

No. 1-10-2006

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	Nos. 00 CR 1820
)	00 CR 1821
)	00 CR 1822
)	
STANLEY WELLS,)	Honorable
)	Arthur F. Hill, Jr.,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court erred in denying defendant's *pro se* petition under section 2-1401 without also considering it as a post-conviction petition where defendant specified that it was also filed under the Post-Conviction Hearing Act; mittimus corrected.

¶ 2 Defendant Stanley Wells appeals from an order of the circuit court of Cook County denying his *pro se* "petition for relief" pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) and section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)). He contends that the circuit court erroneously treated his

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pleading solely as a section 2-1401 petition when he also explicitly invoked the Act and alleged constitutional violations cognizable under the Act. He further contends that he is entitled to 1,277 days of presentence detention credit.

¶ 3 The record shows that in June 2003, defendant entered a negotiated guilty plea to charges of first degree murder and two counts of residential burglary. He was then sentenced to concurrent, respective terms of 30 and 15 years in prison, and received 1,264 days of sentence credit for time served. Although admonished, defendant made no attempt to vacate that plea or otherwise perfect an appeal from the judgment entered thereon.

¶ 4 In March 2010, defendant filed a *pro se* "Petition for relief under the Post Conviction Act and section 2-1401 of the Code of Civil Procedure," alleging that his guilty plea was not made knowingly and voluntarily, that his plea was the result of coercion, and that it lacked a sufficient factual basis. He also alleged that his plea was the result of ineffective assistance of counsel, who also failed to file a motion to withdraw his plea which, he claimed, was warranted by the facts.

¶ 5 On June 9, 2010, the circuit court treated defendant's *pro se* pleading as a section 2-1401 petition and denied it in a written order, stating, "[defendant] fails to advance a claim or defense which would entitle him to relief under section 2-1401. He does not rely on any newly discovered evidence or any material outside the record with which to form the basis of a section 2-1401 petition. He likewise fails to raise any meritorious factual argument." The court also noted that section 2-1401 proceedings are not an appropriate forum for ineffective assistance of counsel claims because they do not challenge the factual basis for the judgment, and, accordingly, that defendant's claim must fail. This appeal follows.

¶ 6 In this court, defendant contends that the circuit court erred in construing and dismissing his petition solely as a section 2-1401 petition when he also explicitly invoked the Act, raised

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claims cognizable under the Act and stated the gist of a constitutional violation. He does not assert that the circuit court was wrong to analyze his claims under section 2-1401, nor does he challenge the court's substantive findings with regard to the denial of his request for section 2-1401 relief. Rather, he argues that the circuit court should also have considered his claims under the Act because he plainly satisfied the pleading requirement of section 122-1(d) of the Act (725 ILCS 5/122-1(d) (West 2008)), and because the circuit court docketed his petition as a post-conviction petition and twice referred to it as such on the record. Whether the circuit court complied with the applicable procedure in resolving defendant's *pro se* pleading raises a question of law which we review *de novo*. *People v. Helgesen*, 347 Ill. App. 3d 672, 675 (2004); see also *People v. Vincent*, 226 Ill. 2d 1, 14-15 (2007) (whether the court correctly enters judgment on the pleadings or dismisses a complaint, the standard of review is *de novo*).

¶ 7 Nearly seven years after his guilty plea in this case, defendant essentially filed a hybrid motion pursuant to the Act and section 2-1401. Defendant made it clear that he sought the circuit court's consideration of his claims under both the Act and section 2-1401 when he labeled his pleading and framed his discussion therein accordingly. *People v. McDonald*, 373 Ill. App. 3d 876, 880 (2007). Although the circuit court may recharacterize a pleading to provide a more effective procedural vehicle to present a defendant's claims (*People v. Shellstrom*, 216 Ill. 2d 45, 51-52 (2005)), no recharacterization occurred here where the circuit court simply chose to evaluate defendant's claims under section 2-1401 even though defendant clearly stated that he was also pursuing post-conviction relief under the Act (*People v. Bland*, 2011 IL App (4th) 100624, ¶ 23). Moreover, any technical imperfection in procedure did not hinder the circuit court from performing its review under either section 2-1401 or the Act, particularly when the court recognized that defendant's claim of ineffective assistance of counsel was not cognizable

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under section 2-1401 and could have addressed it under the Act. *People v. Tidwell*, 236 Ill. 2d 150, 159-60 (2010).

¶ 8 In *People v. McDonald*, 373 Ill. App. 3d 876, 877 (2007), the defendant filed a *pro se* post-conviction petition in which he wrote "Ill. Post-Conviction Petition" or "Post-Conviction Petition" at the top of each page. The Appendix to the petition was titled "Illinois Post-Conviction Petition," and contained references to "725 ILCS 5/122-6," "122-4," and "122-5 & 6." *McDonald*, 373 Ill. App. 3d at 877. The circuit court summarily dismissed the petition because it failed to specifically state that it was filed under section 122-1 of the Act, and without addressing whether the claims were frivolous and patently without merit. *McDonald*, 373 Ill. App. 3d at 878. On appeal, this court reversed, holding that the Act authorizes summary dismissal only where the circuit court makes a finding that the petition is frivolous and patently without merit. Furthermore, because no such finding occurred within 90 days of the date the petition was filed, we held that on remand, the petition had to be docketed for second stage proceedings.

¶ 9 Here, as in *McDonald*, defendant clearly informed the circuit court that his petition was also being filed under the Act, and the court erred when it failed to address his claims accordingly. *McDonald*, 373 Ill. App. 3d at 880. Under these circumstances and because the circuit court failed to address whether defendant's petition was "frivolous and patently without merit" within the initial 90-day period, we reverse the circuit court's denial of his petition and remand the cause for second stage proceedings under the Act. *McDonald*, 373 Ill. App. 3d at 881.

¶ 10 Defendant next contends that he is entitled to 1,277 days of presentence detention credit, rather than 1,264 days, as reflected in the mittimus. He argues that he should receive 13 additional days of credit because he was sentenced on June 4, 2003, with a stay of mittimus until

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June 18, 2003. The State responds that the mittimus accurately reflects the number of days of presentence credit as of the date the mittimus was signed.

¶ 11 We agree with defendant that he is entitled to additional presentence credit, but disagree with his computation of the number of days. When a defendant, pursuant to his sentence, is to be committed to the Department of Corrections (DOC), section 5-8-5 of the Unified Code of Corrections (730 ILCS 5/5-8-5 (West 2008)) requires the court to commit the defendant to the custody of DOC at the time that the court issues the mittimus, which is the document by which the judgments of conviction and sentence are entered. *People v. Williams*, 239 Ill. 2d 503, 508-09 (2011). A defendant's sentence commences on the date on which he is received by DOC (730 ILCS 5/5-4.5-100(a) (West 2008)), which typically occurs upon the issuance of the mittimus, and for that reason the date of the issuance should not be counted as a day of presentence custody. *Williams*, 239 Ill. 2d at 509.

¶ 12 However, in this case, defendant's mittimus actually issued on June 18, 2003, and DOC's records show defendant's admission date as June 20, 2003 (*People v. Peterson*, 372 Ill. App. 3d 1010, 1019 (2007)). *People v. Hill*, 408 Ill. App. 3d 23, 32 (2011). Under these circumstances, we conclude that defendant is entitled to presentence credit for the days from June 4, 2003 up to, but not including, June 20, 2003, which by our calculation is 16 days. We therefore order that the mittimus be corrected to reflect that defendant is entitled to 1,279 days credit for time served.

¶ 13 For the reasons stated, we reverse the circuit court's denial of defendant's petition and remand the cause for further second stage proceedings under the Act.

¶ 14 Reversed and remanded; mittimus corrected.