2015 IL App (2d) 140174-U
No. 2-14-0174
Order filed December 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RICHARD G. HILL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Ogle County. No. 12-CF-18 Honorable Robert T. Hanson, Judge, Presiding.

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

ORDER

¶ 1 *Held*: Having reasonably recharacterized defendant's filing, which raised a *Whitfield*-like claim, as a postconviction petition—and thus having vested itself with jurisdiction of that filing—the trial court erred in failing to give defendant admonishments under *Shellstrom*, and we vacated and remanded for those admonishments; although the *Whitfield*-like claim might have been moot, the appeal was not moot, as defendant still had standing to file a postconviction petition raising any other claims he might have.

¶ 2 Defendant, Richard G. Hill, appeals after the court treated his filing in which he sought "resentenc[ing] *** according[] to the [plea] agreement" as a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)) and summarily dismissed it. He

asserts that he is entitled to a remand for the procedure required under *People v. Shellstrom*, 216 Ill. 2d 45 (2005), which would allow him to withdraw or modify his claim. The State responds that the recharacterization was ineffectual and that we therefore lack jurisdiction of the appeal. Alternatively, it argues that the court erred in recharacterizing defendant's filing as a postconviction petition and that defendant therefore was entitled to no more than an undoing of the recharacterization. Finally, it argues that the appeal is moot given that defendant has been released from prison but remains on mandatory supervised release (MSR). We agree that defendant was entitled to the procedure specified in *Shellstrom*. We hold that it was within the court's discretion to recharacterize the filing as it did, so the recharacterization was effectual and was not error. Moreover, we hold that, because defendant otherwise could still seek postconviction relief on another matter, we cannot dismiss the appeal as moot. We therefore vacate the dismissal of the filing and remand for proceedings pursuant to *Shellstrom*.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with three drug-related offenses. He and the State told the court that they had reached a fully-negotiated agreement by which he would plead guilty to one count, unlawful possession of less than 15 grams of a substance containing cocaine (720 ILCS 570/402(c) (West 2012)), and would receive a sentence of three years of imprisonment and one year of MSR. At the plea hearing, the court and parties discussed in detail defendant's entitlement to sentencing credit. On April 12, 2013, the court sentenced defendant to three years' imprisonment and one year of MSR.

¶ 5 On February 4, 2014, the court received from defendant a filing, which was hand-written and just over a page long. It stated that defendant was "looking for reconsideration of his plea agreement, resentencing." Defendant stated that he had not received the sentencing credit

discussed at the plea hearing. One sentence in the filing suggests that the Department of Corrections (DOC) was improperly withholding credits. Defendant, however, asked that the court "resentence him according[] to the [plea] agreement."

¶ 6 Also on February 4, 2014, the court entered an order stating that it was dismissing defendant's "Petition for Post Conviction Relief" as "frivolous and patently without merit." On February 18, 2014, defendant filed a notice of appeal; appellate counsel later filed an amended notice of appeal.

¶ 7 II. ANALYSIS

¶ 8 On appeal, defendant argues that he is entitled to a remand for the admonishments and opportunity to amend or withdraw his petition as set out in *Shellstrom*. We agree.

¶ 9 The supreme court created the *Shellstrom* rule as a remedy for the loss of the ability to file a single petition under the Act as of right that can occur when a court unexpectedly converts some other filing into a petition under the Act. In *Shellstrom*, the supreme court described as "troubling" the prospect that a court could "summarily recharacterize as a first postconviction petition a *pro se* litigant's pleading that was labeled differently," with the result that "[a]ny additional arguments that the litigant might have included in a first postconviction petition would be barred from successive petitions unless the litigant could demonstrate cause for failing to bring them and prejudice resulting from that failure." *Shellstrom*, 216 Ill. 2d at 56. To avoid that result, the court used its supervisory authority to require that such litigants have an opportunity to amend or withdraw the recharacterized pleading:

> "[W]hen a circuit court is recharacterizing as a first 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 any subsequent postconviction 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 claims appropriate to a postconviction petition that the litigant believes he or she has." *Shellstrom*, 216 Ill. 2d at 57.

Although *Shellstrom* states that this procedure applies when a defendant has filed a "pleading *** labeled as a different action cognizable under Illinois law" (*Shellstrom*, 216 Ill. 2d at 57) the supreme court, consistent with the remedial purpose it described in *Shellstrom*, has required the *Shellstrom* procedure when a defendant has framed a filing as a recognizable form of motion. Thus, in *People v. Swamynathan*, 236 Ill. 2d 103, 107, 112 (2010), the court required the *Shellstrom* procedure when the trial court recast a late-filed motion to withdraw a guilty plea and vacate the sentence as a petition under the Act. We review *de novo* the question of whether the court has used the proper procedure. *People v. Corredor*, 399 Ill. App. 3d 804, 806 (2010).

¶ 10 The *Shellstrom* procedure was required here. Defendant's filing, although confusingly structured, was—based on the relief that defendant sought—a motion to modify the sentence to conform it to the terms of the plea agreement. Further, the court indeed recharacterized the filing as a petition under the Act. This is demonstrated by its reference to the petition as a "Petition for Post Conviction Relief" and its dismissing it as "frivolous and patently without merit," the standard for the first-stage dismissal of a petition under the Act (725 ILCS 5/122-2.1(a)(2) (West 2014)). A recharacterization of a "pleading *** labeled as a different action cognizable under Illinois law" (*Shellstrom*, 216 Ill. 2d at 57) thus occurred.

¶ 11 As we noted in our introduction, the State raises three arguments to counter defendant. One, it asserts that, because defendant's filing was untimely as a motion to reconsider, neither

the court nor we gained jurisdiction to address his claim. Two, it asserts that the court erred in classifying defendant's claim as a claim under the Act, so that the proper remedy is to undo that characterization. Three, it asserts that defendant's release from imprisonment renders his claim moot. We address each of these arguments in turn, explaining why each fails.

¶ 12 The State is incorrect that we lack jurisdiction of this appeal. It contends (1) that defendant's filing was untimely as a motion directed against his sentence, (2) that the trial court therefore lacked jurisdiction to recharacterize the filing, and (3) that this court consequently lacks jurisdiction of the appeal. See *People v. Flowers*, 208 Ill. 2d 291 (2003) (a trial court loses jurisdiction to consider a postjudgment motion filed more than 30 days after the finalization of the judgment and a reviewing court thus lacks jurisdiction of any resulting appeal). The State's argument fails at the second step—in claiming that a court cannot recharacterize a filing so as to allow the court to have jurisdiction of a claim. Illinois precedent is contrary. Trial courts frequently recharacterize filings in ways that cause them to have jurisdiction. For instance, as indicated above, the supreme court in *Swamynathan* accepted the recharacterization of a late motion to withdraw a guilty plea. In *Shatku v. Wal-Mart Stores, Inc.*, 2013 IL App (2d) 120412, ¶ 13, we recognized a line of cases that, in the civil context, allows a court to treat a late-filed motion for reconsideration of a judgment as a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). In *People v. Starks*, 365 Ill. App. 3d 592, 597 (2006), we recognized conferring jurisdiction on the court as a proper purpose of relabeling a filing. Illinois law thus allows a court to evaluate its jurisdiction *after* it has decided how it will characterize a filing.

¶ 13 The State is wrong that the court erred in recharacterizing defendant's filing. It argues that the supreme court, in *Shellstrom* (and its sister case, *People v. Pearson*, 216 Ill. 2d 58

(2005)), "intended to limit the recharacterization of pleadings, however labeled, to rights cognizable under [section] 2-1401 or post-conviction petitions." It asserts that, because defendant's "pleading request[ed] 180 days[']credit," and not relief that could be granted in a postconviction petition, the court should have simply dismissed defendant's filing, rather than recharacterizing and dismissing.

¶ 14 We note that the State is not the appellant here. It thus is limited to arguing in favor of a simple affirmance. We therefore interpret its argument to be that *defendant* has requested improper relief. In other words, we take it to argue that defendant is entitled only to have us undo the recharacterization, but not to remand for the *Shellstrom* admonishments. We conclude that the recharacterization was not error.

¶ 15 A decision to recharacterize another filing as a petition under the Act is reviewable under an abuse-of-discretion standard. The *Shellstrom* court made clear that courts are permitted to recharacterize filings as postconviction petitions only because such reclassifications may aid *pro se* defendants when they have chosen the wrong vehicles for their claims. *Shellstrom*, 216 Ill. 2d at 51-52. Neither *Shellstrom* nor *Pearson* discusses the standard under which we evaluate a decision to recharacterize a filing. However, in *People v. Helgesen*, 347 Ill. App. 3d 672, 677-78 (2004), this court recognized that such a decision is reviewed for an abuse of discretion.

¶ 16 Here, because defendant's claim had characteristics of a claim under *People v. Whitfield*, 217 Ill. 2d 177, 188-95 (2005), a case in which the defendant received postconviction relief, the decision to treat defendant's filing as a postconviction petition was not an abuse of discretion. In *Whitfield*, the defendant, who had pled guilty under an agreement as to a specific sentence, asserted that he had been deprived of the benefit of his bargain by the failure to inform him that he would be subject to MSR, and he sought to reduce his term of imprisonment to produce an

overall term of the length to which he had agreed. *Whitfield*, 217 Ill. 2d at 180-81. The supreme court held that this claim was cognizable under the Act and entitled him to relief. *Whitfield*, 217 Ill. 2d at 179. Given the overall similarity in form between defendant's claim and the successful claim in *Whitfield*, the court's decision to treat the filing as a petition under the Act was not arbitrary.

¶ 17 We agree with the State that parts of defendant's filing seem to relate to a claim that the DOC was not applying credits properly, a claim that would plainly be outside the scope of the Act. However, the filing was ambiguous. Given that defendant thought that appropriate relief was resentencing, the filing is unclear as to where defendant placed the blame for the mismatch between his understanding of the effective length of his sentence and the DOC's application of credits. Given the ambiguity, we cannot say that the court acted unreasonably in reading the claim as relating to a flaw in the plea agreement and thus potentially addressable under the Act.

¶ 18 Finally, the State is incorrect that this appeal is moot because defendant is no longer in prison—having been released on May 24, 2015—so that the relief that defendant sought in his filing is unavailable. It notes that the relief he requested *in the trial court*, modification of his sentence, is no longer available, and it asserts that this moots *the appeal*. We disagree, as a remand for the procedure mandated by *Shellstrom* is effective relief. "An appeal is moot if no actual controversy exists or if events have occurred that make it impossible for the reviewing court to grant the complaining party effectual relief." *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 291 (2005). The relief that defendant has requested *on appeal* is a remand for the *Shellstrom* admonitions and an opportunity to amend or withdraw his petition. That relief is still of use to defendant, as he could amend his petition or file a new original petition on remand. We note that a "defendant retains standing under the Act so long as he is challenging a conviction

from which he continues to serve some form of sentence." *People v. Stavenger*, 2015 IL App (2d) 140885, ¶ 9. Thus, a defendant on MSR has such standing. *People v. Correa*, 108 Ill. 2d 541, 546 (1985). Further, some cases hold that a defendant does not lose standing to maintain a petition if he or she had standing when filing the petition. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 10. *Contra People v. Henderson*, 2011 IL App (1st) 090923. Defendant is now serving his MSR and thus currently has standing, by all precedent, to proceed on a new original petition or an amended petition. Beyond that, under the rule in *Jones*, defendant will be able to pursue such a petition even after he has fully served his MSR. As a remand under *Shellstrom* will give defendant an opportunity to raise new claims, the appeal is not moot, even though the claim raised in defendant's filing may be.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we vacate the dismissal of defendant's filing and remand the cause for the proceedings specified in *Shellstrom*.

¶ 21 Vacated and remanded with directions.