

2020 IL App (2d) 160402-U
No. 2-16-0402
Order filed January 9, 2020

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Stephenson County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-94
)	
PHILLIP M. SHIPP,)	Honorable
)	Michael P. Bald,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Because defendant's untimely motion to reconsider his sentence did not mention the Post-Conviction Hearing Act, the trial court was not required to recharacterize it as a postconviction petition, and we could not review its failure to do so.

¶ 2 Defendant, Phillip M. Shipp, appeals the trial court's denial of his motion to reconsider his December 2009 sentence for possession of more than 1 gram but less than 15 grams of cocaine with intent to deliver within 1000 feet of a church (720 ILCS 570/401(c)(2), 407(b)(1) (West 2006)). The trial court denied the motion because it was untimely filed, and defendant contends

that the court should have recharacterized the motion as a petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). We affirm.

¶ 3

I. BACKGROUND

¶ 4 In 2009, defendant was convicted of the possession offense and was sentenced to 22 years' incarceration. In setting defendant's sentence, the trial court referenced defendant's conviction in a contemporaneous case, No. 09-CF-38. Defendant later filed a postconviction petition in that case, which was summarily dismissed. *People v. Shipp*, 2015 IL App (2d) 130587, ¶ 18. We reversed and remanded. *Id.* ¶ 64. Defendant then filed his motion to reconsider his sentence in this case, alleging newly discovered facts showing that the trial court should not have considered the conviction in No. 09-CF-38 when determining his sentence. The motion made no mention of the Act.

¶ 5 The trial court denied the motion on the basis that it was untimely, and defendant appealed. In January 2018, we granted defendant's motion to hold the appeal in abeyance pending the outcome of his postconviction proceedings in case No. 09-CF-38. In December 2018, the trial court in that case granted the postconviction petition and vacated defendant's conviction. We now address defendant's appeal.

¶ 6

II. ANALYSIS

¶ 7 Defendant contends that the trial court erred by denying his motion without recharacterizing it as a postconviction petition. He argues that we should review the matter for an abuse of discretion. The State argues that the court's decision to not recharacterize the motion may not be reviewed for error at all.

¶ 8 Section 122-1(d) of the Act provides:

“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.” 725 ILCS 5/122-1(d) (West 2016).

¶ 9 A line of appellate court cases has held that a court’s decision as to whether to recharacterize a *pro se* pleading as a postconviction petition is reviewed for an abuse of discretion. See, e.g., *People v. Smith*, 386 Ill. App. 3d 473, 477 (2008) (citing cases). But our supreme court has since made clear that, where the pleading “ ‘makes no mention of the Act, a trial court is under no obligation to treat the pleading as a postconviction petition.’ ” (Emphasis omitted.) *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010) (quoting *People v. Shellstrom*, 216 Ill. 2d 45, 53 n.1 (2005)). Because it cannot be error for a trial court to fail to do something it is not required to do, a trial court’s decision not to recharacterize a *pro se* pleading as a postconviction petition may not be reviewed for error. *Stoffel*, 239 Ill. 2d at 324. Thus, courts have unfettered discretion to decline to even consider whether a filing could qualify as a petition under the Act. *People v. Bean*, 389 Ill. App. 3d 579, 583 (2009).

¶ 10 Here, defendant did not specify in the motion or its heading that he was seeking relief under the Act. Accordingly, he did not comply with section 122-1(d). The trial court could have characterized it as a postconviction petition, but did not do so. Under *Stoffel*, the law is clear that we may not consider whether the trial court erred in that respect.

¶ 11 Defendant, who did not discuss *Stoffel* in his opening brief, suggests for the first time in his reply brief that, under *People v. McNett*, 361 Ill. App. 3d 444 (2005), we should recharacterize

the motion on appeal. There, the defendant filed a motion labeled, “ ‘Motion to Vacate Illegal Sentence and Void Plea Agreement,’ ” arguing that his sentence was unauthorized by statute and thus void. *Id.* at 446. After a hearing, the trial court denied the motion. On appeal, we recognized that, in order to attack his sentence, the defendant was required to file either a postconviction petition or a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2002)). *McNett*, 361 Ill. App. 3d at 447. We noted that we had jurisdiction to consider the motion as appropriately reclassified and further stated that the reclassification could be made for the first time on appeal. *Id.* We then determined that it did not matter how the defendant’s motion was reclassified, because the parties raised no issue concerning the procedure used by the trial court when it dismissed the defendant’s motion and because the issue was purely legal and subject to *de novo* review. *Id.*

¶ 12 Here, in contrast, defendant did not file a motion seeking to attack a void judgment and his claim on appeal focuses solely on the trial court’s procedure in denying his motion. Unlike in *McNett*, if we were to recharacterize defendant’s motion, we would invade the trial court’s prerogative not to do so. *Stoffel* prohibits that.

¶ 13 Defendant does not argue that the trial court erred in determining that his motion was untimely. Indeed, it was filed over six years late. See 730 ILCS 5/5-4.5-50(d) (West 2016) (motion to reconsider sentence must be filed within 30 days of the sentence). Accordingly, the trial court properly denied it.

¶ 14 Finally, defendant argues that judicial economy dictates that we should order the trial court to recharacterize his motion. As noted, *Stoffel* does not allow us to do that. Further, not recharacterizing the motion essentially costs defendant nothing, because, if he wishes to proceed

under the Act, he may still file a petition seeking to do so. *People v. Holliday*, 369 Ill. App. 3d 678, 682 (2007).

¶ 15

III. CONCLUSION

¶ 16 For the reasons stated, the judgment of the circuit court of Stephenson County is affirmed.

¶ 17 Affirmed.