FIFTH DIVISION
November 13, 2015

No. 1-13-3640

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. 03 CR 14312
	)	
ALEXANDER TERUEL,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant's *pro se* pleading did not specify "in the petition or its heading" that it was filed under the Post-Conviction Hearing Act, the trial court was not required to treat the pleading as such and its decision not to characterize the pleading as a postconviction petition may not be reviewed for error.

¶ 2 Defendant Alexander Teruel, who was convicted of first degree murder and sentenced to 50 years in prison, appeals from the dismissal of his *pro se* motion for an order augmenting the record on appeal. On appeal, defendant contends that the motion should have been construed as a *pro se* postconviction petition, and that because the trial court did not address whether it was

frivolous or patently without merit within 90 days of its docketing, it must be remanded for second-stage postconviction proceedings. In the alternative, defendant contends that the trial court did treat his motion as a postconviction petition, and erred in summarily dismissing it because it presented an arguable claim that appellate counsel was ineffective for failing to argue on direct appeal that defendant was denied his constitutional right to counsel of choice.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's murder conviction arose from the events of June 2, 2003. The underlying facts of the case are set forth in our order on direct appeal and need not be repeated here. On appeal, defendant contended that he did not receive a fair trial because the State improperly inflamed the passions of the jury and repeatedly disparaged him during closing and rebuttal arguments. He also requested that this court enter an order stating that he need not register as a sex offender. We affirmed, finding that defendant forfeited his claim of prosecutorial misconduct and that the issue regarding sex offender registration was moot. *People v. Teruel*, 2012 IL App (1st) 093494-U.

¶ 5 On September 16, 2003, defendant filed the untitled *pro se* pleading that is the subject of the instant appeal. The first paragraph of the pleading provided, "I Alexander Teruel, the appellant herein, hereby moves the court for an order augmenting the record on appeal to include certain matters not currently in the record, as explained with more particularity in the following discussion." Defendant alleged that his "enhanced sentence should have been concurrent to the murder sentence" and requested "that the sentence be corrected in accordance to the claim that the sentence was merged to the single murder conviction." Defendant also asserted that both before and during trial, he had expressed dissatisfaction with his retained counsel and requested

several times to have counsel of his choice appointed, but that his requests had been repeatedly denied by the trial court. Defendant asserted that his right to effective assistance of counsel required that he be afforded counsel free of conflicting interest or inconsistent obligations, and claimed to have suffered a "6th Amendment violation." Defendant concluded by stating, "A trial court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to reversal of his conviction. So that this matter may be briefed, argued, and decided the appellant moves that the record on appeal be augmented to include copies of the court transcripts mentioned. In this way counsel will be able to argue with specificity the nature of the prejudice present."

¶ 6 Defendant's "Notice of Filing / Affidavit of Service" that accompanied the pleading identified the documents he mailed as "Post conviction with supporting documents." Attached to the pleading were a copy of a letter written to defendant by an assistant Appellate Defender, suggesting that defendant "may be able" to raise a sixth amendment issue in a postconviction petition, as well as portions of transcripts from a hearing on retained counsel's motion to withdraw as counsel and from the trial court's discussion of defense counsel's motion for fees.

¶ 7 On September 25, 2013, the trial court denied or dismissed the pleading. The trial court explained its decision as follows:

> "Mr. Teruel is not present, he's in the penitentiary. He was convicted of the charge of murder and is serving 50 years. That conviction and sentence were affirmed on appeal and he has filed before me a motion which he has not titled. It's a four-page motion. It never makes reference to any statute, the postconviction statute or any other statute. It appears to be addressed to the appellate court. He seems to be under the belief that something is pending in the appellate court.

He moves the court for an order augmenting the record on appeal to include certain matters not currently in the record. This does not appear to be addressed to me. It's not clear what remedy he seeks. He does mention ineffectiveness in the body of the four-page motion but again references no specific remedy and no statute that would afford him relief.

His motion to the extent that it can be denied is denied, dismissed. All previous orders to stand. Clerk to notify within ten days. Off call."

¶ 8 On appeal, defendant first contends that the pleading he filed should have been construed as a *pro se* postconviction petition, and that because the trial court did not address whether the pleading was frivolous or patently without merit within 90 days of its docketing, it must be remanded for second-stage postconviction proceedings. Relying on *People v. McDonald*, 373 Ill. App. 3d 876, 879-80 (2007), defendant argues that his reference to "Post conviction" in the notice of filing was sufficient to adequately inform the trial court of the nature of the filing, and that therefore, the court's refusal to treat the filing as a postconviction petition was erroneous. Defendant additionally argues that in addition to the notice of filing, the fact that he raised a constitutional claim in his pleading and attached supporting documents further indicated that the pleading was intended to be a postconviction petition.

¶ 9 Section 122-1(d) of the Post-Conviction Hearing Act (Act) imposes the following requirement on defendants seeking relief under the Act:

"A person seeking relief by filing a petition under this Section must specify *in the petition or its heading* that it is filed under this Section. A trial court that has received a petition complaining of a conviction or sentence that fails to specify *in the petition or its*

> *heading* that it is filed under this Section need not evaluate the petition to determine whether it could otherwise have stated some grounds for relief under this Article." (Emphases added.) 725 ILCS 5/122-1(d) (West 2012).

Our supreme court has held that under section 122-1(d), a trial court may treat a *pro se* pleading that alleges a deprivation of constitutional rights as a postconviction petition, but is not required to do so. *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010); *People v. Shellstrom*, 216 Ill. 2d 45, 53 n.1 (2005). Specifically, where the pleading " 'makes no mention of the Act, a trial court is under no obligation to treat the pleading as a postconviction petition.' " *Stoffel*, 239 Ill. 2d at 324 (quoting *Shellstrom*, 216 Ill. 2d at 53 n.1). Because it cannot be error for a trial court to fail to do something it is not required to do, a trial court's decision not to recharacterize a *pro se* pleading as a postconviction petition may not be reviewed for error. *Stoffel*, 239 Ill. 2d at 324.

¶ 10 Here, defendant did not specify "in the petition or its heading" that he was seeking relief under the Act. Accordingly, he did not comply with the requirements of section 122-1(d). 725 ILCS 5/122-1(d) (West 2012). The trial court, presented with an unlabeled pleading that did not comply with section 122-1(d) but did allege a deprivation of constitutional rights, could have characterized the pleading as a postconviction petition, but did not to do so. Under *Stoffel*, we may not consider whether the trial court erred in declining to characterize the pleading as a postconviction petition. *Stoffel*, 239 Ill. 2d at 324. Absent a basis to reverse the trial court's judgment, we affirm the trial court's denial / dismissal of defendant's pleading.

¶ 11 We are not persuaded otherwise by the decision in *People v. McDonald*, 373 Ill. App. 3d 876 (2007). In *McDonald*, the defendant filed an eight-page *pro se* pleading in which he wrote the words "Ill. Post-Conviction Petition" at the top of pages one, two, and three, and the words

"Post-Conviction Petition" on top of pages four, five, six, seven, and eight. *McDonald*, 373 Ill. App. 3d 876, 877, 880 (2007). The appendix to the pleading was headed "Illinois Post-Conviction Petition," and in the body of the one-page appendix were references to "725 ILCS 5/122-6," "122-4," and "122-5&6." *Id*. The circuit court dismissed the pleading, finding that the defendant had failed to specify that his petition had been filed under section 122-1 of the Act. *Id*. at 878. The defendant appealed, arguing that he had complied with the pleading requirements set forth in section 122-1(d). *Id*.

¶ 12 This court reversed and remanded for second-stage postconviction proceedings. *Id*. at 881-82. In doing so, we found that the defendant made it clear his pleading was intended to be a postconviction petition when he wrote "Ill. Post-Conviction Petition" or "Post-Conviction Petition" at the top of every page. *Id*. at 880. We held that requiring a defendant to specifically cite section 122-1 of the Act by number in order to satisfy section 122-1(d)'s pleading requirements would undermine the intent of the legislature to provide a low threshold during the first stage of a postconviction proceeding. *Id*. We further reasoned that requiring a *pro se* defendant to expressly cite section 122-1, rather than simply refer to the Act itself, would not advance the legislature's intent when it adopted section 122-1(d), which was to eliminate the need to recharacterize a pleading as a postconviction petition even though the pleading made no reference to the Act itself. *Id*. We concluded, "A *pro se* defendant's notation in the heading that a petition is an Illinois postconviction petition adequately informs the circuit court that the petition is being filed pursuant to section 122-1 of the Act." *Id*.

¶ 13 In contrast to *McDonald*, where the defendant titled every page of his pleading with the words "Ill. Post-Conviction Petition" or "Post-Conviction Petition," here, defendant did not once

mention the Act in his pleading or its heading. While defendant did use the words "Post conviction with supporting documents" on his notice of filing / affidavit of service, and attached a letter from an assistant Appellate Defender advising him that he may be able to raise a sixth amendment issue in a postconviction petition, we cannot find that these references constitute references to the Act "in the petition or its heading," as required by section 122-1(d). 725 ILCS 5/122-1(d) (West 2012). In *McDonald*, we held that a defendant's notation "in the heading" that a pleading is a postconviction petition provides adequate notice that the pleading is being filed as a petition under the Act. *McDonald*, 373 Ill. App. 3d at 880. In this case, defendant has not supplied similarly adequate indicators that the pleading was intended to be a postconviction petition.

¶ 14 Moreover, the thrust of our decision in *McDonald* was that a trial court may not refuse to consider a pleading as a postconviction petition based solely on the defendant's failure to refer to a section of the Act by number. Here, there is no similar concern that defendant did not specifically mention section 122-1. In reversing the trial court in *McDonald*, we wrote, "The language of section 122-1(d) of the Act does not persuade us the legislature intended petitioners to specifically cite section 122-1 in their petitions." *Id*. We agree with this position, but are also of the view that the language of section 122-1(d) indicates the legislature did intend defendants to specify in some manner "in the petition or its heading" that their pleadings are intended to be postconviction petitions.

¶ 15 Given our disposition, we need not address defendant's alternative contention that the trial court did treat his motion as a postconviction petition, and erred in summarily dismissing it

because it presented an arguable claim that appellate counsel was ineffective for failing to argue on direct appeal that defendant was denied his constitutional right to counsel of choice.

¶ 16 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 17 Affirmed.