

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).

NO. 4-09-0661

Order Filed 3/16/11

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from
Plaintiff-Appellee,) Circuit Court of
v.) Champaign County
ESLEY D. CARTER,) No. 07CF202
Defendant-Appellant.)
) Honorable
) Thomas J. Difanis,
) Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

Held: The trial court erred by not providing defendant the notice required by *People v. Pearson*, 216 Ill. 2d 58, 833 N.E.2d 827 (2005), after recharacterizing the pro se motion under section 2-1401 of the Civil Practice Act (735 ILCS 5/2-1401 (West 2008)) as a successive petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)).

In July 2009, defendant, Esley P. Carter, filed a pro se petition for relief from judgment under section 2-1401 of the Civil Practice Act (735 ILCS 5/2-1401 (West 2008)). In August 2009, the circuit court referred to defendant's petition as a "Post-Conviction Petition" and dismissed it as "frivolous and patently without merit." Defendant appeals, arguing (1) the court failed to give him notice of its intent to treat his sec-

tion 2-1401 petition as a postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)) and (2) the *sua sponte* dismissal of his section 2-1401 pleading before the end of the 30-day period to answer or otherwise plead was premature and should be vacated.

We vacate the order of the circuit court and remand with directions.

I. BACKGROUND

In May 2007, a jury found defendant guilty of attempt (identity theft) (720 ILCS 5/8-4(a), 16G-15(a)(1) (West 2006)) and burglary (720 ILCS 5/19-1(a) (West 2006)). Defendant was sentenced to consecutive terms of 15 years' imprisonment for attempt and 5 years' imprisonment for burglary.

While imprisoned, defendant filed a number of challenges to his conviction and sentence. One such challenge was a March 2008 petition for postconviction relief under the Act. The circuit court dismissed this petition as frivolous and patently without merit. This court affirmed, upon granting the office of the State Appellate Defender's motion to withdraw as counsel on grounds no meritorious issues were raised in the petition. *People v. Carter*, No. 4-08-0239 (Oct. 28, 2009) (unpublished order under Supreme Court Rule 23).

In August 2009, defendant filed his petition for relief from judgment under section 2-1401. Defendant argued the trial court violated his rights under the fifth and fourteenth amendments. Specifically, defendant maintained (1) the trial court improperly convicted him of burglary by information without affording him a preliminary hearing or indictment of the grand jury, (2) the court acted without proper jurisdiction "when it convicted [him] of count 2 of [the] information (07-CF-202) which alleged the offense of attempt *** that was not filed with the courts," (3) the State fraudulently amended the indictment without resubmitting the case to the grand jury or moving for an amendment to the count, and (4) the court erroneously allowed him to be arraigned on count III of the information in his absence.

In August 2009, the trial court referred to defendant's filing as "a Post-Conviction Petition" and dismissed the filing as "frivolous, patently without merit." The court held the grand jury returned an indictment charging attempt (identity theft), and defendant was tried on this count. The court concluded defendant did "not understand the function of the Grand Jury" and, following an arraignment on count III, "waived preliminary hearing."

This appeal followed.

II. ANALYSIS

On appeal, defendant maintains the circuit court erroneously failed to give him notice of its intent to treat his section 2-1401 petition as a postconviction petition. Defendant argues both *People v. Shellstrom*, 216 Ill. 2d 45, 833 N.E.2d 863 (2005), and *People v. Pearson*, 216 Ill. 2d 58, 833 N.E.2d 827 (2005), establish he should have been given notice of such treatment and the opportunity to amend or withdraw his petition.

The record shows the circuit court recharacterized defendant's section 2-1401 petition as a postconviction petition under the Act. Defendant titled his pleading as a petition for relief from judgment and cited section 2-1401, but the court, in its order dismissing defendant's petition, referred to filing as a "Post-Conviction Petition" and dismissed it using the "frivolous and patently without merit" language from the Act (725 ILCS 5/122-2.1(a)(2) (West 2008)). Before treating defendant's *pro se* petition for relief from judgment as a postconviction petition under the Act, the circuit court did not inform defendant of its intent to do so.

When a *pro se* pleading sets forth a claim cognizable in a postconviction proceeding, a circuit court may treat that pleading as a postconviction petition even if it is titled differently. *People v. Hood*, 395 Ill. App. 3d 584, 586, 916 N.E.2d 1287, 1289 (2009). *Shellstrom* and *Pearson*, however, set forth

mandates a circuit court must follow before so treating a *pro se* petition. See *Shellstrom*, 216 Ill. 2d at 57, 833 N.E.2d at 870; *Pearson*, 216 Ill. 2d at 68, 833 N.E.2d at 832.

In *Shellstrom*, our supreme court considered whether the circuit court erred by treating as an initial postconviction petition the *pro se* defendant's motion to reconsider sentence or, in the alternative, petition for *mandamus*, without giving the defendant notice of its intent to do so. See *Shellstrom*, 216 Ill. 2d at 49-50, 833 N.E.2d at 866-67. The *Shellstrom* court determined the circuit court's failure to provide the notice would result in the defendant's unanticipated forfeiture of future claims in successive postconviction petitions. See *Shellstrom*, 216 Ill. 2d at 56, 833 N.E.2d at 870. The court then mandated circuit courts, when recharacterizing a pleading mislabeled by a pro se litigant as a first postconviction petition, do the following:

"(1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that any subsequent postconviction petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant an

opportunity to withdraw the pleading or to amend it so that it contains all the claims appropriate to a postconviction petition that the litigant believes he or she has."

Shellstrom, 216 Ill. 2d at 57, 833 N.E.2d at 870.

In *Pearson*, our supreme court concluded *Shellstrom*'s rationale applied to the recharacterization of *pro se* petitions as *successive* postconviction petitions under the Act:

"As in *Shellstrom*, we hold that prior to recharacterizing as a successive postconviction petition a pleading that a *pro se* litigant has labeled as a different action cognizable under Illinois law, the circuit court must (1) notify the *pro se* litigant that the court intends to recharacterize the pleading, (2) warn the litigant that this recharacterization means that the petition will be subject to the restrictions on successive postconviction petitions, and (3) provide the litigant with an opportunity to withdraw the pleading or to amend it so that it contains all the factors and arguments

appropriate to a successive postconviction petition that the litigant believes he or she has." *Pearson*, 216 Ill. 2d at 68, 833 N.E.2d at 832.

Despite *Shellstrom's* and *Pearson's* mandates, the State, maintains, because of a change in the Act, the notice required in *Shellstrom* and *Pearson* no longer must be given. The State emphasizes, at the time the *pro se* petitions in *Shellstrom* and *Pearson* were filed, the only limitation on the filing of a successive petition appeared in section 122-3, which deemed waived those claims of a substantial denial of constitutional rights not raised in the original or amended petition. See 725 ILCS 5/122-3 (West 2002). In 2004, however, the Act was amended, adding the cause-and-prejudice requirements necessary for the successful filing of a successive postconviction petition:

"Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure."

Pub. Act 93-493 (eff. Jan. 1, 2004) (adding 725 ILCS 5/122-1(f)). The State argues petitioners, like defendant, who filed their actions after the effective date of section 122-1(f) no longer need to be informed of this change in the law, because the statute itself informs would-be postconviction petitioners of the new requirements for successive postconviction petitions.

The State misinterprets the purpose of *Shellstrom* and *Pearson*. The purpose of these cases is not to inform inmates of the addition of section 122-1(f). The purpose of *Shellstrom* and *Pearson* is to insure that *pro se* petitioners, who label their petitions as actions other than one under the Act, like the mislabeled section 2-1401 petition here, know their actions will be recharacterized and the limitations of the Act will apply if the petitioners wish to proceed. See e.g. *Pearson*, 216 Ill. 2d at 68, 833 N.E.2d at 832 (requiring mandates be provided to a *pro se* petitioner who did not realize "he was, in effect, filing a successive postconviction petition"). To accept the State's position would lead to the unjust result prevented in *Shellstrom* and *Pearson*: dismissing a petition pursuant to an act the petitioner did not invoke or seek to apply.

We find, despite the addition of section 122-1(f), the notice requirements of *Shellstrom* and *Pearson* must be satisfied before a circuit court may consider the merits of a

recharacterized successive postconviction petition. Here, the circuit court erred by not providing defendant such notice.

Defendant also argues the circuit court erred when it dismissed his section 2-1401 pleading *sua sponte* before the end of the 30-day period for the State to answer or otherwise plead. For two reasons, we need not consider this issue. First, in the conclusion section of his brief, defendant indicates he seeks relief under the first issue or this one and we agree the relief requested in the first issue should be provided. Second, defendant has not argued his section 2-1401 pleading was improperly recharacterized as a postconviction petition under the Act. He has only argued proper notice was not provided. By not arguing the recharacterization was improper, he has forfeited review of the dismissal of his filing as a section 2-1401 petition. Ill. S. Ct. R. 341(h) (7) (eff. September 1, 2006) ("Points not argued are waived").

III. CONCLUSION

For the reasons stated, the circuit court's judgment dismissing defendant's recharacterized section 2-1401 petition is vacated. This matter is remanded to the trial court with instructions to provide the notice set forth in *Pearson*, which applies when a *pro se* filing is recharacterized as a successive postconviction petition under the Act.

Vacated and remanded with directions.