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2019 IL App (3d) 170359-U

Order filed June 14, 2019

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Mercer County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0359
LUCIEN SCOTT McARTHUR,	)	Circuit No. 03-CF-77
Defendant-Appellant.	)	Honorable James G. Conway, Judge, Presiding.

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

**ORDER**

- ¶ 1 *Held:* Circuit court erred in dismissing defendant's recharacterized successive postconviction petition on timeliness grounds for filing of section 2-1401 petitions.
- ¶ 2 Defendant, Lucien Scott McArthur, appeals following the combined dismissal of three postconviction filings. One of those filings was a section 2-1401 petition (see 735 ILCS 5/2-1401 (West 2002)) that the circuit court subsequently recharacterized as a successive postconviction petition. Defendant argues on appeal that the court's dismissal of that petition based upon the

limitations period of section 2-1401 was erroneous. We reverse and remand for further proceedings.

¶ 3

## I. BACKGROUND

¶ 4

Defendant pled guilty in 2004 to four counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2002)). In exchange for the plea, the State dropped 17 other counts of criminal sexual assault and requested a sentencing cap of 50 years' imprisonment. The circuit court sentenced defendant to 12 consecutive years on each count, resulting in an aggregate sentence of 48 years' imprisonment.

¶ 5

Defendant filed a direct appeal, but did not obtain any relief. *People v. McArthur*, No. 3-05-0384 (2006) (unpublished order under Supreme Court Rule 23). He filed a postconviction petition in 2007, which the circuit court dismissed at the second stage of proceedings. This court affirmed that judgment as well. *People v. McArthur*, No. 3-09-0617 (2011) (unpublished order under Supreme Court Rule 23).

¶ 6

On December 1, 2014, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (see 735 ILCS 5/2-1401(West 2002)), which is the subject of the present appeal. Defendant alleged in the petition that he had been interrogated in violation of *Miranda* and that he suffered from a mental disorder that rendered his confession involuntary. He alleged that these issues rendered his conviction void.

¶ 7

On July 27, 2015, defendant filed a motion for leave to file a successive postconviction petition. In that motion, defendant raised multiple arguments with respect to his sentencing. Specifically, he argued that he should not have been subject to mandatory consecutive sentences because the change in the law that would make his sentences mandatory came into effect in the middle of the course of conduct that gave rise to the charges. On June 8, 2016, defendant filed an

amended motion in which he further elaborated upon the sentencing issues raised in his previous motion.

¶ 8 On September 6, 2016, no action having been taken on his three filings, defendant filed a motion for supervisory order in the supreme court. The motion requested that the supreme court issue an order compelling the Mercer County circuit court to rule upon those filings. A docket entry for September 28, 2016, states: “Judge Zimmer given Vol. 2 of file. Court became aware of 17 correspondences , including at least 6 Motions within last 24 hrs, which court had not previously seen or been made aware of.” The docket entry also indicated that Dan Dalton was appointed as defendant’s attorney.

¶ 9 On December 29, 2016, defendant filed a *pro se* motion to dismiss counsel and proceed *pro se*. In the motion, defendant alleged that he had yet to have any contact with his attorney

¶ 10 On January 30, 2017, while defendant’s *pro se* motion to dismiss counsel remained pending, the circuit court filed a document titled “Enlarged Findings and Opinion RE: Emergency Orders of 9/28/2016.” In the filing, the court indicated that defendant’s three prior filings had not come to the attention of the court because of “the Circuit Clerk’s failures” to forward them. The court continued:

“In order to assure that Defendant’s statutory rights are observed, the Court found it necessary to treat the filing captioned ‘Void Judgment — 2-1401(f)’ as a successive Post Conviction Petition for which leave to file should be granted [citation]; allow the successive Petition to be docketed for further consideration [citation]; grant the requested appointment of counsel [citation]; and set status on October 4, 2016. Attorney D.P. Dalton was appointed.”

The court explained that these orders had been made on September 28, 2016. The court concluded: “This case is advanced to the second stage.”

¶ 11 The court discussed defendant’s *pro se* motion at a February 15, 2017, hearing. While addressing defendant, the court reminded him of the procedural posture of the case, reiterating many of the observations originally made in the court’s “Enlarged Findings.” The court informed defendant: “I determined that the only thing to do with those items \*\*\* that were pleadings that you have submitted after December 2014 in and after December 2014 was to advance this matter immediately to the second stage[.]” The court reminded defendant that it had recharacterized his section 2-1401 petition into a successive postconviction petition, and that his motion for leave to file a successive postconviction petition was also granted.

¶ 12 Turning back to the *pro se* motion to dismiss counsel, the court informed defendant that if it granted that motion, defendant would only “be allowed to file one more thing between now and then, and that’s what’s called a reply, a reply brief.” Defendant indicated that he still wished to proceed *pro se*, and the court granted his motion, dismissing appointed counsel.

¶ 13 On March 3, 2017, defendant filed a motion urging the court to reconsider its recharacterization of his section 2-1401 petition as a successive postconviction petition. In the motion, defendant argued that any recharacterization must be done within 30 days of filing. In a verification affidavit attached to his motion, defendant asserted that the circuit court’s February 15th directive that defendant was barred from filing anything other than a reply brief was in violation of due process.

¶ 14 On March 23, 2017, the State filed a motion to dismiss defendant’s postconviction petition. Defendant filed a reply to the State’s motion on April 7, 2017. In his reply, defendant

continued to assert that the court's recharacterization had been in error under Supreme Court Rule 101(d).

¶ 15 A hearing was held on May 8, 2017. At that hearing, defendant continued to argue that the court had erred in recharacterizing his section 2-1401 petition. He argued that the court was required to admonish him when it recharacterized his section 2-1401 petition. The court told defendant that his recharacterization argument based on Rule 101(d) was "without merit." The parties proceeded to argue the merits of defendant's substantive claims.

¶ 16 On May 24, 2017, the court filed a written order stating its findings. In the order, the court began by summarizing the procedure that had led the case to that point. The court wrote that it had been "compelled to advance the three substantive filings to the second stage\*\*\*." Substantively, the court divided its order into two "counts," labeled as "Count 1 (07/27/15 filing)" and "Count 2 (2-1401 filing)." The court dismissed the arguments under "Count 1" as forfeited and conclusory.

¶ 17 With respect to "Count 2," the court wrote that "Defendant objects to the dismissal of what he conceives to be his 735 ILCS 5/2-1401 claim to have his judgment and sentence vacated as void." The court observed that defendant's filing had come "long after" the two year limitations period contemplated by section 2-1401. The court concluded: "[T]he 'Section -1401' Petition's allegations were, and are, subject to summary dismissal."

¶ 18 In a multipage footnote in the order, the court seemed to address the recharacterization issue. The court observed that defendant "was trying to mix apples and oranges in his desired remedies." The court continued: "The record [defendant] wishes the Courts to brew promises to be a murky juice, if his three substantive filings are not treated as a single Post-Conviction Petition consisting of 'Count 1' and 'Count 2.' ". The court concluded:

“[S]ince leave to file the Second Successive Petition was being allowed in light of the above conclusions, that an additional notice of intent to recharacterize (to trigger the second and third *Shellstrom* requirements) would be a nugatory and unnecessary act; especially when Second Stage counsel was simultaneously appointed, and Defendant vigorously insisted on counsel being relieved, without advising Defendant on possible amendments. Thus, the Court did not inattentively fail to give those *Shellstrom* notices in a prejudicial way to defendant.”

¶ 19

## II. ANALYSIS

¶ 20

On appeal, defendant argues that the circuit court erred by dismissing his December 1, 2014, filing based on the limitations period found in section 2-1401, where the court had previously recharacterized that filing as a successive postconviction petition. The State does not dispute that a second-stage postconviction petition may not be dismissed on timeliness grounds. However, the State contends that the circuit court granted defendant’s motion to reconsider, effectively transforming defendant’s filing once again into a section 2-1401 petition. Thus, the State argues, the court did not err in applying the limitations period of section 2-1401.

¶ 21

Section 2-1401 of the Code provides the means by which a defendant may petition for relief from a final judgment more than 30 days after the entry thereof. 735 ILCS 5/2-1401(a) (West 2014)). That section demands that any such petition be filed within two years of the judgment being attacked, with exceptions provided for periods of disability, duress, or fraudulent concealment. *Id.* 2-1401(c). A successive postconviction petition, in contrast, may only be filed when leave is granted by the court. 725 ILCS 5/122-1(f) (West 2014). There is no limitation period on the filing of a successive postconviction petition; rather, a petitioner must demonstrate cause and prejudice for failing to bring his claims earlier. *Id.*

¶ 22 In *People v. Stoffel*, 239 Ill. 2d 314 (2010), the circuit court did not explicitly recharacterize the defendant’s section 2-1401 petition. However, both the court and defense counsel treated the filing as a postconviction petition throughout the proceedings. *Id.* at 327. The court subsequently summarily dismissed the filing, opining that defense counsel could not “magically transform a pleading filed pursuant to 735 ILCS 5/2-1401 as being filed pursuant to 725 ILCS 5/122-1.” *Id.* at 321.

¶ 23 The *Stoffel* court first found that the circuit court had treated the defendant’s filing as a postconviction petition that had survived first-stage summary dismissal. *Id.* at 327. Accordingly, the circuit court’s later reference to that filing as a section 2-1401 petition was error. *Id.* at 329. The *Stoffel* court reversed,

“not because the trial court in its final docket entry failed to ‘recharacterize’ defendant’s pleading, but because the trial court failed to offer any reasonable basis for treating the pleading as a section 2-1401 petition after the pleading had *already* been ‘recharacterized’ as a postconviction petition and survived summary dismissal.” *Id.*

¶ 24 The holding in *Stoffel* applies with greater force in the present case. The circuit court here did not merely treat defendant’s December 1, 2014, filing as a successive postconviction petition, it informed defendant explicitly and repeatedly that it had recharacterized his section 2-1401 petition. Having recharacterized the defendant’s section 2-1401 petition into a postconviction petition that had advanced to the second stage, the court erred when it dismissed that petition on grounds found in section 2-1401 of the Code.

¶ 25 To be sure, nothing in *Stoffel* would render the circuit court unable to unrecharacterize a petition on the defendant’s motion. However, we reject the State’s contention that that is what

the court did here. The record contains no order granting defendant's motion to reconsider. Indeed, it appears that motion was never ruled upon in any formal capacity. At the hearing on that motion, however, the court told defendant that his argument in favor of unrecharacterization was meritless. Moreover, in its final order, the court seemed to reemphasize its recharacterization. It stated that it had forwarded "the three substantive filings to the second stage[.]" Further, the court criticized defendant's continued insistence that his filing be treated as a section 2-1401 petition by stating: "The record [defendant] wishes the Courts to brew promises to be a murky juice, if his three substantive filings are not treated as a single Post-Conviction Petition[.]"

¶ 26 In short, the court in the instant case never explicitly nor implicitly reconsidered its recharacterization of defendant's December 1, 2014, filing. The court was, however, consistent in referring to that filing as a successive petition that had been advanced to the second stage. Accordingly, the court committed error when it dismissed defendant's successive postconviction petition on the statutory grounds found in section 2-1401.

¶ 27 The State argues in the alternative that even if the circuit court did not unrecharacterize the petition, it nevertheless included alternate grounds in the footnote of its written order implying that "defendant's argument would not have offered him any relief even if defendant's 2-1401 petition had been considered a postconviction petition." The State contends that the following excerpt from the court's footnote is indicative of this alternative ruling:

"[S]ince leave to file the Second Successive Petition was being allowed in light of the above conclusions, that an additional notice of intent to recharacterize (to trigger the second and third *Shellstrom* requirements) would be a nugatory and unnecessary act; especially when Second Stage counsel was simultaneously



appointed, and Defendant vigorously insisted on counsel being relieved, without advising Defendant on possible amendments. Thus, the Court did not inattentively fail to give those *Shellstrom* notices in a prejudicial way to defendant.”

¶ 28 This portion of the footnote contains no reference to the Post-Conviction Hearing Act, nor does it reference a “substantial showing of a constitutional violation,” the applicable standard at second-stage proceedings. See *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Rather, the court was finding the requirement—set forth by our supreme court in *People v. Shellstrom*, 216 Ill. 2d 45, 57 (2005)—that a defendant be given notice and admonishment when a filing is recharacterized as a postconviction petition was unnecessary in the present case. The circuit court’s repeated references to “*Shellstrom* requirements” or “*Shellstrom* notices” makes abundantly clear what the circuit court was referring to. Indeed, those references to *Shellstrom* further demonstrate that the court was continuing to treat defendant’s filing as having been recharacterized. Accordingly, we reject the State’s contention that this excerpt can be interpreted as alternatively dismissing defendant’s petition on second-stage grounds.

¶ 29 In closing, we recognize that when faced with this situation in *Stoffel*, our supreme court declined to remand for further proceedings, instead addressing the merits of the defendant’s postconviction petition “[i]n the interests of judicial economy.” *Stoffel*, 239 Ill. 2d at 330. In this case, however, neither party argues for such a procedure. Indeed, neither party has substantively briefed the merits of the claims raised in defendant’s December 1, 2014, filing. We therefore reverse the circuit court’s order of dismissal with respect to those claims, and remand for new second-stage proceedings, including appointment of counsel and amendment of the successive postconviction petition. We also note that defendant has raised no contentions of error with respect to the court’s dismissal of his June 8, 2016, amended successive postconviction

petition—labeled “Count 1” in the court’s final written order. Accordingly, the scope of the second-stage proceedings on remand should be limited to defendant’s December 1, 2014, filing, which has been recharacterized as a successive postconviction petition.

¶ 30

### III. CONCLUSION

¶ 31

The judgment of the circuit court of Mercer County is reversed and the cause is remanded for further proceedings.

¶ 32

Reversed.

¶ 33

Cause remanded.

¶ 34

PRESIDING JUSTICE SCHMIDT, dissenting:

¶ 35

Defendant invited the error of which he now complains. I would affirm.