2016 IL App (2d) 140796-U
No. 2-14-0796
Order filed September 23, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Respondent-Appellee,	)	
v.	)	No. 01-CF-2523
JAMES W. ZOLLIECOFFER,	)	Honorable James C. Hallock,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court failed to admonish defendant concerning the consequences of recharacterizing his petition for relief from judgment under 735 ILCS 5/2-1401 to a petition under the Post Conviction Hearing Act in accordance with the supreme court's holding in *People v. Shellstrom*. We vacated the order dismissing defendant's post-conviction petition and remanded for a new second-stage hearing.

¶ 2 Defendant, James W. Zolliecoffer (defendant), appeals the second-stage dismissal of his post-conviction petition. Defendant contends that the trial court failed to adequately admonish him pursuant to *People v. Shellstrom*, 216 Ill. 2d 45 (2005), before recharacterizing his petition for relief from judgment as a post-conviction petition. We vacate and remand.

¶ 3 I. BACKGROUND

¶ 4 Following a bench trial on July 10, 2003, defendant was found guilty of first-degree murder and attempted armed robbery. At his sentencing hearing on August 29, 2003, the court sentenced defendant to 68 years in prison (43 years with an additional 25 years for personally discharging the firearm which killed the victim). Defendant also received a consecutive term of 12 years for the attempted armed robbery, giving him a total term of 80 years in prison. Defendant filed a motion to reconsider sentence which was denied on December 11, 2003. Defendant then filed a *pro se* direct appeal raising a litany of contentions of error. This court affirmed the judgment of the trial court. *People v. Zolliecoffer*, No 2-04-0019 (May 19, 2006) (Rule 23 Order).

¶ 5 On May 18, 2005, defendant filed a petition entitled, "Relief from a Void Judgment, pursuant to 735 ILCS 5/2-1401(f) (West 2000)." Defendant then filed a "Notice of Filing Post Conviction Hearing Petition" on July 18, 2006. The following day, July 19, 2006, the defendant filed another pleading entitled "Memorandum to Support Petition for Post-Conviction Relief from Judgement (sic)." This pleading stated the memorandum was filed in accordance with the Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq* (West 2004).

¶ 6 On August 24, 2006, an order docketing defendant's July 19, 2006, post-conviction petition was entered by Judge Phillip L. DiMarzio and a hearing was set for October 16, 2006. Defendant then filed a motion for appointment of counsel on September 6, 2006. Judge DiMarizio appointed counsel for defendant on November 20, 2006. On December 12, 2007, defendant filed a *pro se* "Motion to Show and Prove Counsel Ineffective." The case was reassigned to Judge James C. Hallock on March 18, 2013, following over six years of inaction for reasons unclear from the record.

¶ 7 On August 26, 2013, defendant's appointed post-conviction counsel filed a certificate of compliance with Supreme Court Rule 651(c). Defendant's appointed counsel filed a motion to withdraw as appointed counsel on September 11, 2013, stating that defendant's post-conviction petition was frivolous or without merit. The trial court denied this motion to withdraw on September 26, 2013.

¶ 8 Following a hearing on October 17, 2013, the trial court concluded that the court file contained only defendant's section 2-1401 petition for relief from judgment and a memorandum in support of a post-conviction petition, but no actual pending post-conviction petition. Defendant's appointed counsel told the trial court that he treated defendant's section 2-1401 petition and memorandum in support of a post-conviction petition as a single pleading brought as a post-conviction petition when he prepared his motion to withdraw as defendant's counsel. On January 15, 2014, the trial court, with defendant in attendance in open court, informed defendant that his section 2-1401 petition would be recharacterized as a petition under the Post Conviction Hearing Act (the Act). The trial court informed the defendant as follows:

> THE COURT: Here's what I am going to do. I don't have the court file here, but I remember reading the court file in detail. I remember reading Judge DiMarzio's order when I moved it into the second stage. He must have felt that the 1401 petition was a post-conviction petition. So the court will allow the Petitioner to rename his 1401 petition as a post-conviction petition, and further now that [defendant's counsel] is in the file and still in the file, before we go to the State, are you asking to amend that petition in some fashion?
>
> [DEFENDANT'S COUNSEL]: My client is nodding his head in the affirmative. You want to amend it?

THE DEFENDANT: No, not amend it, but he can -

[DEFENDANT'S COUNSEL]: Re-title it?

THE DEFENDANT: Re-title it.

THE COURT: We will re-title the 1401 as a post-conviction petition. There will be no amendment. So at this time then the State will be granted leave to file a responsive pleading to that pleading, which is now known as a post-conviction petition, ***.

¶ 9 On January 29, 2014, the State filed a motion to dismiss defendant's post-conviction petition. The trial court heard arguments on the State's motion to dismiss on May 1, 2014. On May 7, 2014, the trial court issued an order granting the State's motion to dismiss defendant's recharacterized post-conviction petition. However, the trial court continued the cause for status concerning the findings outlined in Judge DiMarzio's order of August 24, 2006. The issues raised by petitioner in his "memorandum of law in support of post-conviction petition", docketed by Judge DiMarzio's order, were not addressed by the trial court in its May 7, 2014 order. The State filed a motion to dismiss defendant's claims made in the memorandum and the trial court dismissed the clams on August 6, 2014. Defendant timely filed this appeal.

¶ 10 II. ANALYSIS

¶ 11 Before addressing the merits of defendant's appeal, we note that the State has argued in their brief on appeal that this cause should be dismissed for lack of jurisdiction. This court addressed the State's same argument in an order entered on May 17, 2016, where the State's motion to dismiss was denied. *People v. Zolliecoffer*, No.2-14-0796 (Order of May 17, 2016). We continue to find the State's jurisdictional arguments unpersuasive.

¶ 12 The State argues that defendant's pleadings were two different post-conviction petitions, each dismissed at separate second-stage, post-conviction proceedings. Following the dismissal

of defendant's recharacterized section 2-1401 petition on May 7, 2014, the order dismissing his petition was sent to him on May 14, 2014, along with a notice of his right to appeal. The State contends that defendant was required to file a notice of appeal within 30 days of the dismissal of the recharacterized section 2-1401 petition.

¶ 13 Section 122–7 of the Act provides that any "final judgment" entered upon a post-conviction petition "shall be reviewed in a manner pursuant to the rules of the Supreme Court." 725 ILCS 5/122–7 (West 2014). Illinois courts have held that an order that disposes entirely of a post-conviction petition is immediately appealable. *People v. Fikara*, 345 Ill. App. 3d. 144, 151 (2003). To preserve review of an order entirely disposing of a post-conviction proceeding, Supreme Court Rules 651(d) and 606(b) require the party seeking review to file a notice of appeal within 30 days of the entry of the final order disposing of the petition or within 30 days of the entry of the order disposing of a timely filed motion attacking the judgment. 134 Ill. 2d R. 651 (d); 188 Ill. 2d R. 606(b).

¶ 14 The trial court's order dismissing defendant's recharacterized section 2-1401 petition on May 7, 2014, was only a partial dismissal of his post-conviction claims. As such, an appeal from that order by defendant would have constituted an interlocutory appeal, forbidden by the rules of post-conviction proceedings. *People v. Garcia*, 2015 IL App (1st) 131180, ¶ 67. Defendant was required to wait until his post-conviction petition received an order disposing entirely of the issues raised. *Fikara*, 345 Ill. App. 3d at 151. The trial court noted in its May 7 dismissal order:

> "(As to the memo of law docketed as a "petition on August 24, 2006)
>
> The issues raised by the petition have yet to be addressed by the parties and the court finds they are still pending.

This cause is continued for status of Judge DiMarzio's findings outlined in the order of August 24, 2006. Cause is continued to June 5, 2014, ***."

The trial court disposed of defendant's remaining issues through its final judgment order on August 6, 2014. Thus, defendant had 30 days from the trial court's entry of the final order disposing of the petition to file notice of appeal. Defendant adhered to the requirements and this court was vested with jurisdiction over this appeal pursuant to Supreme Court Rule 651(a) and Section 122-7 of the Act.

¶ 15 We now turn to defendant's contention on appeal. Defendant contends that the trial court erred in failing to admonish defendant about the consequences of recharacterizing his petition for relief from judgment as required by *Shellstrom*. Defendant maintains that the trial court's failure mandates this cause be remanded for defendant to be properly admonished and to have the opportunity to amend or withdraw his petition for relief from judgment. As a consequence of the trial court's recharacterization of defendant's petition, we agree that he was entitled to the admonitions mandated by *Shellstrom.*

¶ 16 Whether the trial court has used the proper procedure when complying with the mandate in *Shellstrom* is reviewed *de novo*. *People v. Correador*, 399 Ill. App. 3d 804, 806 (2010).

¶ 17 The Act provides a remedy for defendants to challenge their convictions or sentences based on constitutional violations. *People v. Barrow,* 195 Ill. 2d 506, 518–19, (2001). When filing a subsequent petition, a defendant must show cause why the claim or claims were not raised in the first post-conviction petition and must show resulting prejudice. 725 ILCS 5/122–1(f) (West 2012). Because of this higher procedural bar, "our supreme court *** instituted certain safeguards to protect such criminal defendants from finding themselves unwitting petitioners under the Act." *People v. Escobedo,* 377 Ill. App. 3d 82, 87 (2007). When a

pleading is recharacterized as an initial post-conviction petition, to prevent unfairness to the defendant, the trial court therefore "*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 post-conviction petition will be subject to the restrictions on successive post-conviction 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 post-conviction petition that the litigant believes he or she has." (Emphasis added.) *Shellstrom,* 216 Ill.2d at 57.

¶ 18 In this case, *Shellstrom* required the trial court to admonish defendant that it intended to recharacterize the petition. The trial court did that. However, the trial court failed to warn defendant about the effects of its recharacterization. See *Shellstrom,* 216 Ill.2d at 57. Filed under section 2–1401, defendant's petition entitled "Relief from a Void Judgment, pursuant to 735 ILCS 5/2-1401(f) (West 2000)" is a cognizable action under Illinois law different from a post-conviction petition. See *Shellstrom,* 216 Ill.2d at 57. Under *Pearson,* the *Shellstrom* rule applies to pleadings filed pursuant to section 2–1401. See *People v. Pearson,* 216 Ill.2d 58, 67–69 (2005). Defendant was entitled to the admonitions mandated by *Shellstrom.*

¶ 19 However, our supreme court, in *Stoffel*, held that the concerns raised in *Shellstrom* do not apply when counsel is appointed, and the absence of admonitions in no way prejudices the defendant. *People v. Stoffel*, 239 Ill.2d 314, 328 (2010). In *Stoffel*, our supreme court noted that the *Shellstrom* rule contemplates a scenario where post-conviction counsel was never appointed, because the trial court summarily dismissed the defendant's *pro se* petition instead of advancing it to a second stage. *People v. Stoffel*, 239 Ill. 2d 314, 328 (2010). The court held in relevant part:

> "The *Shellstrom* admonitions are designed to protect the rights of *pro se* defendants and, in particular, to inform them of the limitation on filing successive post-conviction petitions and the need to amend their initial petition to include all possible post-conviction claims. [Citations.] But this is precisely the role performed by appointed counsel, who is required to consult with the defendant and make any amendments to the *pro se* petition that are necessary. [Citations.] Thus, as the appellate court below pointed out, the concerns raised in *Shellstrom* do not apply when counsel is present [Citations], and the absence of admonitions in no way prejudices the defendant. * * * [W]here, as here, a defendant's *pro se* petition is not summarily dismissed but is instead advanced for further review, and counsel is appointed to represent the defendant, *Shellstrom* admonitions are unnecessary." *Stoffel*, 239 Ill. 2d. at 328.

¶ 20 Taken at face value, a straightforward application of the *Stoffel* rule may appear appropriate here, because the "pleadings" were re-characterized as a post-conviction petition after the case had advanced to a second stage and post-conviction counsel had been appointed. However, our takeaway from *Stoffel* is that, where post-conviction counsel has been appointed and has complied with Rule 651(c), including making any necessary amendments to the *pro se* petition, it may be presumed that the defendant has not been prejudiced by the absence of the *Shellstrom* admonitions. Such presumptions cannot be made in this case.

¶ 21 Here, defendant was appointed post-conviction counsel in November 2006. After a series of continuances and additional time granted for defendant to file an amended petition, nothing happened until March 2013. Not until August 2013 did defendant's appointed counsel file a certificate of compliance with Rule 651(c). Two weeks after filing his 651(c) certificate, defendant's appointed counsel sought to withdraw as counsel pursuant to *People v. Greer*, 212

Ill. 2d 192 (2004), stating that defendant's post-conviction petition was frivolous or without merit. Rule 651(c) requires post-conviction counsel to make a showing in the record that he or she has (1) consulted with the petitioner to ascertain his allegations of deprivation of constitutional rights; (2) examined the record of proceedings at trial; and (3) made any amendments to *pro se* petitions that are necessary to adequately present the petitioner's allegations. *Id.* at 205. This third mandate does not include advancing frivolous or meritless claims as any amendments to such claims would not qualify as "necessary." *Id.* On the contrary, advancing such a claim might very well place counsel in violation of Illinois Supreme Court Rule 137 (eff. Jan. 4, 2013), which states that an attorney's signature on a pleading certifies that, after a reasonable inquiry, the attorney believes that the pleading is grounded in fact and warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. *Greer*, 212 Ill.2d at 205. The court concluded in *Greer* that nothing in the Act prevents appointed counsel from withdrawing if he or she determines that the defendant's petition is frivolous or patently without merit and that the attorney's ethical obligations therefore prohibit him or her from continuing representation. *Id.* at 209.

¶ 22 Additionally, post-conviction counsel stated in his Rule 651(c) certificate only that he had "*attempted* to consult with petitioner to ascertain his contentions of deprivation of constitutional rights by mail." Furthermore, post-conviction counsel did not certify that he had made any necessary amendments to the *pro se* petition. He instead stated, "With respect to consultations with petitioner regarding his contentions of deprivation of constitutionally-protected rights which led directly to his conviction herein, petitioner has responded by mail and it is apparent that petitioner will not accept counsel's opinions as to the posture of this post-conviction case."

¶ 23 There was obvious disagreement between post-conviction counsel and defendant regarding the merits of defendant's various claims. On August 24, 2006, Judge DiMarzio entered a written order concluding that defendant's ineffective assistance claim regarding the probable cause for his arrest "was not patently without merit." Judge DiMarzio accordingly docketed the "pleadings" for a second-stage post-conviction hearing. On August 26, 2013, following an unexplained seven-year gap in the court file, post-conviction counsel filed the puzzling Rule 651(c) certificate. But then two weeks later, on September 11, 2013, post-conviction counsel filed a motion to withdraw from the case pursuant to *Greer*. Judge Hallock's denial of the *Greer* motion could be considered an affirmation of Judge DiMarzio's conclusion that defendant's "pleadings" were not patently without merit. See *People v. Kuehner*, 2015 IL 117695, ("where a *pro se* post-conviction petition advances to the second stage on the basis of an affirmative judicial determination that the petition is neither frivolous nor patently without merit, appointed counsel's motion to withdraw must contain at least some explanation as to why all of the claims set forth in that petition are so lacking in legal and factual support as to compel his or her withdrawal from the case").

¶ 24 We are troubled by the general state of confusion surrounding this case in the trial court. The trial court denied the *Greer* motion on September 26, 2013, and gave the State 60 days to file an answer or a motion to dismiss. Interestingly, nobody in the court room knew exactly *what* it was that the State would be responding to. The ASA made this point when the parties reconvened on October 17, 2013. The ASA asked the trial court for clarification, noting that, despite the § 2-1401 motion and the memorandum, there was no actual post-conviction petition in the court file. The ASA additionally pointed out that, because post-conviction counsel had filed a *Greer* motion to withdraw, an amended petition was never filed. Hence, the ASA

concluded, there was nothing for him to reply to. Finally, on January 15, 2014, the trial court informed defendant that he would be allowed to rename his § 2-1401 petition as a post-conviction petition. In doing so, the trial court asked defendant whether he wanted to amend the petition. Defendant answered that he did not want his post-conviction counsel to amend it, but that he would allow counsel to "re-title" it. The State then moved to dismiss the *pro se* petition and the trial court granted the State's motion.

¶ 25 While it is true that defendant had an opportunity to amend the petition, we do not believe it was a meaningful opportunity. After all that had transpired, it is not suprising that defendant declined to allow post-conviction counsel to amend his petition. Regardless, given Judge DiMarzio's finding that the original "pleading" had merit and Judge Hallock's denial of the *Greer* motion, post-conviction counsel abdicated his responsibility to make any necessary amendments to the *pro se* petition. See *People v. Bashaw*, 361 Ill. App. 3d 963, 969 (2005) (the decision to amend a post-conviction petition is similar to the strategic matters entrusted to counsel due to the required exercise of an attorney's professional judgment, and that an attorney who surrenders the decision to the defendant does not fulfill his or her duty to exercise that professional judgment). Furthermore, *Stoffel* does not contemplate Rule 651(c) deficiencies such as the "attempted to consult" language and the absence of any certification regarding the necessary amendments. We cannot understand why post-conviction counsel file the Rule 651(c) certificate in the first place to only turn around and file a *Greer* motion.

¶ 26 In sum, the circumstances of this case justify remanding the cause for a new second-stage proceeding with newly appointed post-conviction counsel. A newly-appointed attorney can then file an amended petition and a proper Rule 651(c) certificate. In line with *Stoffel*, there would be

a presumption that defendant has not been prejudiced by the absence of the *Shellstrom* admonitions.

¶ 27 III.CONCLUSION

¶ 28 For the reasons stated, we vacate the judgment of the circuit court of Kane County and remand the cause for a second-stage proceeding.

¶ 29 Vacated and remanded with instructions.