

No. 1-14-2123

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 21625
	)	
JOSE CANCHOLA,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Lavin and Cobbs concurred in the judgment.

**O R D E R**

¶ 1 *Held:* The trial court abused its discretion in denying defendant's motion to vacate the dismissal of his freestanding *pro se* "motion for leave to file supplemental issue on ineffective assistance of appellate counsel instanter" after analyzing it as a petition under the Post-Conviction Hearing Act (Act) (725 ILC 5/122-1 *et seq.* (West 2014)). We vacate the court's assessment of \$105 in filing fees and court costs.

¶ 2 Defendant Jose Canchola appeals from the denial of his motion to vacate the dismissal of his *pro se* "motion for leave to file supplemental issue on ineffective assistance of appellate counsel instanter," which the circuit court analyzed as a petition under the Post-Conviction

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Hearing Act (Act) (725 ILC 5/122-1 *et seq.* (West 2014)). Defendant contends that the circuit court procedurally erred in dismissing his *pro se* motion as a postconviction petition under the Act without first admonishing him of the recharacterization pursuant to *People v Shellstrom*, 216 Ill. 2d 45 (2005) and *People v. Pearson*, 216 Ill. 2d 58 (2005), and thereby giving him the opportunity to amend or withdraw his motion. He also contends that we should vacate the court's assessment of \$105 in fees for filing of a frivolous postconviction petition. We reverse and vacate.

¶ 3 Following a 2011 jury trial, defendant was found guilty of two counts of predatory criminal sexual assault and two counts of criminal sexual assault, and sentenced to an aggregate term of 36 years' imprisonment. We affirmed that judgment on direct appeal over defendant's contention that he was improperly subjected to a double enhancement because the age of the victim and his position as the victim's stepfather were used as an element of the offense and as an aggravating factor during sentencing. *People v. Canchola*, 2014 IL App (1st) 123297-U.

¶ 4 On November 28, 2013, while his direct appeal was pending, defendant filed a *pro se* "motion for leave to file supplemental issue on ineffective assistance of appellate counsel *instanter*," which is the motion at issue in this appeal. In the motion, defendant stated that, although he requested his appellate counsel to include an issue in his direct appeal: that the trial court violated his right to due process by allowing the prosecutor to define reasonable doubt to the jury in rebuttal to defendant's closing argument, counsel failed to do so. Defendant argued, without citation to the Act, that this was the "strongest issue available" to him and that he was prejudiced by appellate counsel's failure to raise the issue. Defendant stated in the motion that:

"It would be a manifest miscarriage of justice not to allow leave to raise this issue instanter. Furthermore, permitting [him] to raise the issue at this time would promote judicial economy in that, if this issue is not addressed in this appeal, [he] might have a viable post-conviction claim of appellate counsel's ineffectiveness for failing to raise the issue in the defendant's direct appeal."

Defendant attached to the motion his signed affidavit, averring that he read and understood the "the above Petition for Post-Conviction Relief" and that "[a]ll of the facts presented in this Petition are true and correct to the best of my knowledge and belief." Although the notice of filing indicates that defendant sent three copies of the motion to this court, one to the State's Attorney's Office and one to the Office of the Appellate Defender, the motion was received by the circuit court as evidenced by the court's order dismissing the motion and now being appealed.

¶ 5 On January 8, 2014, before the circuit court issued its ruling on defendant's motion, he filed *pro se* the same motion in this court. We denied that motion.

¶ 6 On March 11, 2014, the circuit court issued a written order analyzing the motion as a postconviction petition under the Act and dismissing it as frivolous and patently without merit. The court found that the petition did not present the "gist" of a constitutional violation where defendant failed to attach any transcripts to demonstrate that the prosecutor's comments ever existed or substantially prejudiced defendant at trial. Accordingly, because defendant failed to show that the underlying claim of ineffective assistance of trial counsel would be meritorious, the court found that appellate counsel was not ineffective for failing to raise this issue on direct appeal. The court dismissed the motion and assessed a total of \$105 in filing fees and court costs against defendant under section 22-105 of the Code of Civil Procedure (Code) (735 ILCS 5/22-

105 (West 2014)): \$90 for filing a frivolous petition, and \$15 in mailing fees under section 27.2(a) of Illinois Clerks of Courts Act (705 ILCS 105/27.2(a) (West 2014)).

¶ 7 On April 30, 2014, defendant filed a *pro se* motion to vacate the court's March 11, 2014, order, arguing that he accidentally sent three copies of his "motion for leave to file supplemental issue on ineffective assistance of appellate counsel" to the clerk of the circuit court instead of the clerk of the appellate court as he intended. According to the proof of service, the motion to vacate was mailed on April 10, 2014, and, thus, was timely filed under the mailbox rule. See *People v. Shines*, 2015 IL App (1st) 121070, ¶ 31 (under the mailbox rule, pleadings are considered timely filed on the day they are placed in the prison mail system by an incarcerated defendant).

¶ 8 In the motion to vacate, defendant argued that his motion was sent to the circuit court by error and should have been disregarded or "returned to sender" and "never accepted (no cause of action)." He also argued that he did not intend to file a postconviction petition and that the trial court lacked jurisdiction to rule on his motion. In the alternative, defendant argued that the court erred in recharacterizing his initial motion as a petition under the Act without first giving him notice and an opportunity to amend or withdraw it. Defendant moved to court to either vacate its March 11, 2014, order or accept a notice of appeal attached to the motion.

¶ 9 The court denied defendant's motion to vacate. In doing so, the court stated:

\*\*\*\* Case of [defendant], a postconviction matter dismissed on the date of March 11, 2014, following the motion to vacate the order that I entered on 3-11-14. I did not consider this successive postconviction petition. I have no idea what he means in his motion to reconsider. Obviously, it's cut and paste from something else.

Case law he cites is irrelevant to this issue here. He's got the case pending on appeal right now that I did, in fact, deny the postconviction petition."

¶ 10 On appeal, defendant contends that the circuit court committed a procedural error by improperly considering his first *pro se* motion as a postconviction petition under the Act without admonishing him of its intent to do so under *Shellstrom*, 216 Ill. 2d at 53 and *Pearson*, 216 Ill. 2d at 66, and thereby affording him the opportunity to amend or withdraw his motion. Defendant also contends that we should vacate the court's assessment of \$105 in fees and costs.

¶ 11 The State responds that the trial court properly treated defendant's motion as a postconviction petition and did not recharacterize it as such so as to trigger the required admonishments under *Shellstrom* and *Pearson*.

¶ 12 Because defendant does not challenge the court's substantive findings, we will consider only the procedural issue raised. *People v. Helgesen*, 347 Ill. App. 3d 672, 675 (2004). Whether the trial court complied with the applicable procedure is a question of law which we review *de novo*. *Id.*

¶ 13 Here, we conclude we need not determine the propriety of the court's decision to treat defendant's motion as a postconviction petition where, after the court entered its March 11, 2014, order dismissing defendant's petition, defendant filed a *pro se* motion to vacate that order and withdraw his initial pleading. Instead, the two pleadings must be considered together.

¶ 14 In this court, both parties focus on defendant's initial pleading and ask whether the trial court erred when it treated it as a postconviction petition or whether it was some other type of pleading, the recharacterization of which as a postconviction petition, triggered the required admonishments pursuant to *Shellstrom* and *Pearson*. We conclude that focusing on this pleading

alone is inappropriate. Defendant is not appealing from the dismissal of a postconviction petition, rather he is appealing from the denial of his motion to vacate that dismissal and for leave to withdraw his initial pleading. Given the facts set forth in this subsequent motion to vacate, we find the trial court abused its discretion in denying the motion.

¶ 15 In so finding, we note that the problems defendant has encountered are of his own making. Defendant's pleadings are inartfully, and sometimes ambiguously drafted. Moreover, defendant's initial pleading was filed in the wrong court. That said, when defendant's motion to vacate is read together in context with his initial pleading, it is sufficiently clear that the trial court's denial of the relief sought constituted an abuse of discretion regardless of how the initial pleading was characterized. In his motion to vacate, defendant alleged that the initial pleading was intended for filing in the appellate court and sent to the trial court in error. This contention is supported by the record. First, copies of the pleading were, in fact, filed in this court and disposed of on the merits. Second, the caption on the motion clearly indicates that it was related to proceedings pending at the time in this court. Third, the notice of filing attached to the motion reflected this court's address and that copies were sent to, among others, the clerk of the appellate court. Finally, the relief requested, the presentation of an additional issue in defendant's appeal is something that, although ultimately improper, could only be granted by this court. The only potential ambiguity was created by defendant's use of a form affidavit verifying the pleading, but using the language associated with a postconviction petition.

¶ 16 This potential ambiguity is likely what led the trial court to treat the initial pleading as a postconviction petition. On appeal, the State focuses on the verification affidavit, isolates the initial pleading, and argues that this case does not fall within the purview of *Shellstrom* and

*Pearson* because there was no recharacterization of defendant's pleading where it was truly a postconviction petition. We find, however, that focusing on defendant's initial pleading in isolation is improper and likely to lead to the wrong result. Defendant's motion to vacate explains that the pleading was intended for filing in the appellate court—a fact borne out by its content. The motion to vacate also explains that it was filed in error with the circuit court—a fact borne out by careful examination of the notice of filing. When these facts, which were highlighted in the motion to vacate, are taken into account, the basis for allowing defendant's motion becomes clear.

¶ 17 The purpose of a motion to vacate, such as the one at issue here, is to ensure that substantial justice is done between the parties. Our supreme court in *Shellstrom* and *Pearson* made clear that the filing of an initial postconviction petition is an action that comes with risks, specifically the risk that issues not raised will be barred in the future by the doctrine of waiver, or at least subjected to the much more stringent cause and prejudice test for successive petition. *Shellstrom*, 216 Ill 2d at 56-7; *Pearson*, 216 Ill. 2d at 67. Here, defendant merely seeks to withdraw an erroneously filed pleading and vacate the order treating it as his initial postconviction petition. We believe that allowing him to do so advances substantial justice. The State suffers little or no prejudice as a result of allowing the correction of what was clearly a *pro se* defendant's clerical mistake. Defendant avoids application of the waiver rule in a situation where it was never contemplated that it should apply. Accordingly, we conclude that the trial court abused its discretion when it denied defendant's motion to vacate the court's March 11, 2014, order and withdraw his initial pleading.

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¶ 18 Having so found, we vacate the court's assessment of \$105 in fees and costs against defendant for filing a frivolous postconviction petition under the Act. See *People v. Sparks*, 393 Ill. App. 3d 878, 888 (2009) (vacating \$105 in fees and costs where the defendant presented the gist of a constitutional claim to avoid a dismissal of his petition as frivolous and patently without merit).

¶ 19 For the reasons stated, we reverse the order of the circuit court of Cook County denying defendant's motion to vacate the court's March 11, 2014, order and withdraw his *pro se* "motion for leave to file supplemental issue on ineffective assistance of appellate counsel instanter" which the court dismissed after analyzing it as a postconviction petition. We vacate the \$105 filing fee.

¶ 20 Reversed; fee vacated.