FIRST DIVISION
May 14, 2018

No. 1-15-1953

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appelllee,	)	Cook County.
	)	
v.	)	No. 95 CR 20771
	)	
TYJUAN TURNER,	)	Honorable
	)	Brian Flaherty,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 Defendant Tyjuan Turner appeals from the second-stage dismissal of his petition for postconviction relief. Mr. Turner was convicted after a bench trial of first degree murder and attempted murder and received consecutive sentences of 40 years and 6 years, respectively. We affirmed those convictions on direct appeal. In his postconviction petition, Mr. Turner argued that his consecutive sentences were not authorized by statute because his crimes were part of a

single course of conduct and there was no evidence of severe bodily injury. The circuit court dismissed Mr. Turner's petition as untimely and barred by this court's decision on direct appeal.

¶ 2 Mr. Turner acknowledges both that his postconviction petition was untimely and that the issue he raised in it could have been but was not raised in his direct appeal. He argues, however, that the circuit court erred when it dismissed his petition because at that time—which was prior to our supreme court's decision in *People v. Castleberry*, 2015 IL 116916—a void sentence could be challenged at any time. Mr. Turner also recognizes that *Castleberry*, which eliminated the void sentence rule, applies retroactively to his claim—curing any error in the circuit court's dismissal of his petition. He asks us, however, to take the unusual step of reversing the dismissal of his petition anyway, to give him the opportunity to either seek leave to amend his petition to include allegations addressing timeliness and forfeiture, or to withdraw the petition. As Mr. Turner acknowledges, if we do not afford him this relief, he may still seek leave to file a subsequent postconviction petition, but he would need to make a threshold showing of cause and prejudice. See *People v. Jellis*, 2016 IL App (3d) 130779, ¶¶ 26, 29 (noting that a petitioner shows cause "by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings" and prejudice "by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process").

¶ 3 We are sympathetic to Mr. Turner's situation. As his counsel made clear at oral argument in this matter, he is not asking to be excused from meeting the applicable legal standard. His argument is that where, as here, a significant change in the law has altered that standard, a defendant's initial attempt to meet the new standard should not be considered a subsequent petition subject to a threshold showing of cause and prejudice.

¶ 4 Although, from a purely equitable standpoint, this argument has some inherent appeal, we are simply not at liberty to grant Mr. Turner the relief that he requests. Our supreme court has made quite clear that its holding in *Castleberry* applies retroactively. *People v. Price*, 2016 IL 118613, ¶ 27. And application of that holding to this case cures any error in the circuit court's dismissal of Mr. Turner's petition. As a court of review, we do not have the power to reverse the judgment of a lower court where there has been no reversible error. Accordingly, we must affirm the judgment of the circuit court.

¶ 5 BACKGROUND

¶ 6 The facts leading to Mr. Turner's arrest and convictions for first degree murder and attempted murder were set out in detail in this court's unpublished order resolving Mr. Turner's direct appeal. *People v. Turner*, No. 1-97-3997, 1-6 (1999) (unpublished order under Illinois Supreme Court Rule 23). Those underlying facts are, for the most part, irrelevant to this appeal. We address them here only briefly to put Mr. Turner's petition into context.

¶ 7 At trial, witnesses identified Mr. Turner as one of several individuals who fired handguns during a dispute between rival gangs that occurred on June 20, 1995. Two individuals were shot during that dispute: Shaquita Fleming, who died of her injuries, and Maurice Scott, who was shot in the leg.

¶ 8 Mr. Scott testified at trial that he was running away from the altercation when he was shot in the back of his right leg and fell. He was taken by ambulance to St. James Hospital, where he was treated. Mr. Scott provided no further information regarding what treatment he received or how long he remained at the hospital. He confirmed, however, that later that same day he spoke to two Chicago Heights police officers at the police station.

¶ 9 The circuit court found Mr. Turner guilty of the murder of Ms. Fleming and the

attempted murder of Mr. Scott. It sentenced him to 40 years in prison on the murder charge and 6 years on the attempted murder charge, with the sentences to be served consecutively.

¶ 10 In his direct appeal, Mr. Turner argued that his convictions should be reversed because the State's evidence was insufficient for a finding of guilt beyond a reasonable doubt, the circuit court improperly shifted the burden of proof from the State to Mr. Turner, and his sentences were excessive because the circuit court failed to properly consider his rehabilitative potential and improperly considered the victim's death, which was implicit in the murder charge, as an aggravating factor for sentencing purposes. *Id.* at 1-2. We rejected each of those arguments and affirmed the judgment of the circuit court. *Id.* at 6.

¶ 11 On January 25, 2010, more than 10 years after the resolution of his direct appeal, Mr. Turner filed a *pro se* postconviction petition. In it he argued that his consecutive sentences were not authorized by statute and were thus void. Mr. Turner acknowledged that his petition was untimely, but argued that, pursuant to our supreme court's decision in *People v. Arna*, 168 Ill. 2d 107 (1995), he could challenge a void sentence at any time. Mr. Turner's petition was advanced to the second stage and counsel was appointed to represent him.

¶ 12 The State moved to dismiss Mr. Turner's petition, arguing that he had not included in it any allegations demonstrating a lack of culpable negligence to excuse the untimeliness of his petition. The State also argued that, because Mr. Turner could have, but did not, raise the issue of his purportedly void sentence in his direct appeal, he had forfeited that issue.

¶ 13 At the hearing on the State's motion, Mr. Turner's appointed counsel elaborated on his argument, noting that, because Mr. Turner's crimes were committed as part of a single course of conduct and there was no evidence of severe bodily injury to Mr. Scott, the statutory criteria for consecutive sentencing had not been met.

¶ 14 The State acknowledged that this was "clearly a single course of conduct case," but reiterated its argument that Mr. Turner's petition was untimely. In addition to forfeiture, the State also suggested that the appellate court had in fact already decided the issue, when it determined that Mr. Turner's sentence was not excessive based on the applicable mitigating and aggravating factors. Summing up his argument, the assistant state's attorney stated: "should-have/could-have been raised on appeal, was raised on appeal, is waived and forfeited."

¶ 15 The circuit court dismissed Mr. Turner's petition, concluding both that it was untimely and that his consecutive sentence argument was barred by *res judicata*, because the propriety of Mr. Turner's sentence had already been raised on direct appeal. The court also rejected a second argument Mr. Turner made in his petition, based on the Untied States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which Mr. Turner does not raise in this appeal.

¶ 16 JURISDICTION

¶ 17 The circuit court granted the State's motion to dismiss Mr. Turner's postconviction petition on May 29, 2015, and Mr. Turner timely filed his notice of appeal on June 19, 2015. Although that notice of appeal incorrectly indicated that the circuit court's judgment of October 30, 1997, was the order being appealed, we granted Mr. Turner's motion for leave to file an amended notice of appeal, which correctly indicates that Mr. Turner is appealing the May 29, 2015, dismissal of his postconviction petition. Jurisdiction is thus proper pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Supreme Court Rules 606 and 651, governing criminal appeals and appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 606 (eff. Dec. 11, 2014); R. 651(a) (eff. Feb. 6, 2013)).

¶ 18 ANALYSIS

¶ 19 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008))

establishes procedures by which an incarcerated criminal defendant may challenge his conviction or sentence for violations of his state or federal constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2008); *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). "A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings." *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Its scope is limited to constitutional issues that were not, and could not, have been previously adjudicated. *Whitfield*, 217 Ill. 2d at 183. Thus, the consideration of issues already decided by a reviewing court is barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal but were not are forfeited. *Id.* To obtain postconviction relief, a defendant must establish that he suffered a substantial deprivation of his constitutional rights in the proceedings resulting in the conviction or sentence he seeks to challenge. *People v. Caballero*, 228 Ill. 2d 79, 83 (2008).

¶ 20 Except where a claim of actual innocence is advanced, a postconviction petition must be filed within 6 months of the conclusion of the defendant's direct appeal. 725 ILCS 5/122-1(c) (West 2008). Untimely petitions will only be considered on a "showing that the delay was not due to [the petitioner's] culpable negligence." *Id.*

¶ 21 Postconviction proceedings occur in three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). At the first stage, the circuit court determines, without any input from the State, whether the defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(2) (West 2008); *Id.* At the second stage, the circuit court appoints counsel to represent the defendant—and, if necessary, to file an amended petition—and the State may file a motion to dismiss the petition. *Id.*; 725 ILCS 5/122-4, 5 (West 2008). Only if the petition and accompanying documentation make a substantial showing of a constitutional violation will the defendant proceed to the third stage, an evidentiary hearing on the merits. *People v. Silagy*, 116 Ill. 2d 357,

365 (1987); 725 ILCS 5/122-6 (West 2008). In determining whether to grant a third-stage hearing, the circuit court takes all well-pleaded facts in the petition and in any accompanying affidavits as true (*People v. Evans*, 186 Ill. 2d 83, 89 (1999)) and does not make findings of fact or credibility determinations (*People v. Childress*, 191 Ill. 2d 168, 174 (2000)).

¶ 22 A. Underlying Sentencing Claim

¶ 23 Mr. Turner's underlying claim for postconviction relief is that the consecutive sentences he received were not authorized by statute. Although the State does not address the merits of this claim in its briefs, we review the dismissal of a postconviction petition without an evidentiary hearing *de novo* (*People v. Sanders*, 2016 IL 118123, ¶ 31) and may affirm on any basis supported by the record (*People v. Jones*, 399 Ill. App. 3d 341, 359 (2010)). If Mr. Turner's sentencing claim lacks merit as a matter of law, dismissal of his petition was warranted, and we could affirm on that basis, without reaching what Mr. Turner himself describes as the "unusual circumstance" he finds himself in due to changes in the law post-dating the dismissal of his petition.

¶ 24 At the time of Mr. Turner's sentencing, section 5-8-4 of the Unified Code of Corrections provided as follows:

> "The court shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective, unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury, or where the defendant was convicted of [certain sex crimes not at issue here], in which event the court shall enter sentences to run consecutively." 730 ILCS 5/5-8-4(a) (West 1998).

¶ 25 It is clear from the record—as the State agreed at the hearing on its motion to dismiss Mr. Turner's petition—that Mr. Turner's convictions both stemmed from "a single course of conduct during which there was no substantial change in the nature of the criminal objective (*id.*)." It is also clear that Ms. Fleming suffered severe bodily injuries that caused her death. First degree murder, however, is its own class of felony; it is not considered a Class X or Class 1 felony. 730 ILCS 5/5-5-1(b) (West 1994). The triggering felony for purposes of consecutive sentencing must therefore be the attempted murder of Mr. Scott. See *People v. Vincent*, 226 Ill. 2d 1, 18 (2007) (noting that attempted murder is a Class X felony that can trigger consecutive sentencing). And our supreme court held in *People v. Whitney*, 188 Ill. 2d 91, 98-99 (1999), that the severe bodily injury contemplated in section 5-8-4 must be inflicted in connection with the triggering Class X or Class 1 felony.

¶ 26 We agree with Mr. Turner that, apart from Mr. Scott's testimony at trial that he was treated for a gunshot wound, the State presented no evidence regarding the severity of that injury. Mr. Turner correctly notes that gunshot wounds are not *per se* severe bodily injuries. See, *e.g.*, *People v. Jones*, 323 Ill. App. 3d 451, 461 (2001) (concluding that a " 'grazed-type' gunshot wound" requiring an adhesive bandage was not a severe bodily injury); *People v. Ruiz*, 312 Ill. App. 3d 49, 63 (2000) (concluding that a gunshot wound to the knee not requiring immediate medical treatment and that was "barely visible" in a photograph taken the day it was inflicted "was not a severe bodily injury for sentencing purposes"); *People v. Murray*, 312 Ill. App. 3d 685, 694 (2000) (concluding that a gunshot wound resulting in a fractured big toe, where the victim was released from the hospital after only a few hours, was not a severe bodily injury). Under these circumstances, we cannot say that Mr. Turner's petition was properly dismissed on the basis that his underlying sentencing claim lacked merit.

¶ 27 After our supreme court's decision in *Castleberry*, 2015 IL 116916, however, we cannot say that Mr. Turner's petition was improperly dismissed. It was filed more than 6 months after the conclusion of Mr. Turner's direct appeal, with no showing that Mr. Turner's culpable negligence was not the cause of the delay, and Mr. Turner forfeited his claim that he was illegally sentenced by failing to raise it on direct appeal. *Castleberry* eliminated the void sentence rule that Mr. Turner relied on in his petition to overcome these obstacles. *Castleberry*, 2015 IL 116916, ¶ 19. And our supreme court has made it clear that *Castleberry* applies retroactively. *People v. Price*, 2016 IL 118613, ¶ 27.

¶ 28 Mr. Turner recognizes all of this. He nevertheless asks us to reverse the judgment of the circuit court so that he can seek leave to amend his postconviction petition to include allegations that were unnecessary at the time of filing but that are now prerequisites to overcoming the timeliness and forfeiture bars to consideration of the merits of his petition. Mr. Turner alternatively requests an opportunity to seek leave to withdraw his petition. In essence, Mr. Turner is asking us to return him to the point in his circuit court proceeding before final judgment was entered against him where, under the Post-conviction Act, the circuit court could have, in its discretion, allowed him to withdraw or amend his petition. 725 ILCS 5/122-5 (West 2016).

¶ 29 B. Remand to Allow Mr. Turner to Amend or Withdraw His Postconviction Petition

¶ 30 In our view, the issue on appeal is a very narrow one. May we remand to give Mr. Turner an opportunity to seek leave to amend or withdraw his petition in the absence of reversible error by the circuit court? The argument Mr. Turner makes is essentially an equitable one. Under the law as it existed when he filed his petition, a void sentence could be challenged at any time (see *Arna*, 168 Ill. 2d at 113), and Mr. Turner fashioned his petition accordingly, specifically citing

Arna to eliminate the need for allegations addressing timeliness and forfeiture. Mr. Turner acknowledges that our supreme court's decision in *Castleberry*, 2015 IL 116916, ¶ 19 (2015), which eliminated the void sentence rule that he relied on in his petition, applies retroactively (see *Price*, 2016 IL 118613, ¶ 27). Accordingly, he agrees that, although the circuit court's dismissal of his petition was incorrect at the time, changes in the law that apply retroactively now make that decision a correct one.

¶ 31 What Mr. Turner seeks is not for us to consider his petition under pre-*Castleberry* law, but, because the requirements to survive dismissal have changed, for us to remand the case and give him "an opportunity to plead facts and legal claims to address both timeliness and waiver [forfeiture]." In other words, Mr. Turner wants a chance to amend his petition to allege (1) that his late filing was not the result of his own culpable negligence, and (2) that his appellate counsel was ineffective for failing to raise the unauthorized nature of his consecutive sentences in his direct appeal. If he is unable to propose such amendments, he wants the opportunity to withdraw his petition, so that any future postconviction petition he may file will not be considered a subsequent petition having to satisfy the cause-and-prejudice test.

¶ 32 In support of this request, Mr. Turner relies on *People v. Pearson*, 216 Ill. 2d 58 (2005). In that case, the circuit court chose to recharacterize the defendant's petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401) (West 2000)) as a successive postconviction petition, then summarily dismissed it for failing to meet the rigorous cause-and-prejudice standard applicable to successive petitions. *Pearson*, 216 Ill. 2d at 68. Our supreme court found nothing wrong with the recharacterization, but concluded that the defendant should have been given notice and an opportunity to amend or withdraw his petition. *Id.* at 68. The court relied on its prior decision in *People v. Shellstrom*, 216 Ill. 2d 45, 51 (2005),

in which the circuit court recharacterized a defendant's petition for mandamus as a postconviction petition and summarily dismissed it.

¶ 33 We agree with Mr. Turner that, as a result of the supreme court's holding in *Castleberry*, his petition must now be assessed according to a standard he had no reason to foresee when he filed it. The defendants in *Pearson* and *Shellstrom* faced a similar situation, caused by the recharacterization of their pleadings by the circuit court. And in both of those cases our supreme court found no error in the circuit court's recharacterization of the defendant's pleading. *Pearson*, 216 Ill. 2d at 66-67; *Shellstrom*, 216 Ill. 2d at 53. As the court has made clear in later cases, because section 122-1(d) of the Post-Conviction Act is permissive (see 725 ILCS 5/122-1(a)(1)(d) (West 2005) (providing that a circuit court "need not evaluate" a *pro se* defendant's pleadings to determine if they should be treated as postconviction petitions)), a circuit court may—but has no obligation to—recharacterize a defendant's pleading as a postconviction petition. *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010). A decision to recharacterize a petition or not is thus one that "may not be reviewed for error." *Id.*

¶ 34 Just as in *Pearson* and *Shellstrom*, there is no reversible error in this case. This is of course due, not to the permissive nature of a statute, but to the retroactive application of *Castleberry*. Mr. Turner urges us to do what our supreme court did in *Pearson* and *Shellstrom* and vacate the circuit court's judgment anyway. He argues that the same equitable considerations the supreme court found persuasive in those cases apply equally to this case. This may be so. But Mr. Turner fails to recognize an important distinction between those cases and this one. In both *Pearson* and *Shellstrom*, the supreme court vacated the circuit court's judgment in the absence of error and remanded with instructions to the circuit court *as an exercise of its supervisory authority*. *Pearson*, 216 Ill. 2d at 67 (quoting *Shellstrom*, 216 Ill. 2d at 51 (setting out,

"[p]ursuant to [its] supervisory authority," the new rule that a circuit court must provide notice and an opportunity to withdraw or amend when a petition is recharacterized)).

¶ 35 Supervisory authority is a special power granted to our supreme court by the Illinois Constitution. See Ill. Const. 1970, art. VI, § 16. It is "an extraordinary power" (internal quotation marks omitted), pursuant to which that court may exercise "general administrative and supervisory authority over all courts" in Illinois. *McDunn v. Williams*, 156 Ill. 2d 288, 300-301 (1993). As an intermediate appellate court, we lack similar authority. The supreme court made this quite clear in *People v. Golden*, 229 Ill. 2d 277 (2008), a case we find applicable here. In *Golden*, the circuit court granted the defendants' postconviction petitions, but denied them the specific relief that they requested. *Id.* at 280. The appellate court affirmed the circuit court's order but remanded with instructions that the defendants be allowed to file successive postconviction petitions restating their claims and requesting different relief. Our supreme court reversed, finding the appellate court had no authority to remand in the absence of reversible error. *Id.* at 281. As the court explained:

> "[w]hen the appellate court concluded that [the circuit court's] order was correct, there was nothing left to remand. The appellate court's instructions on how petitioners should proceed, though laudable, were unnecessary and improper. The remand order was effectively an exercise of supervisory authority the appellate court does not possess." *Id.*

¶ 36 We conclude that what Mr. Turner asks us to do in this case—to remand, in the absence of reversible error, with instructions that he be allowed to seek leave to amend or withdraw his initial postconviction petition—would be a similar exercise of supervisory authority that we simply do not have. Mr. Turner may seek such relief from our supreme court if he chooses. In the alternative, he may seek leave in the circuit court to file a successive petition, for which he

will need to make a threshold showing of cause and prejudice. We express no opinion regarding whether he will be able to do so, as that issue is not before us.

¶ 37 CONCLUSION

¶ 38 Accordingly, we affirm the circuit court's dismissal of Mr. Turner's postconviction petition at the second stage.

¶ 39 Affirmed.