No. 3--10--0063

Order filed January 11, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

DOIAKAH GRAY,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Petitioner-Appellant,	)	Will County, Illinois,
	)	
v.	)	No. 09--MR--360
	)	
TERRY McCANN,	)	Honorable
	)	Rick A. Mason,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

Held: Where petitioner failed to properly serve defendant with a copy of the complaint and summons, the trial court did not err in dismissing the petition for want of prosecution and denying petitioner's motion to reinstate.

Petitioner, Doiakah Gray, appeals from the dismissal of his motion to reinstate his petition for mandamus relief in which he sought good conduct credit under section 5/3--6--3(a)(2.1) of the Unified Code of Corrections (730 ILCS 5/3--6--3(a)(2.1) (West

2008)). On appeal, he claims that the trial court erred in dismissing his petition for want of prosecution because he properly served the respondent, Terry McCann, through the United States Postal Service. We affirm.

Petitioner was convicted of first degree murder (720 ILCS 5/9--1(a) (West 1994)) and sentenced to 80 years in the Department of Corrections. While incarcerated at the Stateville Correctional Center (Stateville), defendant enrolled in various educational, vocational and chemical dependency courses. On January 10, 2009, petitioner filed a grievance with Stateville, requesting eight years, four months and five days of "educational good time credit" against his sentence. His request was denied.

On April 6, 2009, after exhausting his administrative remedies, petitioner filed a petition for mandamus in the circuit court against respondent. Petitioner sought to compel the warden to award the good conduct credit and reduce his sentence accordingly.

Thereafter, McCann was succeeded by Frank Shaw as the warden of Stateville. On June 8, 2009, the clerk of the court issued a summons for Shaw. Petitioner served him with the summons by returned certified and registered mail through the United States Postal Service on June 17. On June 19, 2009, the clerk issued a second summons against Shaw. Petitioner served Shaw with the summons, including an affidavit and proof of service, by mailing

the summons directly to the correctional center. Stateville returned the summons to plaintiff on July 13, 2009, and informed petitioner that the summons had been improperly served. In the letter, the Stateville litigation coordinator outlined the procedure petitioner was required to follow to obtain proper service. The instructions specifically provided that "an order must be properly prepared in place for the circuit clerks office to send documents(s) and summon(s) [sic] to the Sheriff's Department. The Sheriff's Department will then serve those individuals."

At the September 24, 2009, status call, the trial court was informed that petitioner failed to return the completed summons, which was provided by the circuit clerk's office. On its own motion, the trial court dismissed the case for want of prosecution.

On October 8, 2009, petitioner filed a motion for default judgment and a motion to reinstate his petition for mandamus. Petitioner asserted that he served defendant with summons twice, but the Department of Corrections returned the summons because he was not a person authorized to serve it. The case was moved to the mandamus call and a hearing was set for December 31, 2009.

Petitioner was not present at the December 31 hearing. The docket shows that respondent was present "by Assistant State's Attorney Phil Mock." The record does not indicate that Mock filed a pleading or motion in response to petitioner's motion. Mock had not previously appeared in the case and did not file a written

appearance with the court. At the conclusion of the hearing, the trial court denied petitioner's motion for default and his motion to reinstate the mandamus action.

ANALYSIS

I

The Attorney General first argues that we lack jurisdiction to consider this appeal because the circuit court's order dismissing plaintiff's action for want of prosecution is not a final and appealable order. A dismissal for want of prosecution becomes a final and appealable order at the point in time that the period for refiling expires. *S.C. Vaughan Oil Co. v. Caldwell, Troutt & Alexander*, 181 Ill. 2d 489 (1998). In this case, the period for refiling under section 13--217 of the Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq.* (West 2008)) has expired. See 735 ILCS 5/13--217 (West 2008). Thus, the circuit court's order is appealable.

II

On appeal, petitioner argues that the trial court erred in dismissing his case for want of prosecution and denying his motion to reinstate in light of evidence that he had diligently served the warden by mailing the summons to his office on two separate occasions.

A dismissal for want of prosecution should be set aside where a satisfactory explanation of the apparent delay has been given,

there was no intentional or willful disregard of any directions of the court, and any further delay of the controversy would not result in prejudice to the parties. *In re Marriage of Dague*, 136 Ill. App. 3d 297 (1985). Whether substantial justice is being done between the parties and whether it is reasonable under the circumstances to compel the opposing side to go to trial on the merits are the overriding considerations. *People ex rel. the Department of Revenue v. Countryman*, 162 Ill. App. 3d 134, 137 (1987).

Nevertheless, the inherent power of the courts to dismiss a complaint for want of prosecution is based on "the necessity of preventing undue delays in the disposition of pending cases and avoiding congestion in the progress of the trial calendars." *Countryman*, 162 Ill. App. 3d at 137. Thus, while a decision on the merits is preferable, continued violations of procedures and rules should not be excused. *Vaughn v. Northwestern Memorial Hospital*, 210 Ill. App. 3d 253 (1991). A determination that there has been a lack of diligent prosecution warranting dismissal is within the sound discretion of the trial court and will be disturbed on appeal absent an abuse of discretion. *Countryman*, 162 Ill. App. 3d at 136.

Service of summons upon a defendant is essential to create personal jurisdiction. *Mortgage Electronic Systems v. Gipson*, 379 Ill. App. 3d 622 (2008). Section 2--203 of the Code governs the

mode of service. It states:

> "Except as otherwise provided, service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, (2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making the service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode." 735 ILCS 5/2--203(a) (West 2008).

Supreme Court Rule 102(b) further provides that a summons must be served no later than 30 days after its date. Ill. S. Ct. R. 102(b) (eff. July 1, 1971). Proper service is obtained by placing the summons for service, together with copies of the complaint, "with the sheriff or other officer or person authorized to serve process." Ill. S. Ct. R. 102(a) (eff. July 1, 1971). A court has no personal jurisdiction over a party that has not been properly served unless that party waives service and enters a general appearance. *People v. Mescall*, 347 Ill. App. 3d 995 (2004). A judgment entered by a court that lacks jurisdiction of the parties or of the subject matter is void and may be attacked at anytime,

either directly or collaterally. *J.C. Penney Co. v. West*, 114 Ill. App. 3d 644 (1983).

Here, the record shows petitioner served Shaw with his petition twice by regular mail. However, service by mail is not an acceptable mode of service under Supreme Court Rule 102. Ill. S. Ct. R. 102(a) (eff. July 1, 1971). Petitioner was then informed that proper service could be obtained through the Sheriff's department. Yet, he did not seek to reissue the summons or direct the clerk to send the petition and summons to the Sheriff for service. Therefore, the trial court lacked personal jurisdiction over the warden and was unable to enter judgment against him.

Moreover, the trial court's lack of personal jurisdiction was not altered by Assistant State's Attorney Mock's appearance at the December 31 hearing on the motion to reinstate. The docket does not indicate that Mock entered a general appearance on behalf of respondent, nor did he file a pleading or substantive response to the motion to reinstate. See 735 ILCS 5/2--301(a-5) (West 2008); *KSAC Corp. v. Recycle Free, Inc.*, 364 Ill. App. 3d 593 (2006) (jurisdictional claim waived only if defendant files a pleading or substantive motion). Thus, respondent did not waive service. Without jurisdiction over the respondent, any judgment entered by the trial court would have been void. See *Mortgage Electronic Systems*, 379 Ill. App. 3d at 629-630.

In his petition to reinstate, petitioner alleged only that he

had properly served respondent through the mail. He did not provide an explanation for his failure to follow the procedures and rules for service of process. In addition, a decision on the merits would have resulted in prejudice to both parties based on the court's prevailing lack of personal jurisdiction over respondent. Under these circumstances, the trial court properly denied petitioner's request to reinstate his petition. See *In re Marriage of Dague*, 136 Ill. App. 3d at 299 (a dismissal should be set aside where satisfactory explanation for delay is given and no prejudice or hardship would occur).

CONCLUSION

The judgment of the circuit court of Will County is affirmed.

Affirmed.