

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lee County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 05-CF-238
	)	
BRIAN T. SHUMACK,	)	Honorable
	)	Charles T. Beckman,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices Schostok and Hudson concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* We affirmed the trial court's dismissal of defendant's motion to vacate a restitution order, which motion we recharacterized as a postconviction petition: although the trial court erred in holding that defendant's claims had been raised on direct appeal, they could have been raised there and thus were forfeited.
- ¶ 2 Defendant, Brian T. Shumack, appeals the trial court's order *sua sponte* dismissing his motion to vacate a restitution order. He contends that the court erred in finding that his claims were barred by *res judicata*, because, contrary to the court's finding, he did not raise the identical claims on direct appeal. We affirm.

¶ 3 Following a bench trial, defendant was convicted of burglary (720 ILCS 5/19-1(a) (West 2004)) and criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2004)). The trial court sentenced him to 14 years' imprisonment and ordered him to pay \$1,280 restitution to Kitzman Lumber. On direct appeal, defendant challenged his prison sentence and the amount of restitution. This court affirmed. *People v. Shumack*, No. 2-06-0067 (2007) (unpublished order under Supreme Court Rule 23).

¶ 4 In 2008, defendant filed a postconviction petition as well as a section 2-1401 petition (735 ILCS 5/2-1401 (West 2008)). The trial court dismissed both petitions and defendant did not appeal.

¶ 5 On January 6, 2012, defendant filed a motion to vacate the judgment of restitution. He contended that the restitution order did not set a proper payment schedule and had been entered without a finding that defendant was able to pay that amount. The trial court dismissed the motion, finding that the issues had been decided on direct appeal. Defendant filed a notice of appeal.

¶ 6 Defendant contends that the trial court erred in dismissing his motion on the basis of *res judicata*, because the issues he raised were not decided on direct appeal. He argues that on direct appeal he challenged only the amount of restitution while his new motion challenged other aspects of the order such as the failure to set an appropriate payment schedule. The State responds that we lack jurisdiction because defendant's motion, filed almost six years after the final judgment, was an untimely postjudgment motion that did not toll the time to appeal. We find that we have jurisdiction, but we affirm the order of dismissal.

¶ 7 Illinois law does not recognize a freestanding motion to vacate an order. *People v. McNett*, 361 Ill. App. 3d 444, 447 (2005); *People v. Helgesen*, 347 Ill. App. 3d 672, 675 (2004). However, a court may reclassify such a motion and consider it as being brought under one of the statutorily authorized modes of collateral attack. *McNett*, 361 Ill. App. 3d at 447. In a criminal case, a court

may consider the motion either as a postconviction petition (see 725 ILCS 5/122-1 *et seq.* (West 2010)) or as a section 2-1401 petition. *Helgesen*, 347 Ill. App. 3d at 675-76. “This reclassification can be made for the first time on appeal.” *McNett*, 361 Ill. App. 3d at 447.

¶ 8 Defendant finds authority for his motion in sections 5-5-6(j) and 5-6-4(f) of the Unified Code of Corrections (730 ILCS 5/5-5-6(j), 5-6-4(f) (West 2010)). The former section provides that the “procedure upon the filing of a Petition to Revoke a sentence to make restitution shall be the same as the procedures set forth in Section 5-6-4 of this Code governing violation, modification, or revocation of Probation, of Conditional Discharge, or of Supervision.” 730 ILCS 5/5-5-6(j) (West 2010). Section 5-6-4(f), in turn, provides, “The conditions of probation, of conditional discharge, of supervision, or of a sentence of county impact incarceration may be modified by the court on motion of the supervising agency or on its own motion, or at the request of the offender after notice and a hearing.” 730 ILCS 5/5-6-4(f) (West 2010). Defendant argues that section 5-5-6(j) applies section 5-6-4(f) to restitution orders and that the latter section allows “the offender” to move to modify the conditions of his sentence. 730 ILCS 5/5-6-4(f) (West 2010). However, by its plain terms, section 5-5-6(j) applies only when there is a petition to revoke a sentence of restitution, and no such petition was filed in this case.

¶ 9 That said, we find that the trial court could properly have considered the motion as a successive postconviction petition. It is now clear that a trial court may rule on a successive postconviction petition in the absence of an explicit request for leave to file it. *People v. Tidwell*, 236 Ill. 2d 150, 161 (2010). Furthermore, the admonitions required by *People v. Shellstrom*, 216 Ill. 2d 45, 57 (2005), before recharacterizing a pleading as a postconviction petition apply only when the pleading would be the defendant’s *first* postconviction petition. As this was not defendant’s first

postconviction petition, *Shellstrom* does not apply. Finally, although the trial court did not explicitly recharacterize the motion, we may do so here. *McNett*, 361 Ill. App. 3d at 447.

¶ 10 Having found that the trial court could properly exercise jurisdiction over defendant's petition, we affirm its dismissal of it. In the context of postconviction petitions, any issue that was actually decided in an earlier proceeding is *res judicata* and any issue that could have been raised earlier but was not is forfeited. *People v. Neal*, 142 Ill. 2d 140, 146 (1990). Here, while the trial court was incorrect to say that the precise issues defendant raised were decided on direct appeal, the fact remains that defendant could have raised those issues there. The defects of which defendant complains were apparent on the face of the record on direct appeal. Defendant suggests no reason why he could not have raised those issues sooner, and we may affirm the dismissal on that ground. See *People v. Blair*, 215 Ill. 2d 427, 442 (2005); *People v. Quigley*, 365 Ill. App. 3d 617, 619 (2006).

¶ 11 The judgment of the circuit court of Lee County is affirmed.

¶ 12 Affirmed.