

2019 IL App (4th) 170635-U

NO. 4-17-0635

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**  
July 19, 2019  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
JEROME P. JOHNSON,	)	No. 07CF654
Defendant-Appellant.	)	
	)	Honorable
	)	Derek J. Girton,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Justices Steigmann and Knecht concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Dismissal of the appeal is warranted where the circuit court’s decision is not reviewable.
- ¶ 2 On remand from this court, defendant, Jerome P. Johnson, filed a *pro se* motion to recharacterize his pending petition brought under section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2012)) as a petition under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). In a May 2017 docket entry, the Vermilion County circuit court dismissed defendant’s section 2-1401 petition and gave the State 30 days to file a responsive pleading to defendant’s motion to recharacterize. The next month, the State filed a special and limited response to defendant’s motion. On July 20, 2017, the court denied defendant’s motion to recharacterize. After the court’s ruling, defendant filed a reply to the State’s limited response, and the court found defendant’s reply did

not change its July 20, 2017, ruling.

¶ 3 Defendant appeals, asserting the circuit court erred by (1) dismissing his postconviction petition at the second stage of the proceedings or, in the alternative, (2) dismissing his postconviction petition at the first stage of the proceedings. We dismiss the appeal.

¶ 4 I. BACKGROUND

¶ 5 In March 2008, after a bench trial, the circuit court found defendant guilty of one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2006)), one count of criminal sexual assault (720 ILCS 5/12-13 (a)(3) (West 2006)), and two counts of indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2006)) for his actions from February through August 2007. At a May 2008 sentencing hearing, the court merged the aggravated criminal sexual abuse conviction into defendant's conviction for criminal sexual assault and sentenced defendant to consecutive prison terms of 30 years for criminal sexual assault and 5 years each for his two indecent solicitation of a child convictions. In June 2008, defendant filed a motion to reconsider his sentence, which the court denied.

¶ 6 Defendant appealed and argued the circuit court erred by imposing an excessive sentence. We affirmed defendant's sentence but remanded the cause for an amended sentencing judgment to show defendant's indecent solicitation of a child convictions as Class 3 felonies rather than Class 2. *People v. Johnson*, 387 Ill App. 3d 1196, 981 N.E.2d 544 (table) (unpublished order under Illinois Supreme Court Rule 23).

¶ 7 On March 18, 2013, defendant filed his section 2-1401 petition. In his petition, defendant asserted (1) his sentence was void because the information did not state he would be subject to Class X sentencing, (2) ineffective assistance of counsel based on counsel's failure to

raise the Class X sentencing issue, (3) ineffective assistance of counsel based on counsel's failure to inform him his sentences would be served consecutively, and (4) the informations in his case were fatally defective. On June 17, 2014, the circuit court entered an order, giving the State 14 days to file a responsive pleading or a special and limited appearance contesting jurisdiction. On July 8, 2014, the State filed a special and limited response to defendant's section 2-1401 petition contesting jurisdiction or, in the alternative, a motion to dismiss. The circuit court entered an order giving defendant 14 days to respond to the State's response. Three days later, defendant filed a motion for default and entry of a final judgment by default. The court entered an order dismissing defendant's section 2-1401 petition because, *inter alia*, the State was never properly served and the petition was untimely.

¶ 8 Defendant appealed the circuit court's dismissal. On August 11, 2016, this court found defendant was denied a meaningful opportunity to respond to the State's motion and thus, his due process rights were violated. *People v. Johnson*, 2016 IL App (4th) 140710-U, ¶ 22. Accordingly, we reversed the circuit court's judgment and remanded the cause for further proceedings. *Johnson*, 2016 IL App (4th) 140710-U, ¶ 24.

¶ 9 On remand, the circuit court entered an October 18, 2016, docket entry granting defendant 14 days to file a reply to the State's motion to dismiss. On November 29, 2016, defendant filed a motion to recharacterize his section 2-1401 petition as a petition under the Postconviction Act. In a May 17, 2017, docket entry, the circuit court explained it was considering defendant's November 2016 motion to recharacterize as a concession to the State's motion to dismiss the section 2-1401 petition. The court then dismissed defendant's March 2013 section 2-1401 petition. Thereafter, the court gave the State 30 days to file a responsive pleading to defendant's motion to recharacterize. The next month, the State filed a special and limited

response, arguing, *inter alia*, (1) lack of jurisdiction because it still had not been properly served the section 2-1401 petition, (2) defendant's motion to recharacterize was untimely filed, (3) defendant failed to attach supporting evidence to his section 2-1401 petition as required by section 122-2 of the Postconviction Act (725 ILCS 5/122-2 (West 2016)), and (4) defendant's claims are barred because they could have been raised on direct appeal.

¶ 10 On July 20, 2017, the circuit court entered a docket order denying defendant's motion to recharacterize. Four days later, defendant filed a reply to the State's limited appearance. On August 8, 2017, the court noted it had reviewed defendant's reply and stated the reply did not change the court's July 20, 2017, order.

¶ 11 On August 17, 2017, defendant filed his notice of appeal from the court's July 20, 2017, judgment. In September 2017, defendant filed an amended notice of appealed, listing the judgment dates of July 20, 2017, and August 8, 2017.

¶ 12 II. ANALYSIS

¶ 13 This case comes to us in a unique posture. Defendant had filed a section 2-1401 petition, which the circuit court had dismissed on the State's motion without giving defendant an opportunity to respond to the motion to dismiss. Defendant appealed, and this court remanded the cause for further proceedings. *Johnson*, 2016 IL App (4th) 140710-U, ¶ 24. On remand, the circuit court gave defendant 14 days to file a reply to the State's limited appearance moving to dismiss the section 2-1401 petition. After the 14 days had expired, defendant filed a motion to recharacterize his section 2-1401 petition as one seeking relief under the Postconviction Act. The court considered defendant's motion to recharacterize as a concession to the State's motion to dismiss and then dismissed defendant's section 2-1401 petition. As to the motion to recharacterize, the court gave the State 30 days to file any responsive pleadings. After the court

received the State's limited response to the motion to recharacterize, the court entered the following docket entry:

“The Court has reviewed the file and original pleading of the Defendant dated 3-18-13. Viewing [sic] that pleading as a Petition for Postconviction Relief the court finds the claims frivolous. In addition [sic] the court finds the claims were not raised in a reasonable time as required by 725 ILCS 122/5-1. [T]herefore the Defendant's request to refile the 3-15-13 pleading as a Post Conviction Petition is denied. This is a final and appealable order. Clerk directed to forward a copy of this docket to Defendant.”

¶ 14 On appeal, defendant spends a significant portion of his brief recharacterizing the proceedings that took place in the circuit court. He contends that, when the circuit court allowed the State an opportunity to file a responsive pleading, it effectively granted defendant's motion to recharacterize and advanced defendant's petition to the second stage of the postconviction proceedings where the circuit court dismissed it on the merits. He notes both the State and the circuit court discussed how the Postconviction Act would apply to defendant's petition and claims.

¶ 15 In support of his assertion, defendant cites *People v. Gaultney*, 174 Ill. 2d 410, 419-20, 675 N.E.2d 102, 107 (1996). There, the supreme court addressed the first stage of the postconviction proceedings and held, at that stage, the trial judge makes an independent evaluation of a postconviction petition without input from the State. *Gaultney*, 174 Ill. 2d at 420, 675 N.E.2d at 107. However, defendant does not really explain how *Gaultney* would require us to find the circuit court in this case granted his motion to recharacterize, which must take place before the petition starts at the first stage, and then dismissed the petition on the merits. Further,

in his reply brief, defendant cites *People v. Shellstrom*, 216 Ill. 2d 45, 57, 833 N.E.2d 863, 870 (2005), and argues the procedures established by the supreme court for recharacterizing a pleading as a first postconviction petition do not include State involvement. However, *Shellstrom* only established procedures for *sua sponte* recharacterizations. See *People v. Bland*, 2011 IL App (4th) 100624, ¶ 24, 961 N.E.2d 953 (finding the circuit court was not required to admonish the defendant under *Shellstrom* because the circuit court did not *sua sponte* recharacterize the defendant's pleading). The State asserts defendant's interpretation of the record is unreasonable. We agree with the State.

¶ 16 Here, the circuit court clearly denied defendant's motion to recharacterize his section 2-1401 petition as a postconviction petition. The court did not treat defendant's dismissed section 2-1401 petition as a postconviction petition. In deciding whether to recharacterize a petition as one brought under the Postconviction Act, it was reasonable for the court to comment on the application of the Postconviction Act to defendant's petition because the Postconviction Act "generally contemplates the filing of only one postconviction petition." *People v. Ortiz*, 235 Ill. 2d 319, 328, 919 N.E.2d 941, 947 (2009). "[T]he obstacles standing in the way of filing a successive postconviction petition are not easy to overcome." *Shellstrom*, 216 Ill. 2d at 55, 833 N.E.2d at 869-70. Thus, by recharacterizing a petition that cannot survive a first-stage dismissal, the court would be severely restricting defendant's ability to obtain relief under the Postconviction Act. In this case, the record does not suggest the circuit court treated defendant's section 2-1401 petition as a postconviction petition and then dismissed it on the merits.

¶ 17 The State contends this case is not subject to appellate review because, *inter alia*, we lack jurisdiction of the circuit court's denial of the motion to recharacterize and such

decisions are not reviewable under our supreme court's decision in *People v. Stoffel*, 239 Ill. 2d 314, 324, 941 N.E.2d 147, 154 (2010). Defendant does not specifically address *Stoffel* but, rather, again argues the court actually recharacterized his section 2-1401 petition as a postconviction petition. We agree this case is not subject to appellate review.

¶ 18 Section 122-1(d) of the Postconviction Act (725 ILCS 5/122-1(d) (West 2016)) provides the following:

“A person seeking relief by filing a petition under this Section must specify in the petition or its heading that it is filed under this Section. A trial court that has received a petition complaining of a conviction or sentence that fails to specify in the petition or its heading that it is filed under this Section need not evaluate the petition to determine whether it could otherwise have stated some grounds for relief under this Article.”

In *Stoffel*, 239 Ill. 2d at 324, 941 N.E.2d at 154, our supreme court held “that, in light of section 122-1(d), a trial court's decision *not* to recharacterize a defendant's *pro se* pleading as a postconviction petition may not be reviewed for error.” (Emphasis in original.) In reaching that conclusion, the supreme court explained it had previously interpreted section 122-1(d) in *Shellstrom* and found, “ ‘while a trial court *may* treat a *pro se* pleading as a postconviction petition, there is no *requirement* that the court do so.’ ” (Emphases in original.) *Stoffel*, 239 Ill. 2d at 324, 941 N.E.2d at 153 (quoting *Shellstrom*, 216 Ill. 2d at 53 n.1, 833 N.E.2d at 868 n.1). Thus, “[i]t cannot be error for a trial court to fail to do something it is not required to do.” *Stoffel*, 239 Ill. 2d at 324, 941 N.E.2d at 154. As this court has explained, section 122-1(d) of the Postconviction Act “requires a person seeking relief under that section to ‘*specify in the petition or its heading*’ ” it is filed under section 122-1 and provides a circuit court “is not required to

treat an improperly labeled pleading as a postconviction petition.” (Emphasis added.) *People v. Johnson*, 2019 IL App (4th) 170622, ¶ 14 (quoting 725 ILCS 5/122-1(d) (West 2006)).

¶ 19 Thus, under *Stoffel*, this court does not have anything to review. Moreover, article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) gives this court jurisdiction to hear appeals from all final judgments entered by the circuit court. *People v. Shinaul*, 2017 IL 120162, ¶ 10, 88 N.E.3d 760. Implicit in the *Stoffel* holding is a decision not to recharacterize a *pro se* pleading as a postconviction petition is itself not a final, appealable order. With such a decision, the case either proceeds on the *pro se* petition as it is filed or, as in this case, defendant can still file an initial postconviction petition. Accordingly, we agree with the State this court also lacks jurisdiction. Accordingly, we find dismissal is warranted.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we dismiss this appeal. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 22 Dismissed.