningful record from the circuit court to be reviewed. The record here merely shows that defendant's petition was stamped "RECEIVED" by the clerk of the circuit court on February 7, 2014. As defendant has acknowledged, the record does not contain any proof or certificate of service indicating who defendant served with his petition, where it was sent, or the medium through which it was transmitted. Consequently, the record does not affirmatively demonstrate the deficiency in service that defendant was required to establish in order to advance his argument.

¶ 21 The record does show that defendant's petition was received on February 7, 2014, that it was docketed and entered into the court's computer on February 27, 2014, and that the court initially addressed the petition on March 14, 2014. The record further shows that the circuit court dismissed defendant's petition *sua sponte* on the merits on April 16, 2014, more than two months after it was received, and well beyond the 30-day period. Therefore, based on this record, we presume that the circuit court's order was in conformity with the law.

¶ 22 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.