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

NO. 4-10-0040

Filed 6/8/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from
Plaintiff-Appellee,	) Circuit Court of
v.	) Macon County
TYRONE J. JOHNSON,	) No. 06CF1532
Defendant-Appellant.	)
	) Honorable
	) Timothy J. Steadman,
	) Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

Held: Trial court did not err in dismissing defendant's *pro se* pleadings after recharacterizing one of the pleadings as a postconviction petition.

Defendant, Tyrone J. Johnson, was charged with several counts of attempt (first degree murder), armed robbery, unlawful possession of a firearm by a felon, and aggravated battery with a firearm. Pursuant to a fully negotiated plea agreement, he pleaded guilty to one count of armed robbery. Defendant filed several different *pro se* pleadings, which were dismissed by the trial court as frivolous. Defendant appeals from their dismissal, alleging the trial court erred (1) in refusing to recharacterize one of the pleadings as a postconviction petition pursuant to *People v. Shellstrom*, 216 Ill. 2d 45, 833 N.E.2d 863 (2005), and (2) having recharacterized another of the pleadings as a post-conviction petition, refusing to allow him to amend the recharacterized petition with claims raised in the original pleading not recharacterized. We affirm.

I. BACKGROUND

On October 31, 2006, defendant was charged with two counts of attempt (first degree murder) (720 ILCS 5/8-4(a)(c)(1)(C), 9-1(a)(1) (West 2006)), two counts of armed robbery (720 ILCS 5/18-2(a)(4), (a)(3) (West 2006)), one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2006)), and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2 (West 2006)).

On March 6, 2007, defendant, represented by appointed counsel, pleaded guilty to armed robbery pursuant to a fully negotiated plea agreement and was sentenced to 25 years in prison and the other charges against him were dismissed. Hereafter, the record becomes much more complicated.

On March 14, 2007, defendant filed a *pro se* motion to withdraw his guilty plea. On March 28, 2007, defendant filed a *pro se* motion to reduce sentence. Defendant continued to be represented by appointed counsel. On April 16, 2008, a hearing was held on the motions which were denied that same day. On April 17, 2008, notice of appeal was filed on defendant's behalf and the office of the State Appellate Defender was appointed to represent defendant.

On March 12, 2009, upon motion of the appellate defender, defendant's appeal was dismissed. A letter to that effect was sent to the trial court and placed in the court file on March 13, 2009.

On September 15, 2009, defendant filed a *pro se* pleading entitled "Illinois Supreme Court, Rule 615 Insubstantial and Substantial Error." The pleading contended defendant's guilty plea was not voluntary and trial counsel was ineffective. It asked for withdrawal of the plea and that counsel be removed from the case. On September 16, 2009, the trial

court struck the pleading, stating it lacked jurisdiction because defendant's case was on appeal and suggested defendant consult with his appellate counsel.

On October 19, 2009, a letter from defendant was filed in the trial court in which defendant states, correctly, his appeal was no longer pending and requested the court allow his "petition of Substantial Errors" to proceed.

On November 16, 2009, defendant filed another *pro se* pleading entitled "Defendant's Supplemental Pleading." In this pleading, defendant stated he raised the issues of ineffective assistance of counsel, conflict of interest on the part of trial counsel, disparate sentencing, and a petition to withdraw his guilty plea in his original pleading. In this new pleading he raised the additional issue of interference by the trial court in the negotiation and entering of his guilty plea. He requested his sentence be set aside.

On November 17, 2009, the trial court entered a docket entry stating the pleading filed on November 16 was

> "not a cognizable one under Illinois law. It is not a 1401 petition, a writ for order of habeas corpus, or a post-conviction petition. Defendant has already had a direct appeal. Therefore, the pleading filed 11/16/09 is being recharacterized by the Court as a post-conviction petition. Any subsequent post-conviction petition will be subject to the restrictions on successive post-conviction petitions. The Defendant is given leave to withdraw the pleading or to amend it within 30 days so that it contains all the claims appropriate to a post-conviction petition. CLERK DIRECTED TO NO-

TIFY DEFENDANT C/O IDOC."

On December 2, 2009, defendant filed several pleadings. These included a "Motion for Clarification" in which defendant notes his pleading of September 15, 2009, was stricken due to the misconception he had a pending appeal. His appeal was dismissed on March 13, 2009. Due to this misunderstanding, defendant asked the court to allow him to refile both the September 15 motion and the November 16 motion which the trial court had recharacterized as a postconviction petition. He included another copy of the September 15 motion with the motion to clarify.

Another pleading which defendant filed on December 2 was entitled "Motion to Amend." In this motion, defendant basically repeated the opening paragraph of the November 16 motion, stating he raised in his original pleading the issues of ineffective assistance of counsel, conflict of interest on the part of trial counsel, disparate sentencing, a petition to withdraw his guilty plea, and, later, judicial interference in the negotiation and entering of his guilty plea.

On December 9, 2009, the trial court entered a docket entry stating the September 16 pleading appears to be in the nature of a motion to withdraw guilty plea and, as defendant was properly admonished as to his right to appeal at the entering of the guilty plea, the trial court lacks subject-matter jurisdiction to entertain this motion. As to the November 16 pleading, the court reiterates its findings and notes defendant was previously notified of the court's ruling on that pleading. As to the pleadings filed on December 2, the court notes one of them references Supreme Court Rule 615 and, since the rule applies to courts of review, not trial courts, the court has no jurisdiction under Rule 615. As to the pleadings labeled "Motion to Amend" and "Supplemental Pleading," the court found they were not recognized under Illinois law and the

court declined to recharacterize them as postconvictions petitions.

Finally, the trial court found the pleadings of September 16, 2009, November 16, 2009, and December 2, 2009, frivolous because "they lack any arguable basis in law or fact" and "the claims or legal contentions" contained in them are "not warranted by existing law." The court did not specifically state the pleadings were dismissed or stricken but ordered the clerk to notify defendant. Notice was mailed to defendant on December 10, 2009, and defendant filed a *pro se* notice of appeal on January 11, 2010.

II. ANALYSIS

Defendant argues the trial court's treatment of his *pro se* pleadings was not in accordance with the procedures set down by the Illinois Supreme Court in *Shellstrom*, 216 Ill. 2d 45, 833 N.E.2d 863. He contends the trial court erred (1) in refusing to recharacterize one of the pleadings as a postconviction petition pursuant to *Shellstrom* and (2) having recharacterized another of the pleadings as a post-conviction petition, refusing to allow him to amend the recharacterized petition with claims raised in the original pleading not recharacterized.

The *Shellstrom* court held where a *pro se* pleading alleges a deprivation of constitutional rights cognizable under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)), a trial court may treat the pleading, however it is labeled, as a postconviction petition. *Shellstrom*, 216 Ill. 2d at 51, 833 N.E.2d at 867. Once a court recharacterizes a *pro se* pleading as a first postconviction petition, the court must (1) notify the *pro se* litigant the pleading is going to be recharacterized, (2) warn the litigant recharacterization means any subsequent postconviction petition will be subject to restrictions on successive postconviction petitions and (3) provide the litigant the opportunity to withdraw the pleading or amend it to

contain all the claims appropriate to a postconviction petition the litigant believes he has. *Shellstrom*, 216 Ill. 2d at 57, 833 N.E.2d at 870.

A trial court is not *required* to treat a *pro se* pleading as a postconviction petition (*Shellstrom*, 216 Ill. 2d at 57, 833 N.E.2d at 870), and its decision to recharacterize a pleading is reviewed under an abuse-of-discretion standard (*People v. Holliday*, 369 Ill. App. 3d 678, 682, 867 N.E.2d 1016, 1020 (2007)). A court's decision *not* to recharacterize a defendant's *pro se* pleading as a postconviction petition may not be reviewed for error. *People v. Stoffel*, 239 Ill. 2d 314, 324, 941 N.E.2d 147, 154 (2010). The question of whether a court has followed the proper procedures after a recharacterization is made is reviewed *de novo*. *People v. Corredor*, 399 Ill. App. 3d 804, 806, 927 N.E.2d 1231, 1232 (2010).

Defendant contends the trial court erred by not recharacterizing his first *pro se* pleading, filed September 16, 2009, to be a postconviction petition after the court erroneously struck it for lack of jurisdiction due to the assumption an appeal was pending. Instead, the court found the pleading to be a motion to withdraw guilty plea and found it still had no jurisdiction due to the untimeliness of such a motion. The motion raised the issues of ineffectiveness of counsel and conflict of interest, among others. This kept all claims appropriate for a postconviction petition from being considered as required by *Shellstrom*. Under *Stoffel*, defendant cannot appeal the denial of a recharacterization.

However, defendant also argues the trial court erred in not actually allowing him to amend the November 16, 2009, *pro se* pleading which *was* recharacterized by adding the issues raised in the September 16 pleading. While the court correctly made known to defendant he needed to withdraw the November 16 pleading or amend it to include all issues appropriate

for a postconviction petition, he did not actually allow any amendments although defendant appears to have attempted to amend his pleadings.

The State contends the pleadings defendant argues were amendments to his recharacterized postconviction petition were actually attempts to amend the September 16 pleading which had been stricken, not allowed to be refiled, and not recharacterized as a postconviction petition. Thus, it was appropriate for the trial court to disallow them as amendments.

In reviewing the record in this case, we find a certain lack of clarity. The lack of clarity is because both the timing and the repetitive nature of defendant's *pro se* pleadings are confusing. The court also mistakenly struck defendant's September 16 pleading because the court believed defendant's appeal was pending. The court never allowed this pleading to be refiled either as a pleading on its own or as an amendment to the recharacterized postconviction petition. However, the court dismissed *all* of defendant's *pro se* pleadings, including the recharacterized postconviction petition, and included findings *all* of those pleadings were frivolous and lacking an arguable basis in law or fact. Thus, the court made a finding on the merits of defendant's claims despite not officially reinstating the wrongfully stricken pleadings and not officially allowing amendments to the recharacterized postconviction petition.

We have reviewed the record in regard to the entry of defendant's guilty plea and find absolutely nothing to support defendant's contention his counsel was ineffective or had a conflict of interest or the trial court interfered with the negotiations or entry of the plea. In fact, the court appears to have been both careful and conscientious in making sure defendant was able to come to an informed and voluntary decision on the entry of the plea. When defendant

hesitated to take the plea, the court repeatedly told defendant he could confer with his counsel and, if he did not want to enter the plea, a jury was ready and trial could proceed. Nowhere in defendant's pleadings does he suggest he had a defense to the charges against him, identify anyone as a potential witness who could aid in his defense, or point to any specific fact or action that impinged on his rights.

The trial court appears to have skipped the step where it specifically allowed amendments to the recharacterized postconviction petition, but made findings concerning the merits of *all* issues raised in *all* the pleadings.

In the interests of judicial economy, we decline to send this case back to the trial court and require the court to formally allow amendments to the pleading it considered as a postconviction petition and then find the contentions therein frivolous and without merit. We note defendant has not included affidavits in support of his pleadings. The court has already considered the merits of the issues that would be included in any such amendments. Instead, we have reviewed the record, the pleadings and those sought to be amended, and conclude the trial court correctly found everything defendant asserts is frivolous and without merit. We affirm.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. The clerk of the court is authorized to prepare the mandate.

Affirmed.