

NOTICE
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2019 IL App (5th) 160265-U

NO. 5-16-0265

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 09-CF-476
)	
MARVIN O. PARKER,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court. Justices Cates and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Order dismissing postconviction petition vacated where circuit court erroneously construed the petition as a successive postconviction petition after erroneously recharacterizing a previously filed pleading as a postconviction petition without providing notification to the defendant as required by *People v. Shellstrom*, 216 Ill. 2d 45 (2005). Remanded for second-stage proceedings under the Post-Conviction Hearing Act (725 ILCS 5/122-1 (West 2014)).

¶ 2 The defendant, Marvin O. Parker, appeals the May 11, 2016, order of the circuit court of St. Clair County that dismissed his *pro se* postconviction petition. For the following reasons, we vacate the order and remand for second-stage proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2014)).

¶ 3

BACKGROUND

¶ 4 In July 2009, the State filed a three-count criminal information, charging the defendant with armed violence (720 ILCS 5/33A-2(c) (West 2008)) (count I); aggravated battery with a firearm (*id.* § 12-4.2(a)(1)) (count II); and attempted armed robbery (*id.* §§ 8-4(a), 18-2(a)(2)) (count III). On April 26, 2011, a jury found the defendant guilty on all counts. The circuit court later merged count II into count I and imposed consecutive sentences totaling 29 years on counts I and III. The defendant appealed, and this court affirmed his convictions and sentences by order of January 14, 2014 (*People v. Parker*, 2014 IL App (5th) 120151-U).

¶ 5 On October 20, 2014, the defendant filed, *pro se*, an untitled pleading (Petition 1) in which he requested an extension of time to file a postconviction petition due to his inability to access the law library. The circuit court did not rule on Petition 1. On March 9, 2015, the defendant filed, *pro se*, a pleading entitled “Motion for [E]xtension of [T]ime” (Petition 2) in which he again requested additional time to file a postconviction petition and again cited an inability to access the law library. The circuit court did not rule on Petition 2.

¶ 6 On March 24, 2016, the defendant filed, *pro se*, a pleading entitled “Petition for [L]eave to [F]ile [L]ate Post-[C]onviction” (Petition 3), in which he indicated that he recently discovered that the time for him to file a postconviction petition had expired. In Petition 3, the defendant again referenced the complications associated with accessing the law library and requested the circuit court to grant him leave to file a late postconviction petition.

¶ 7 On April 4, 2016, the circuit court entered an order denying Petition 3 because it “contains no allegations of constitutional violations nor any itemization of the days he was prevented from having access to the library” and “provides no facts to substantiate granting the request.” In the order, the circuit court referenced Petition 3 directly as a “petition *for leave to file* a post-conviction petition.” (Emphasis added.) On the same date, notice of adverse judgment with the order attached was filed and sent to the defendant.

¶ 8 On April 21, 2016, the defendant filed a “*Pro Se [P]ost-[C]onviction [P]etition*” (Petition 4), in which he alleged that his “constitutional rights were violated” and requested relief under the Act. On May 11, 2016, the circuit court entered an order, finding that the defendant “previously filed a petition for postconviction relief [(Petition 3)] which was denied on 4-4-16” and that “the post-conviction petition filed on 4-21-16 [(Petition 4)] is a successive petition.” The circuit court dismissed Petition 4 because “[t]here is nothing in the petition to indicate why the claims could not have been made in the earlier petition.” A notice of adverse judgment with the attached order was filed on May 11, 2016, and sent to the defendant, who received it on May 13, 2016. The defendant filed, *pro se*, a timely notice of appeal. Appellate counsel was subsequently appointed.

¶ 9 ANALYSIS

¶ 10 The issue on appeal is whether the circuit court erred by construing Petition 4 as a successive postconviction petition and dismissing it after reviewing it for cause and prejudice instead of for a gist of a constitutional claim as required for first-stage

postconviction petition proceedings. A circuit court's first-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Swamynathan*, 236 Ill. 2d 103, 113 (2010).

¶ 11 The Act “provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial.” *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). “Under the Act, a post-conviction proceeding not involving the death penalty contains three stages.” *Id.* at 244. “At the first stage, the trial court independently assesses a defendant’s petition, and if the court determines that the petition is frivolous or patently without merit, the court can summarily dismiss it.” (Internal quotation marks omitted.) *People v. Little*, 2012 IL App (5th) 100547, ¶ 12. “A post-conviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the ‘gist of a constitutional claim.’ ” *Edwards*, 197 Ill. 2d at 244 (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). “The ‘gist’ standard is ‘a low threshold.’ ” *Id.* (quoting *Gaultney*, 174 Ill. 2d at 418). “To set forth the ‘gist’ of a constitutional claim, the post-conviction petition ‘need only present a limited amount of detail’ [citation] and hence need not set forth the claim in its entirety.” *Id.* (quoting *Gaultney*, 174 Ill. 2d at 418). A *pro se* defendant need only allege enough facts to make out a claim that is arguably constitutional in nature, and the petition is not required to contain formal legal arguments or citations to legal authority. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 12 “If a postconviction petition is not dismissed at the first stage, it advances to the second stage, where an indigent defendant can obtain appointed counsel and the State can

move to dismiss his petition.” *Little*, 2012 IL App (5th) 100547, ¶ 12. “At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the defendant’s petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed.” *Id.*

¶ 13 “ ‘The Act is not a substitute for an appeal, but rather, is a collateral attack on a final judgment.’ ” *Id.* ¶ 13 (quoting *People v. Edwards*, 2012 IL 111711, ¶ 21). “ ‘Thus, “[t]he judgment of the reviewing court on a previous appeal is *res judicata* as to all issues actually decided, and any claim that could have been presented to the reviewing court in the direct appeal is, if not presented, thereafter barred under the doctrine of waiver.’ ” ” *Id.* (quoting *People v. Stewart*, 121 Ill. 2d 93, 104 (1988), quoting *People v. Silagy*, 116 Ill. 2d 357, 365 (1987)).

¶ 14 “ ‘The Act generally limits a defendant to one post-conviction petition.’ ” *Id.* ¶ 14 (quoting *People v. Holman*, 191 Ill. 2d 204, 210 (2000)). “ ‘Successive postconviction petitions are disfavored under the Act[,] and a defendant attempting to institute a successive postconviction proceeding, through the filing of a second or subsequent postconviction petition, must first obtain leave of court.’ ” *Id.* (quoting *People v. Gillespie*, 407 Ill. App. 3d 113, 123 (2010)). “To obtain leave of court to file a successive petition, a petitioner must either demonstrate ‘actual innocence’ or satisfy the cause-and-prejudice test codified in section 122-1(f) of the Act.” *Id.* (citing 725 ILCS 5/122-1(f) (West 2010)).

¶ 15 Here, the defendant argues that Petition 4 was his initial postconviction petition and the circuit court erred by construing it as a successive postconviction petition and applying to it the cause-and-prejudice test after previously and erroneously recharacterizing Petition 3 as a postconviction petition. Conversely, the State argues that the “defendant did not clearly label [Petition 3] as anything other than a post-conviction petition” and the circuit court properly accepted it as such, “due to both the similarity of titles and the content within.” We agree with the defendant.

¶ 16 Petition 3 bears the title: “Petition for [L]eave to [F]ile [L]ate Post-[C]onviction.” Within Petition 3, the defendant referenced the complications with accessing the law library and indicated that he recently discovered that the time to file a postconviction petition had come and gone, thereby explaining the title of Petition 3. The title of Petition 3 contradicts the State’s allegation that “the defendant did not clearly label [Petition 3] as anything other than a post-conviction petition.” Accordingly, we decline to further entertain this argument.

¶ 17 Besides the *title* of Petition 3, the State contends that the *content* of Petition 3 establishes that the circuit court correctly accepted it as a postconviction petition. The State claims that in Petition 3, the defendant “alleged deprivations of his constitutional right to access the law library, and asked that his conviction be overturned.” We disagree. Petition 3 is essentially the same as Petitions 1 and 2, both of which requested extensions of time for the defendant to file a postconviction petition. The main difference is that in Petition 3, the defendant conceded the expired deadline and requested permission to file a late postconviction petition.

¶ 18 Although Petition 3—like Petitions 1 and 2—indicates that the defendant had difficulty accessing the law library, there is no allegation of a constitutional violation set forth in Petition 3. Nor does the defendant request in Petition 3 that his conviction be overturned, as the State alleges. The defendant does report in Petition 3 that “*I asked about what I could do*” (emphasis added) to file a petition “which would help me get my conviction overturned.” However, the defendant’s prayer for relief in Petition 3 does not include a request for his conviction to be overturned, but simply “that he be granted leave to file [a] post-conviction [petition] ***.” Petition 3 is no more than a *request for permission* to file a late postconviction petition. We find that Petition 3—in neither form nor substance—comprises a postconviction petition and disagree with the State that the circuit court properly accepted it as such. Rather, the circuit court improperly recharacterized Petition 3 as a postconviction petition.

¶ 19 Moreover, in recharacterizing Petition 3 as a postconviction petition, pursuant to *People v. Shellstrom*, 216 Ill. 2d 45, 57 (2005), the circuit court was required to (1) notify the defendant of its intent to recharacterize Petition 3 as a postconviction petition, (2) warn the defendant that the recharacterization would result in any subsequently filed postconviction petition being subject to the restrictions of successive postconviction petitions, and (3) provide the defendant an opportunity to withdraw Petition 3 or to amend it to comply with the requirements of a postconviction petition. If the circuit court recharacterizes a pleading as a postconviction petition but fails to apprise the defendant of the notifications required by *Shellstrom*, “the pleading cannot be considered to have

become a postconviction petition for purposes of applying to later pleadings the Act's restrictions on successive postconviction petitions." *Id.*

¶ 20 Here, the circuit court failed to provide the defendant with the information required by *Shellstrom*. See *id.* Notably, the April 4, 2016, order contained language *implying* that the circuit court viewed Petition 3 as a postconviction petition. However, that language failed to satisfy the notification requirements under *Shellstrom*. See *id.* The circuit court stated in its order that it dismissed Petition 3 because it “contains no allegations of constitutional violations nor any itemization of the days [the defendant] was prevented from having access to the library” and “provides no facts to substantiate granting the request.”

¶ 21 Notwithstanding the implications of this language set forth in the April 4, 2016, order, the circuit court nevertheless referenced Petition 3 directly as a “petition *for leave to file* a post-conviction petition” (emphasis added) in the same order and failed to provide the *Shellstrom* notifications to the defendant. See *id.* Accordingly, it is entirely reasonable that the defendant construed the April 4, 2016, order as no more than a denial of his request to file a late postconviction petition (Petition 3). The State argues that “[b]ecause [Petition 3] was not clearly labeled as anything other than a post-conviction petition, the trial court did not recharacterize [it], and there was therefore no need to inform [the] defendant of a ‘recharacterization’ pursuant to *Shellstrom*.” For the aforementioned reasons, we disagree.

¶ 22 Because we find that Petition 3 is *not* a postconviction petition and the circuit court erred by recharacterizing it as such and by failing to comply with *Shellstrom* (see

216 Ill. 2d at 57), it necessarily follows that the circuit court erred by subsequently identifying Petition 4 as a successive postconviction petition and reviewing it as the same. Indeed, Petition 4 is—in both form and substance—the initial postconviction petition the defendant filed in this case. Petition 4 is titled “*Pro Se* [P]ost-[C]onviction [P]etition.” It alleges violations of the defendant’s constitutional rights—setting forth details in support of that allegation—and requests relief under the Act.

¶ 23 In its order of May 11, 2016, the circuit court incorrectly held that the “defendant previously filed a petition for postconviction relief [(Petition 3)] which was [dismissed] on 4-4-16” and that “the post-conviction petition filed on 4-21-16 [(Petition 4)] is a successive petition.” This procedural chain of error resulted in the circuit court incorrectly reviewing Petition 4 for cause and prejudice, because once the circuit court failed to give notice to the defendant per *Shellstrom*, Petition 3 could not be considered as a postconviction petition “for purposes of applying to [Petition 4] the Act’s restrictions on successive postconviction petitions.” 216 Ill. 2d at 57.

¶ 24 Having established that Petition 4, rather than Petition 3, is the initial postconviction petition, we now turn to the State’s jurisdictional challenge. The State contends that because the defendant did not appeal the circuit court’s denial of the “post-conviction petition” (Petition 3), but instead filed a “successive petition” (Petition 4), this court “cannot disturb the trial court’s finding that [Petition 3] was a post-conviction petition.” The State aptly notes that a circuit court’s dismissal of a postconviction petition after first-stage review is a final judgment (see 725 ILCS 5/122-2.1(a)(2) (West 2014)) and that a party must file a notice of appeal within 30 days after the entry of a

final judgment to preserve jurisdiction on appeal (see *People v. Miraglia*, 323 Ill. App. 3d 199, 204 (2001)).

¶ 25 The State cites *People v. Love*, 2013 IL App (2d) 120600, to support its argument. *Love* is easily distinguished from and does not apply to the instant case, because there, the appellate court lacked jurisdiction, as the defendant's initial postconviction petition was dismissed at the first stage and the defendant did not appeal the dismissal within 30 days. *Id.* ¶¶ 1, 32. Here, having found that Petition 3 was not a postconviction petition but a request to file a late postconviction petition, the circuit court's order denying it was not a final judgment. Also having found that Petition 4 was a postconviction petition and the defendant filed a timely notice of appeal after the circuit court dismissed it in its order of May 11, 2016, we have jurisdiction over this appeal, and the State's argument fails.

¶ 26 Having established our jurisdiction and the foregoing errors of the circuit court, we look to *People v. Little*, in which this court set forth the appropriate remedy to apply in this case. See *People v. Little*, 2012 IL App (5th) 100547, ¶¶ 24, 26. In *Little*, the defendant filed a *pro se* postconviction petition seeking leave to file a late notice of appeal because his trial counsel did not file one. *Id.* ¶ 6. The circuit court granted the petition and gave the defendant 30 days to file his notice of appeal, after which the judgment was affirmed on appeal. *Id.* ¶ 8. The defendant then filed a second *pro se* postconviction petition, alleging numerous substantive issues and problems with counsel and the court. *Id.* ¶ 9. Upon filing of the second postconviction petition, the circuit court found that the defendant failed to satisfy the cause-and-prejudice test and denied what it considered to be the defendant's request for leave to file a successive petition. *Id.* ¶ 10.

¶ 27 On appeal, this court held that “where a defendant files an initial postconviction petition seeking only to reinstate the right to a direct appeal that was lost due to counsel’s ineffectiveness, a subsequent petition is not a successive petition for purposes of [the Act].” *Id.* ¶ 19. The *Little* court observed section 122-2.1 of the Act, under which “ ‘a court is required to review a petition within 90 days to determine whether it is frivolous or patently without merit’ or else ‘the court *must* docket the petition for further proceedings.’ ” (Emphasis in original.) *Id.* ¶ 23 (quoting *People v. Inman*, 407 Ill. App. 3d 1156, 1162 (2011)). “This rule applies even if by honest mistake the trial court disposes of a postconviction petition on the erroneous belief that the petition was a successive petition brought without leave of court.” *Id.*

¶ 28 Here, the circuit court construed Petition 4 as a successive postconviction petition and reviewed it for cause and prejudice instead of correctly considering it as a postconviction petition and determining if it was frivolous or patently without merit. Because the determination of whether Petition 4 was frivolous or patently without merit was not made within 90 days of the filing of Petition 4, the cause must be remanded for second-stage proceedings. See *id.*

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we vacate the May 11, 2016, order of the circuit court of St. Clair County and remand for second-stage proceedings under the Act.

¶ 31 Order vacated; cause remanded.