

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).

2012 IL App (4th) 110589-U

NO. 4-11-0589

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 24, 2012
Carla Bender
4th District Appellate
Court, IL

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.

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

ORDER

¶ 1 *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 the court recharacterized defendant's *pro se* petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)) as a successive petition under the Post-Conviction Hearing Act (725 ILCS ILCS 5/122-1 to 122-8 (West 2008)) and on remand the trial court did not comply with this court's March 2011 mandate to provide such required notice.

¶ 2 In July 2009, defendant, Esley D. Carter, filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2008)). In August 2009, the trial court referred to defendant's petition as a "Post-Conviction Petition" and dismissed it as frivolous and patently without merit. In March 2011, this court in *People v. Carter*, No. 4-09-0661 (Mar. 16, 2011) (unpublished order under Supreme Court Rule 23), vacated the trial court's dismissal and remanded with directions the trial court

provide defendant the notice required by *People v. Pearson*, 216 Ill. 2d 58, 833 N.E.2d 827 (2005). On remand, on June 2, 2011, the court once again dismissed defendant's petition without providing notice to defendant as mandated. We vacate the trial court's June 2, 2011, dismissal and remand with directions.

¶ 3

I. BACKGROUND

¶ 4 In May 2007, a jury convicted defendant 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)). The trial court sentenced defendant to consecutive terms of 15 years' imprisonment for attempt and 5 years' imprisonment for burglary.

¶ 5 In December 2007, defendant appealed his conviction, and in April 2008, this court affirmed the convictions but remanded for reconsideration of defendant's motion to reconsider sentence. *People v. Carter*, No. 4-07-0602 (Apr. 16, 2008) (unpublished order under Supreme Court Rule 23). After remand, in October 2009, this court affirmed the trial court's sentence. *People v. Carter*, No. 4-08-0577 (Oct. 21, 2009) (unpublished order under Supreme Court Rule 23).

¶ 6 In March 2008, defendant filed a petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)), arguing various issues, including ineffective assistance of trial counsel, insufficient evidence, invalid charging instruments, improper jury instructions, and sentencing errors. In October 2009, this court affirmed the trial court's dismissal of defendant's March 2008 petition. *People v. Carter*, No. 4-08-0239 (Oct. 28, 2009) (unpublished order under Supreme Court Rule 23).

¶ 7 On July 27, 2009, defendant filed the instant petition for relief from judgment

under section 2-1401 of the Civil Code. Defendant argued the trial court violated his constitutional 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 attempt, which he alleged "was not filed with the court"; (3) the State fraudulently amended the indictment without resubmitting the case to the grand jury or moving for amendment to the count; and (4) the court erroneously allowed him to be arraigned on the burglary count in his absence.

¶ 8 On August 11, 2009, the trial court referred to defendant's filing as a "Post-Conviction Petition" and dismissed the filing as frivolous and patently without merit. In March 2011, this court vacated the trial court's August 2009 dismissal for failing to provide defendant notice as required by *Pearson*, after it recharacterized defendant's *pro se* petition under section 2-1401 as a successive postconviction petition. *People v. Carter*, No. 4-09-0661 (Mar. 16, 2011) (unpublished order under Supreme Court Rule 23). Our mandate issued April 20, 2011.

¶ 9 On May 19, 2011, the State filed a motion to dismiss defendant's July 2009 petition arguing defendant's petition (1) pursuant to section 2-619(a)(4) of the Civil Code (735 ILCS 5/2-619(a)(4) (West 2008)) is barred by this court's October 2009 order, and (2) pursuant to section 2-615(a) of the Civil Code (735 ILCS 5/2-615(a) (West 2008)) fails to state a claim upon which relief can be granted. On June 2, 2011, the trial court dismissed plaintiff's petition, referring to it as a "2-1401 petition." The court did not provide notice of the recharacterization and defendant did not appear at the June 2011 hearing personally or by counsel.

¶ 10 This appeal followed.

¶ 11

II. ANALYSIS

¶ 12 Defendant argues the trial court's proceedings on remand are void because the trial court did not follow the requirements of this court's March 2011 order directing the court to advise defendant it was recharacterizing defendant's petition and the notice required by *Pearson*. The State concedes error. We accept the State's concession.

¶ 13 In *Pearson*, the supreme court held:

"[P]rior 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 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.

¶ 14 "[A] trial court must obey the clear and unambiguous directions in a mandate issued by a reviewing court." *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276, 442 N.E.2d 185, 188 (1982). A reviewing court's mandate vests the trial court with jurisdiction to only take action in compliance with the mandate, and the trial court lacks authority to exceed the scope of the mandate. *People v. Winters*, 349 Ill. App. 3d 747, 749-50, 812 N.E.2d 737, 739 (2004).

