

NOTICE
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2012 IL App (4th) 110717-U

Filed 10/3/12

NO. 4-11-0717

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
ALVIN C. SIEVERT,)	No. 97CF615
Defendant-Appellant.)	
)	Honorable
)	James E. Souk,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court vacated and remanded, concluding that the trial court erred by failing to admonish defendant that it intended to recharacterize his *pro se* motion as a successive postconviction petition.

¶ 2 In May 2011, following a direct appeal and series of collateral attacks, defendant, Alvin C. Sievert, *pro se* filed (1) a "Motion for Order Nunc Pro Tunc" and (2) a "Motion to Vacate Judgment and Sentence." Later that month, without admonishing defendant, the trial court recharacterized defendant's "Motion to Vacate Judgment and Sentence" as both a post-conviction petition (725 ILCS 5/122-1 to 122-7 (West 2010)) and a petition for relief from judgment (735 ILCS 5/2-1401 (West 2010)). Thereafter, the court summarily dismissed the filing that it had recharacterized, as well as defendant's "Motion for Order Nunc Pro Tunc."

¶ 3 Defendant appeals, arguing that the trial court erred by (1) recharacterizing his *pro*

se "Motion to Vacate Judgment and Sentence" without admonishing him that it intended to do so, and (2) dismissing the motion seven days after defendant filed it. The State concedes both issues. Because we accept the State's concession, we vacate the court's order and remand for further proceedings.

¶ 4

I. BACKGROUND

¶ 5 Following an April 1998 bench trial, the trial court found defendant guilty of six counts of aggravated criminal sexual assault and in July 1998 sentenced him to 30 years in prison. On direct appeal, this court affirmed defendant's conviction. *People v. Sievert*, No. 4-98-0869 (Jan. 25, 2000) (unpublished order under Supreme Court Rule 23).

¶ 6 In December 2000, defendant *pro se* filed a petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2000)). Shortly thereafter, the trial court dismissed defendant's petition as frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000). This court affirmed. *People v. Sievert*, No. 4-01-0093 (Apr. 8, 2002) (unpublished order under Supreme Court Rule 23).

¶ 7 In November 2007, defendant *pro se* filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2006)). In April 2009, the trial court *sua sponte* dismissed defendant's petition for failure to state a cause of action, which this court later affirmed. *People v. Sievert*, No. 4-08-0094 (Apr. 15, 2009) (unpublished order under Supreme Court Rule 23).

¶ 8 On May 13, 2011, defendant filed two motions: (1) a "Motion for Order Nunc Pro Tunc," requesting additional credit for time spent in custody, and (2) a "Motion to Vacate Judgment and Sentence," asserting that he had not been proved guilty beyond a reasonable doubt

and that the State had suppressed evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

¶ 9 On May 20, 2011, the trial court entered orders dismissing both motions. With respect to defendant's "Motion for Order Nunc Pro Tunc," the court found that the Department of Corrections had correctly calculated defendant's release date.

¶ 10 With respect to defendant's "Motion to Vacate Judgment and Sentence," the trial court noted that it could not determine whether defendant intended for the motion to be a postconviction petition or a section 2-1401 petition. Accordingly, the court treated the motion as both, first finding that, if it was a postconviction petition, it should be dismissed because it was a successive postconviction petition that defendant had not sought leave to file. Likewise, the court found that, if defendant's petition was a section 2-1401 petition, it should be dismissed because it (1) did not state a legally recognizable claim, (2) was not properly supported by an affidavit, (3) was not timely filed, and (4) raised claims that were barred by either *res judicata* or collateral estoppel.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant argues that the trial court erred by (1) recharacterizing his *pro se* "Motion to Vacate Judgment and Sentence" without admonishing him that it intended to do so, and (2) dismissing the motion seven days after he filed it. The State concedes, and we accept the State's concession.

¶ 14 A. Recharacterizing Defendant's Petition Without Admonishing Him

¶ 15 Defendant contends that the trial court erred when it recharacterized his *pro se*

filing as a successive postconviction petition without first admonishing him that it intended to do so, as required by *People v. Pearson*, 216 Ill. 2d 58, 833 N.E.2d 827 (2005). We agree.

¶ 16 In *People v. Shellstrom*, 216 Ill. 2d 45, 57, 833 N.E.2d 863, 870 (2005), the supreme court held that before recharacterizing a defendant's *pro se* pleading as a first postconviction petition, the trial court must (1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that the court's recharacterization means the 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 arguments appropriate to a successive postconviction petition. In *Pearson*, 216 Ill. 2d at 68, 833 N.E.2d at 832, the supreme court concluded that the trial court must provide the same admonishments when recharacterizing a defendant's *pro se* pleading as a successive postconviction petition.

¶ 17 Here, the trial court did not provide any admonishments to defendant before recharacterizing his *pro se* petition as a successive postconviction petition. Rather, the court simply entered a written order recharacterizing before dismissing defendant's petition. Accordingly, the court failed to comply with the rule set forth in *Pearson*.

¶ 18 Before addressing defendant's next contention, we point out that defendant's case once again illuminates the procedural hurdles that await a trial court when it chooses to recharacterize a defendant's *pro se* filing as a postconviction petition. See *People v. Holliday*, 369 Ill. App. 3d 678, 682, 867 N.E.2d 1016, 1020 (2007). In light of these difficulties, we reiterate our advice to trial courts that recharacterization should occur only "in unusual and compelling circumstances." *Holliday*, 369 Ill. App. 3d at 682, 867 N.E.2d at 1020; *People v.*

Hood, 395 Ill. App. 3d 584, 589, 916 N.E.2d 1287, 1291 (2009).

¶ 19 B. Dismissing Defendant's Section 2-1401 Petition Before 30 Days Had Passed

¶ 20 Defendant next contends that the trial court erred by recharacterizing his *pro se* filing as a section 2-1401 petition and then *sua sponte* dismissing the petition seven days after defendant filed it. We have already concluded that the trial court committed reversible error by failing to admonish defendant before recharacterizing the same *pro se* filing as a postconviction petition. Accordingly, we need not address defendant's second contention. However, were we to do so, it appears defendant's argument that the trial court prematurely dismissed his section 2-1401 petition has merit. See *People v. Laugharn*, 233 Ill. 2d 318, 323, 909 N.E.2d 802, 805 (2009) (concluding that by dismissing the defendant's section 2-1401 petition before the usual 30-day period to file a responsive pleading expired, the trial court "short-circuited the proceedings and deprived the State of the time it was entitled to answer or otherwise plead," rendering the petition "not 'ripe for adjudication' ").

¶ 21 III. CONCLUSION

¶ 22 Based on the foregoing, we vacate the trial court's dismissal order and remand the case for further proceedings pursuant to *Pearson*.

¶ 23 Vacated and remanded.