

NOTICE

Decision filed 01/28/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 120386-U

NO. 5-12-0386

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 79-CF-285
	)	
FREDDIE TILLER,	)	Honorable
	)	Stephen P. McGlynn,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE CHAPMAN delivered the judgment of the court.  
Justices Goldenhersh and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the trial court properly concluded that defendant failed to provide proper service of process of his section 2-1401 petition, and we find no equitable basis to excuse this failure, we affirm the court's judgment.

¶ 2 Defendant appeals from the trial court's August 14, 2012, order dismissing his *pro se* petition for relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). The State of Illinois filed a motion to dismiss the petition on the basis that the court had no personal jurisdiction because defendant had not served an officer of the State with a copy of the petition. The court agreed with the State's motion, and dismissed defendant's petition. We affirm.

¶ 3

## FACTS

¶ 4 The State of Illinois charged Freddie Tiller with the murders of Samuel Nersesian and Debra Brown in 1979. Defendant was tried and convicted of the murders. Defendant received a death sentence. On direct appeal, the supreme court affirmed his convictions, but vacated his death sentence, and remanded for resentencing. *People v. Tiller*, 94 Ill. 2d 303, 324, 447 N.E.2d 174, 185 (1992). On remand, the trial court imposed concurrent terms of natural life imprisonment. Defendant appealed to this court, and we vacated those sentences and remanded to the trial court for resentencing. *People v. Tiller*, 130 Ill. App. 3d 549, 552-53, 474 N.E.2d 756, 758-59 (1984). On remand, the trial court sentenced defendant to two consecutive 40-year sentences. We affirmed that sentence in 1987. *People v. Tiller*, 158 Ill. App. 3d 1106, 525 N.E.2d 601 (1987) (unpublished order under Supreme Court Rule 23).

¶ 5 Between the years of 1991 and 2000, defendant filed three separate postconviction petitions and a *habeas corpus* petition. The trial court dismissed all four petitions. Defendant then filed a second *habeas corpus* petition in 2004, along with an amended version of the initial *habeas corpus* petition. The trial court again dismissed the petitions. On appeal, we affirmed. *People v. Tiller*, 361 Ill. App. 3d 803, 806, 838 N.E.2d 969, 972 (2005).

¶ 6 On April 11, 2011, defendant filed his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). In his sworn "Notice of Filing," defendant averred that he "served a copy" of the petition on the St. Clair County State's Attorney's office by mailing it from the Pinckneyville

Correctional Center where he was then incarcerated. The State filed a special and limited appearance for the sole purpose of objecting to personal jurisdiction, stating that defendant did not properly serve the State with process as mandated by Illinois procedural rules. The trial court granted the State's motion on August 1, 2011.

¶ 7 Defendant filed the same petition on November 3, 2011, and again mailed a copy of the petition to the State's Attorney. In March 2012, defendant filed a motion for default. In response, the State filed its motion to dismiss claiming that the court lacked personal jurisdiction because defendant failed to serve the State. On August 14, 2012, the trial court granted the State's motion and dismissed the petition.

¶ 8 Defendant appeals.

¶ 9 **LAW AND ANALYSIS**

¶ 10 We review section 2-1401 petition dismissals on a *de novo* basis. *People v. Bramlett*, 347 Ill. App. 3d 468, 473, 806 N.E.2d 1251, 1255 (2004). A section 2-1401 petition serves as a means by which the petitioner can seek correction to errors of fact that occurred during trial. *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000). The purpose of such review "is not to relitigate matters that were or could have been raised on direct appeal, but rather to resolve arguments that new or additional matters, if they had been known at the time of trial, could have prevented [the] finding [made]." *People v. Burrows*, 172 Ill. 2d 169, 187, 665 N.E.2d 1319, 1327 (1996); *Haynes*, 192 Ill. 2d at 461, 737 N.E.2d at 182.

¶ 11 Supreme Court Rule 105 controls notice requirements of a petition filed pursuant to section 2-1401. Ill. S. Ct. R. 105(a) (eff. Jan. 1, 1989); see also Ill. S. Ct. R. 106 (eff.

Aug. 1, 1985). Supreme Court Rule 105 provides three possible means of service of notice: by methods provided by law for service of summons, by prepaid certified or registered mail with return receipt requested, or by publication. Ill. S. Ct. R. 105(b) (eff. Jan. 1, 1989).

¶ 12 Defendant did not achieve service of notice by any of the above-prescribed methods. He asks this court, however, to find an equitable exception to these rules because of the difficulties of following the service rules from inside a correctional institution.

¶ 13 Defendant cites case law supporting an equitable exception. Only one of the cited cases, *Public Taxi Service, Inc. v. Ayrton*, 15 Ill. App. 3d 706, 304 N.E.2d 733 (1973), allows an equitable exception to service. We find that *Ayrton* is distinguishable.

¶ 14 In *Ayrton*, which involved a motor vehicle accident, Public Taxi Service and its driver, James Taylor, sued Karen Ayrton. *Id.* at 707-08, 304 N.E.2d at 735. Karen answered the complaint and filed a counterclaim. *Id.* at 708, 304 N.E.2d at 735. After an in-court meeting between the attorneys about the plaintiffs' plan to amend the complaint to increase the amount of damages sought, the attorneys agreed that the plaintiffs would not file the amended complaint until additional discovery was completed. *Id.* at 708, 709, 304 N.E.2d at 735, 736. Despite the agreement, plaintiffs filed an amended complaint. *Id.* Plaintiffs then took default judgments against Karen. *Id.* at 708, 304 N.E.2d at 735. Karen and her attorney received no notice of the defaults. *Id.* at 708, 304 N.E.2d at 735-36. Upon learning of the default judgments, Karen filed her petition under section 72 of

the Practice Act asking the court to set aside the default judgments.<sup>1</sup> *Id.* Because Karen could not locate James Taylor, she sent copies of her petition to his last known employer, Public Taxi Service, and to his attorney. *Id.* at 711, 304 N.E.2d at 737-38. James Taylor's attorney filed a special and limited appearance on his behalf contesting personal jurisdiction. *Id.* at 708, 304 N.E.2d at 736. Although Karen filed this petition within the original civil suit, the requirements of section 72 of the Practice Act mandated new notice to the nonmoving party by service of process because the court construes this petition as an independent action. *Id.* at 710, 304 N.E.2d at 737. Because James Taylor's attorney represented him in a matter ancillary to the original judgment, the court concluded that service upon that attorney was adequate. *Id.* at 712, 304 N.E.2d at 739. The court noted that the specific circumstances of this case "illustrate the need for an exception to the three methods of service prescribed in Rule 105(b) as it pertains to section 72 petitions." *Id.*

¶ 15 Defendant also cites to *Armis Construction Co. v. Cosmopolitan National Bank*, 134 Ill. App. 3d 177, 479 N.E.2d 1111 (1985). In that case, a copy of the section 2-1401 petition was served upon Armis Construction Company's attorney from Armis's earlier suit seeking foreclosure of a mechanic's lien and damages against a bank. *Id.* at 178, 479 N.E.2d at 1113. During that case, the court substituted the Federal Deposit Insurance Corporation (FDIC) as the real party in interest in place of the bank. *Id.* The FDIC filed

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<sup>1</sup>Ill. Rev. Stat. 1969, ch. 110, ¶ 72 (an earlier version of section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008))).

a counterclaim in 1981. *Id.* In December 1983, the court dismissed the action for the parties' failure to appear in court at an assignment call. *Id.* at 179, 479 N.E.2d at 1113. The FDIC then filed a section 2-1401 petition asking the court to vacate the dismissal. *Id.* The FDIC was not able to serve Armis Construction Company despite several different investigative methods. *Id.* at 179, 479 N.E.2d at 1113-14. The trial court concluded that the FDIC's service upon Armis Construction Company's attorney was adequate. *Id.* at 179, 479 N.E.2d at 1114. On appeal, the court reversed the trial court's ruling concluding that it would not expand the service methods mandated by Supreme Court Rule 105:

"We believe that the equitable exception set forth in *Ayrton* to the requirements of service of notice of a section 2-1401 petition, as prescribed by Supreme Court Rule 105(b), is an extremely narrow one, carefully constructed to provide the relief deemed necessary under the particular and extreme circumstances of that case. \*\*\* [W]e believe that any further expansion of the statutorily approved methods of service of notice of section 2-1401 petitions would more appropriately be accomplished by amendment to the supreme court rules or to the statute than by creation of particular exceptions to the rule by this court." *Id.* at 181-82, 479 N.E.2d at 1115.

The appellate court noted that subsequent to *Ayrton*, other courts only applied the equitable exception in cases where the representation by an attorney was in a proceeding ancillary to the current petition. *Id.* In *Armis Construction Co.*, the attorney who was served by the FDIC was not currently representing Armis in any court case. *Id.* at 182,

479 N.E.2d at 1115.

¶ 16 We appreciate the difficulty that defendant has with filing pleadings while incarcerated, and recognize the fact that he must rely upon the Department of Corrections mailing system in order to do so. Defendant argues on appeal that he lacked financial resources necessary to have the State served by the St. Clair County sheriff's department. However, defendant does not comment upon his ability to achieve service by certified or registered mail utilizing the same prison mail system.

¶ 17 In this case, defendant was on notice of the need to serve the State by one of the prescribed methods. The court dismissed his first section 2-1401 petition for this reason. In filing his section 2-1401 petition for the second time, defendant had the ability to correct this error. Despite the notice that service by regular mail was ineffective, he chose to mail the petition again by regular mail. Accordingly, the facts of this case do not warrant the creation of an equitable exception.

¶ 18 CONCLUSION

¶ 19 For the foregoing reasons, we affirm the judgment of the St. Clair County circuit court.

¶ 20 Affirmed.