

FIRST DIVISION
JUNE 29, 2012

No. 1-10-2733

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.)	No. 98 CR 3816
)	
SWAVELL TOLIVER,)	Honorable
)	Michael J. Howlett, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice HOFFMAN and Justice KARNEZIS concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court did not err in dismissing defendant's freestanding *pro se* motion after analyzing it as both a successive postconviction petition and a section 2-1401 petition.
- ¶ 2 Defendant Swavell Toliver appeals from the dismissal of his *pro se* "motion to vacate and void the judgment," which the circuit court analyzed as both a successive petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), and a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401

(West 2010)). On appeal, defendant contends that the circuit court procedurally erred in dismissing his *pro se* motion (1) as a successive postconviction petition under the Act without first admonishing him of the recharacterization pursuant to *People v. Pearson*, 216 Ill. 2d 58 (2005), and (2) as a section 2-1401 petition in less than 30 days after its filing as prohibited by *People v. Laugharn*, 233 Ill. 2d 318 (2009). We affirm.

¶ 3 Following a 1999 jury trial, defendant was convicted of first degree murder and two counts of attempted first degree murder. The court imposed consecutive prison terms of 45 years for murder and 12 years for each attempted murder. We affirmed that judgment on direct appeal. *People v. Toliver*, No. 1-99-4018 (2003) (unpublished order under Supreme Court Rule 23).

¶ 4 In 2002, while the direct appeal was pending, defendant filed his first postconviction petition under the Act, which the circuit court summarily dismissed, and we affirmed that judgment on appeal. *People v. Toliver*, No. 1-02-3014 (2004) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed two successive postconviction petitions under the Act. The circuit court denied defendant leave to file the successive petitions, and we affirmed those judgments on appeal. *People v. Toliver*, Nos. 1-07-0876 (2008); 1-09-2902 (2011) (unpublished orders under Supreme Rule 23).

¶ 5 On July 12, 2010, defendant filed a "*Pro-se* motion to vacate and void the judgment in Cook County case No. 98 CR 3816 and to appoint counsel in this proceeding," which is the motion at issue in this appeal. In the motion, defendant alleged that Public Act 80-1099 was unconstitutional and thus the court should "vacate and void" the judgment entered against him. The motion did not make any reference to the Act or the Code or any other statute.

¶ 6 On August 5, 2010, the circuit court issued a written order entitled "order denying petitioner leave to file successive petition for postconviction relief." In its order, the court analyzed the motion as both a successive postconviction petition and a section 2-1401 petition.

Prior to issuing its dismissal order, the court did not admonish defendant that it intended to recharacterize his motion.

¶ 7 On appeal, defendant contends that the trial court committed a procedural error by improperly considering the motion as a successive postconviction petition under the Act without admonishing him of its intent to do so under *Pearson*, 216 Ill. 2d at 58. Defendant also asserts that the trial court improperly ruled on his motion as a section 2-1401 petition under the Code before waiting the required 30 days to allow the State an opportunity to respond before dismissing it as required by *Laugharn*, 233 Ill. 2d at 318. We find no error here.

¶ 8 After an unsuccessful direct appeal and three unsuccessful postconviction petitions, defendant filed the subject pleading labeled "pro-se motion to vacate and void the judgment," referring to his 1999 criminal convictions and sentences. This freestanding motion did not invoke the trial court's jurisdiction. *People v. Flowers*, 208 Ill. 2d 291, 307-08 (2003); *People v. Helgesen*, 347 Ill. App. 3d 672, 675 (2004).

¶ 9 To the extent defendant attempted to claim his underlying judgment was void, the law is well established that a void judgment can be attacked at any time either directly or collaterally. *People v. Gutierrez*, 2012 IL 1111590 ¶14; *People v. Thompson*, 209 Ill. 2d 19, 25, 28 (2004). However, defendant must challenge it through a legally cognizable claim. "Illinois law does not recognize a freestanding motion to vacate a void order." *People v. McNett*, 361 Ill. App. 3d 444, 447 (2005); see also *People v. Rodriguez*, 355 Ill. App. 3d 290, 293 (2005) ("motion to vacate judgment of conviction"); *Helgesen*, 347 Ill. App. 3d at 675-76 ("motion to vacate void judgment"). Accordingly, the circuit court here had the option to dismiss defendant's *pro se* motion for lack of jurisdiction.

¶ 10 Nevertheless, a circuit court may, but is not obligated to, recharacterize an inappropriate pleading for the purpose of reviewing the claim. *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010),

citing *People v. Shellstrom*, 216 Ill. 2d 45, 53 n.1, quoting *Helgeson*, 347 Ill. App. 3d at 676. Notably, the decision of the circuit court *not* to recharacterize a *pro se* defendant's pleading cannot be reviewed for error. *Stoffel*, 239 Ill. 2d at 314.

¶ 11 If the court is to consider such a filing, it must construe it so that it falls into some recognized category, and it has discretion to make a reasonable choice of a category. See *Helgeson*, 347 Ill. App. 3d at 676. A reasonable choice is one that allows the court to consider the filing on its merits, or one that is at least not self-defeating. See *Helgeson*, 347 Ill. App. 3d at 676 (explaining why it was within the court's discretion to construe a "Motion to Vacate Void Judgment" as a postconviction petition).

¶ 12 Here, the circuit court noted that defendant's claim would be appropriate under the Act because it argued the constitutionality of a statute and the Act is an appropriate forum to consider constitutional issues on collateral review. See *People v. Vilces*, 321 Ill. App. 3d 937, 942 (2001) (stating that the Act provides a possible remedy for constitutional claims that could not have been previously adjudicated). However, the sole claim in defendant's *pro se* pleading is that Public Act 80-1099, which made sweeping changes to the Unified Code of Corrections, is unconstitutional because the legislature violated "Robert's Rules of Order" and various other Senate rules of parliamentary procedure when it enacted the bill. There is no question that this claim is without merit. Nor is there any way the claim could be restated or amended to make it viable. A remand in this case would be a waste of judicial resources.

¶ 13 We find *Pearson* inapplicable under the circumstances of this case. According to *Pearson*, when the trial court decides to treat a differently labeled *pro se* pleading as a postconviction petition, it must admonish the defendant that the pleading (1) is being recharacterized, (2) will be subject to the restrictions of a successive postconviction petition, and (3) may be withdrawn or amended by the defendant. These admonishments reflect the *Pearson*

court's concern that a defendant who brings his claim under a particular legal theory could be prejudiced where the trial court decides to consider (or recharacterize) the claim under another legal theory with different pleading requirements. *Pearson*, 216 Ill. 2d at 67. However, "recharacterization" implies a different legal characterization than the one chosen by the defendant in the first place. As stated in *Pearson*, the admonishments are required where the *pro se* pleading was "labeled as a different action cognizable under Illinois law." *Pearson*, 216 Ill. 2d at 68 (a section 2-1401 petition recharacterized as a successive postconviction petition); *People v. Shellstrom*, 216 Ill. 2d 45 (2005) (a petition for a writ of *mandamus* recharacterized as an initial postconviction petition); *Hood*, 395 Ill. App. 3d at 584 (a *habeas corpus* petition recharacterized as a postconviction petition). The instant freestanding *pro se* motion, which did not even reference an applicable statute, was not cognizable in Illinois law and, therefore, is not within the holding of *Pearson*. Where, as here, the defendant did not choose any specific legal theory to advance his claim, no recharacterization occurred.

¶ 14 We also reject defendant's contention that even though his *pro se* motion to "vacate and void" his criminal convictions did not mention any statutory authority, his motion was cognizable under Illinois common law. Common law means of attacking void judgments were codified in section 2-1401 of the Code. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104-05 (2002); *In re Application of the County Collector*, 397 Ill. App. 3d 535, 542-43 (2009); *Helgesen*, 347 Ill. App. 3d at 675.

¶ 15 Next, we reject defendant's argument that the circuit court erred in considering his motion under section 2-1401 of the Code without allowing the State 30 days to respond as is required by *Laugharn*, 233 Ill. 2d at 323. Here, however, defendant did not file a section 2-1401 petition and failed even to invoke the Code in his motion. *Cf. People v. Clemons*, 2011 IL App (1st) 102339 ¶¶1, 5 (applied the 30-day rule in *Laugharn* where the defendant filed a motion which was

1-10-2733

entitled "motion for specific performance of plea agreement" and which actually requested relief under section 2-1401 of the Code). It is disingenuous to suggest that the State is on notice to respond to a section 2-1401 petition where no such petition was actually filed. Because defendant did not file a section 2-1401 petition, the 30-day rule applicable to section 2-1401 motions did not apply in this case.

¶ 16 For the foregoing reasons, we affirm the circuit court's dismissal of defendant's motion to vacate and void the judgment.

¶ 17 Affirmed.