

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 by Rule 23(e)(1).

2012 IL App (3d) 100484-U

Order filed March 19, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2012

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 14 th Judicial Circuit
)	Henry County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0484
v.)	Circuit Nos. 04-CF-356; 05-CF-391
)	
TIMOTHY L. WAUGH,)	The Honorable
)	Ted J. Hamer,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Justice Wright dissented.

ORDER

- ¶ 1 *Held:* Pursuant to *Shellstrom*, the trial court erred when it recharacterized the defendant's "petition for post-judgment relief" as a postconviction petition and summarily dismissed it without first notifying the defendant of this intent and or giving him the opportunity to withdraw or amend the petition.
- ¶ 2 The defendant, Timothy Waugh, appeals from the trial court's recharacterization and summary dismissal of his "petition for post-judgment relief." On appeal, the defendant contends

that pursuant to *People v. Shellstrom*, 216 Ill. 2d 45 (2005), the trial court should have given him the opportunity to amend or withdraw his section 2-1401 petition before recharacterizing it as a postconviction petition and summarily dismissing it. We conclude that the trial court erred in the manner alleged, and we follow the precedent of *Shellstrom*, reverse the trial court's dismissal of the defendant's petition and remand the cause to give the defendant the opportunity to do so.

¶ 3

FACTS

¶ 4 In Henry County case No. 04-CF-356, the trial court convicted the defendant of failure to report an accident involving personal injury (625 ILCS 5/11-401(b) (West 2004)) and driving while his license was suspended (625 ILCS 5/6-303(a) (West 2004)), and imposed a six-year term of imprisonment. Thereafter, in Henry County case No. 05-CF-391, following a reversal of his conviction and remand, the defendant entered a negotiated plea of guilty to aggravated controlled substance manufacturing (720 ILCS 5/20-1.5(a)(2) (West 2004)), in exchange for the State's agreement to dismiss pending remaining charges and to recommend a 24-year term of imprisonment. The court imposed the recommended sentence, and ordered that this term of imprisonment be served consecutively to the aforementioned 6-year term of imprisonment in the earlier case.

¶ 5 The defendant filed a direct appeal of his convictions in case No. 04-CF-356, and this court affirmed. *People v. Waugh*, No. 3-06-0421, cons. with No. 3-06-0431 (2008) (unpublished order under Supreme Court Rule 23). The defendant ultimately did not pursue a direct appeal of his guilty plea in case No. 05-CF-391.

¶ 6 Thereafter, on January 11, 2010, the defendant filed a pro se "petition for post-judgment relief" pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West

2010)) (the Code), and essentially alleged that his sentence was unconstitutional and void because the state legislature did not intend for inmates to serve beyond the maximum sentence it prescribed for each offense when including the term of mandatory supervised release. In this petition, the defendant also requested that:

“[i]n the event that [the trial] court [was] of the opinion that [the defendant] has sought the wrong remedy, but nonetheless he has established his entitlement to relief under any other remedies at law. [The defendant] urges [the trial] court construe the instant pleadings in that light and grant the relief [the defendant] is entitled to receive, pursuant to 735 ILCS 5/2-617; 735 ILCS /2-1401 Sec. (F) AND OR &@% [725] ILCS 5/2-122 ET, SEG.”

¶ 7 The trial court dismissed the defendant’s petition, stating that it had reviewed the “post-conviction petition.” In its written order, the trial court specifically stated that “[t]he petition, when viewed liberally in favor of the Defendant, state[d] the gist of a constitutional claim.” The trial court then addressed the merits of the defendant’s petition and found that “[t]he Illinois Legislature ha[d] clearly and succinctly specified the minimum and maximum sentences for criminal felonies and each sentence carrie[d] a period of [MSR] after the offender’s release from imprisonment.” Therefore, the court found the defendant’s petition was “frivolous and without merit.”

¶ 8 This court allowed the defendant to file an untimely notice of appeal, and appointed the Office of the State Appellate Defender to represent the defendant on appeal. Appointed appellate counsel filed a motion for summary remand pursuant to Shellstrom, which was denied “based on

our decision in *People v. Higginbotham*, 386 Ill. App. 3d 1137 *** (2006). [But, the defendant] may raise this issue in his [appellate] brief.” The defendant appeals.

¶ 9

ANALYSIS

¶ 10 On appeal, the defendant contends that the trial court erred by recharacterizing his postjudgment petition as a postconviction petition and summarily dismissing it without providing him with the opportunity to amend or withdraw it, as required by *Shellstrom*. The defendant also asks this court to overrule its previous decision in *Higginbotham*, where this court concluded that a remand was not required in every instance that the trial court recharacterized a postjudgment pleading as a postconviction petition without first notifying the defendant pursuant to *Shellstrom* before dismissing it. The State, on the other hand, contends that *Shellstrom* does not require a remand in every instance, and here, the trial court did not err in summarily dismissing the defendant’s petition under this court’s decision in *Higginbotham*. We conclude that the trial court erred when it did not give the defendant the opportunity to amend or withdraw his postjudgment petition before it recharacterized it as a postconviction petition and summarily dismissed it, and, since the facts of this case are akin to that of *Shellstrom*, the trial court’s judgment should also be vacated and the cause should be remanded for further proceedings.

¶ 11 Under section 2-1401 of the Code, a defendant may seek relief to correct all errors of fact that occurred in the prosecution of his case, errors which, had they been known to the defendant or the court at the time of the trial, would have prevented the court from entering the contested judgment. *People v. Haynes*, 192 Ill. 2d 437 (2000). A section 2-1401 petition, however, is not to be substituted for a direct appeal, nor is it designed to provide a general review of all alleged errors that occurred at the defendant’s trial. *Haynes*, 192 Ill. 2d 437.

¶ 12 On the other hand, pursuant to the Post-Conviction Hearing Act (the Act), an imprisoned defendant may file a petition for postconviction relief if he asserts there was a substantial denial of his constitutional rights at trial. 725 ILCS 5/122-1(a) (West 2010). In a noncapital case, the Act provides a three-stage process for adjudicating postconviction petitions. At the first stage, the trial court may summarily dismiss the petition if it is found frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2004). A petition is considered frivolous or patently without merit if the petitioner's allegations, taken as true, fail to state the gist of a constitutional claim. *People v. Collins*, 202 Ill. 2d 59 (2002).

¶ 13 The case of *People v. Shellstrom*, 216 Ill. 2d 45 (2005), involved a situation where the trial court considered a defendant's postjudgment "[m]otion to reduce sentence, alternatively, petition for writ of mandamus to order strict compliance with terms of guilty plea[,]” as a postconviction petition, and summarily dismissed the petition without first notifying the defendant of the recharacterization. Our supreme court held that:

“[w]hen a circuit court is recharacterizing as a first postconviction petition a pleading that a pro se litigant has labeled as a different action cognizable under Illinois law, the circuit court must (1) notify the pro se litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that any subsequent postconviction petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an opportunity to withdraw the pleading or to amend it so that it contains all the claims appropriate to a postconviction petition that the litigant believes he or she has. If the court fails to do so, the pleading cannot be

considered to have become a postconviction petition for purposes of applying to later pleadings the Act's restrictions on successive postconviction petitions. As noted, *** trial courts need not recharacterize a pro se pleading as a postconviction petition. However, [the supreme court] urge[d] judges to consider recasting pleadings that warrant such treatment.”

The Shellstrom court noted that that defendant was aware that the court intended to recharacterize his petition, and that defendant knew the consequences thereof, but the court did not give the defendant the opportunity to amend or withdraw his petition. Thus, the Shellstrom court found that the proper course was to vacate the trial court's dismissal of the defendant's postjudgment pleading and remand the cause to the trial court. The supreme court specifically held that on remand, the trial court must provide the defendant with the opportunity to amend or withdraw his petition.

¶ 14 This court subsequently interpreted Shellstrom in Higginbotham, where we concluded that it was not reversible error for a trial court to recharacterize a defendant's postjudgment pleading as a postconviction petition and to dismiss it without first admonishing the defendant pursuant to Shellstrom. In doing so, this court opined that Shellstrom did not expressly require that a reviewing court must remand each time a trial court recharacterized a postjudgment pleading as a postconviction petition without the proper admonitions. This court concluded that when a trial court recharacterizes a postjudgment pleading as a postconviction petition and summarily dismisses it without notice to the defendant, Shellstrom indicated that the recharacterized pleading cannot be considered to have been a postconviction petition for purposes of the Act's requirements pertaining to successive postconviction petitions and limited

the Higginbotham defendant to that relief. The defendant in Higginbotham filed a petition for leave to appeal to the supreme court, and the supreme court denied leave to appeal. *People v. Higginbotham*, No. 103910 (March 28, 2007).

¶ 15 Other districts of the appellate court have disagreed with our holding in *Higginbotham*, and have concluded that in an instance where a trial court recharacterizes a defendant's postjudgment petition as a postconviction petition and summarily dismisses it without notice to the defendant, the proper remedy under *Shellstrom* was to remand the cause to the trial court to allow the defendant the opportunity to withdraw or amend his pleading. See *People v. Caliendo*, 391 Ill. App. 3d 847 (2009) (court concluded that it was not harmless error when a trial court failed to provide the admonishments under *Shellstrom*); see also *People v. Hood*, 395 Ill. App. 584 (2009); see also *People v. Escobedo*, 377 Ill. App. 3d 82 (2007).

¶ 16 Based on our review of *Shellstrom*, *Higginbotham*, and the cases from other districts of the appellate court that have interpreted *Shellstrom*, we decline to follow our holding in *Higginbotham*. On the facts in this case, we believe that the proper remedy is to vacate the trial court's dismissal of the defendant's petition, and to remand the cause to the trial court so that it can, among other things, afford the defendant the opportunity to amend or withdraw his postjudgment petition.

¶ 17 We first conclude that in this case, the record indicates that the trial court in fact recharacterized the defendant's "petition for post-judgment relief" as a postconviction petition without providing the *Shellstrom* admonitions. Specifically, the trial court stated that it had reviewed the "post-conviction petition" and found it frivolous and patently without merit, thereby dismissing it using language contained in the Act. See 725 ILCS 5/122-2.1(a)(2) (2010).

Furthermore, given the *pro se* status of the instant defendant, we do not believe that in his postjudgment pleading, he intended to ask the court to reconstrue the entire pleading as a postconviction petition. Rather, we believe that the defendant simply asked that if he demonstrated relief under the Act instead of section 2-1401 of the Code, that the court grant him that relief.

¶ 18 Here, however, the trial court did not grant the defendant relief under the Act instead of section 2-1401 of the Code. Rather, the trial court reviewed the pleading as a postconviction petition and found it frivolous and patently without merit, thus construing the petition in its entirety under the Act and dismissing it under the Act. We note that in this instance, the trial court had the option of considering the instant petition as it was labeled, that is, as a section 2-1401 petition, and summarily dismissing it under section 2-1401 of the Code. See *People v. Vincent*, 226 Ill. 2d 1 (2007) (supreme court held that a trial court may summarily dismiss a *pro se* petition filed under section 2-1401 of the Code without first notifying the petitioner). However, the trial court did not choose this course of action, and by recharacterizing the entire petition as a postconviction petition, the trial court subjected the matter to review under *Shellstrom* and its progeny.

¶ 19 Consequently, we apply *Shellstrom* to the case at bar. Here, the defendant acknowledges that he was aware that the trial court intended to recharacterize his postjudgment petition, and was also aware of the consequences thereof. However, in his brief, the defendant contends that he was not given the opportunity to amend or withdraw his petition. Our review of the record supports this assertion. Thus, this factual scenario is like that of *Shellstrom*, where the court noted that that defendant was aware of the first two *Shellstrom* principles, but was not notified

that he could amend or withdraw his postjudgment petition. Therefore, as in *Shellstrom*, the cause should be remanded to notify the defendant of his right to either amend or withdraw his petition, and to afford him the opportunity to do so.

¶ 20 In reaching this conclusion, we need not comment on whether *Higginbotham* should be overruled, or attempt to reconcile its conclusion with the seemingly conflicting resolutions of other districts of this appellate court on this precise issue. Rather, we only note that this panel believes that the *Higginbotham* court's literal interpretation of the *Shellstrom* case is correct--that is--*Shellstrom* in fact states that if a trial court does not give the requisite admonishments before recharacterizing a defendant's postjudgment petition as a postconviction petition, and summarily dismisses it, the pleading cannot be considered a first postconviction petition for purposes of applying the restrictions on successive postconviction petitions under the Act. However, we believe this rule is best followed in instances where the pro se defendant does not seek an appeal of the trial court's recharacterization and summary dismissal of his postjudgment petition. Thus, in such an instance, that pro se defendant is best served if the petition is not considered as a first postconviction petition for purposes of applying the restrictions in the Act, as that defendant may then subsequently file a postconviction petition without having to meet the requirements of a successive petition.

¶ 21 However, in an instance where as here, the defendant appeals from the trial court's recharacterization and summary dismissal of his postjudgment pleading, and the record does not indicate that the defendant was given all three *Shellstrom* admonishments, we believe the best and most logical course is to follow the action of the *Shellstrom* court and remand the cause for proper admonishments and the defendant's knowing election among his alternatives.

¶ 22 In closing, we comment on the dissent. The trial court's order stated two conclusions. It first found that "[t]he petition, when viewed liberally in favor of the Defendant, state[d] the gist of a constitutional claim." The trial court then addressed the merits of the defendant's petition and stated that "[t]he Illinois Legislature ha[d] clearly and succinctly specified the minimum and maximum sentences for criminal felonies and each sentence carrie[d] a period of [MSR] after the offender's release from imprisonment[,]" and therefore, the defendant's petition was "frivolous and without merit." Thus, to us, this conflicting language indicates that it is not entirely clear that the court found that the defendant's petition stated the gist of a constitutional claim and perhaps prompted the defendant to forgo presenting this issue to this court.

¶ 23 For the foregoing reasons, we conclude that Higginbotham does not provide the appropriate remedy; that *Shellstrom* controls our decision in the instant case; and we therefore vacate the trial court's dismissal of the defendant's postjudgment pleading, and remand the cause for the trial court to admonish the defendant pursuant to *Shellstrom*, and permit the defendant to amend or withdraw his petition if he deems that either course of action is suitable for him.

¶ 24 CONCLUSION

¶ 25 The judgment of the circuit court of Henry County is vacated, and the cause is remanded for proceedings consistent with this order.

¶ 26 Judgment vacated; cause remanded.

¶ 27 JUSTICE WRIGHT, dissenting:

¶ 28 I agree with the majority's view that the trial court's decision to summarily dismiss defendant's petition cannot be upheld. However, I disagree with the majority's decision to

vacate and remand the matter to the trial court for admonishments pursuant to *People v. Shellstrom*, 216 Ill. 2d 45 (2005).

¶ 29 Here, unlike the circumstances in *Shellstrom*, the trial court found defendant's pro se pleading, "when viewed liberally in favor of the Defendant, stated the gist of a constitutional claim." Yet, in spite of this finding, the trial court erroneously summarily dismissed the recharacterized pleading. The parties have simply overlooked the content of the judge's order when requesting remand.

¶ 30 I respectfully submit that the error in this case did not occur when the trial court elected to recharacterize this pleading without notice to defendant. Rather, the reversible error occurred when the trial court summarily dismissed the recharacterized pro se petition after finding this petition stated the gist of a constitutional claim. See *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002); *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). Our supreme court has repeatedly held that only the "gist" of a constitutional claim is required to survive dismissal under section 122-2.1 and to require the appointment of counsel under the Act. *Coleman*, 183 Ill. 2d at 380-81 (citing *People v. Porter*, 122 Ill. 2d 64, 84 (1988)). Thus, having determined the petition set out the gist of a constitutional claim, I believe the court erred by dismissing the recharacterized petition. The trial court's summary dismissal must be reversed, not the decision to recharacterize the pleading without notice as required by *Shellstrom*.

¶ 31 The case law clearly provides the trial court has authority to recharacterize the pro se pleading in this case. *Shellstrom*, 216 Ill. 2d at 51. In fact, the pro se petition specifically requested the court to recharacterize the petition, if necessary, pursuant to the Post-Conviction Hearing Act, by stating:

“[I]n the event that [the trial] court [was] of the opinion that [defendant] has sought the wrong remedy, but nonetheless he has established his entitlement to relief under any other remedies at law. [Defendant] urges [the trial] court construe the instant pleadings in that light and grant the relief [defendant] is entitled to receive, pursuant to 735 ILCS 5/2-617; 735 ILCS 2-1401 Sec. (F) AND OR &@% [sic.][725] ILCS 5/2-122 ET, SEG. [sic].”

¶ 32 I also respectfully submit that the decision in *People v. Higginbotham* (368 Ill. App. 3d 1137 (2006)) contains sound reasoning and need not be questioned at this juncture because the circumstances are easily distinguishable. On appeal, the defendant in *Higginbotham* did not argue that his *pro se* petition stated a gist of a constitutional claim warranting its advancement to a second-stage post-conviction proceeding. Unlike the trial judge in *Higginbotham*, the judge in this case clearly found defendant successfully raised the gist of a constitutional claim, but nonetheless summarily dismissed the petition anyway. Consequently, the trial court failed to advance the matter to a second stage examination as required by the court’s own finding in this case. *Hodges*, 234 Ill. 2d at 9. This is the error which must be reversed following a specific finding that the gist of a constitutional claim existed.

¶ 33 After reversing the summary dismissal, I would remand the matter with instructions for the trial court to set the petition for the second stage post-conviction proceedings, admonish defendant that he has the right to appointed counsel, and then allow defendant to amend or withdraw the pleading as necessary. 725 ILCS 5/122-2.1(b) (2010); See *Hodges*, 234 Ill. 2d at 23.

¶ 34 The issue of whether the recharacterized pleading in this case would require defendant to request leave of court before filing another petition seeking post conviction relief is neither ripe for our review nor relevant to the circumstances presented in this appeal.

¶ 35 Therefore, I dissent.