

No. 1-11-3760

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).

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. 91 CR 17056
)	
GILBERT TAYLOR,)	Honorable
)	Rickey Jones,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's consideration of the defendant's *pro se* filing as a petition for relief from judgment under section 2-1401, as opposed to a post-conviction petition, could not be reviewed for error pursuant to *People v. Stoffel*, 239 Ill. 2d 314 (2010), and counsel need not be appointed for the defendant.

¶ 2 Defendant Gilbert Taylor appeals from the circuit court's order granting the State's motion to dismiss his *pro se* petition for relief from judgment brought pursuant to section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2010)). On appeal, defendant contends the circuit court erred in refusing his request to recharacterize his section 2-

1401 filing as a petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant also argues the circuit court erred when it appointed counsel to represent him in the proceedings on his petition but then proceeded in the absence of counsel. We affirm the circuit court's dismissal of defendant's filing.

¶ 3 Defendant was charged with first degree murder, attempted first degree murder and other offenses in connection with a gang shooting that occurred on June 22, 1991. In 1994, defendant was tried simultaneously but separately from two co-defendants, Lavell Jackson and Tyree Anderson. Defendant presented alibi witnesses at trial who testified he was home on the night of the shooting. Defendant was convicted of first degree murder and attempted first degree murder and was sentenced to consecutive terms of 55 years and 6 years for those respective offenses.

¶ 4 In a combined direct appeal with his co-defendants, this court affirmed defendant's convictions and sentences. *People v. Jackson et al.*, Nos. 1-94-3357, 1-94-3365 and 1-94-3949 (consolidated) (1996) (unpublished order under Supreme Court Rule 23). In that order, this court allowed appellate counsel to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967), based on counsel's conclusion that no issues of merit existed warranting an appeal. *Id.* at 6. Defendant filed a response asserting that no witnesses testified he was at the scene of the crime and that no evidence supported the State's contention that he participated in the shooting in retaliation for having been shot one month earlier. This court reviewed the evidence and concluded it was sufficient to convict defendant when weighed in the light most favorable to the prosecution. *Id.*

¶ 5 In May 2011, almost 15 years after that direct appeal, defendant filed the *pro se* petition that is the subject of this appeal. In defendant's filing, which cited section 2-1401 of the Code,

he contended the prosecution committed a discovery violation by failing to list Clark Brown as a potential witness. (Brown was charged in the shootings and tried separately.) Defendant also claimed the State failed to prove his guilt beyond a reasonable doubt and stated he was actually innocent of the crimes. Attached to defendant's petition were affidavits from Brown, Anderson and Jackson stating they were responsible for the shooting and that defendant was not in the car with them when the shooting took place. Defendant also filed a motion for appointment of counsel to assist him in the proceedings on his petition.

¶ 6 In the initial proceedings on defendant's petition in the circuit court, the court alternately referred to defendant's filing as a section 2-1401 petition and as a post-conviction petition. On July 7, 2011, with an assistant State's Attorney present, the court stated:

"Gilbert Taylor is [2-1401] petition, a post conviction matter. I am going to need the appointment of the Public Defender and the State's Attorney's Office, Post-Conviction Unit will have to be notified. They all will be here on July 14th. So this will be order of court status July 14th. They were asking for state to respond not appointment of Public Defender."

¶ 7 On July 14, 2011, an assistant State's Attorney was present before the court; however, neither defendant nor any counsel representing defendant appeared in court, and the case was continued.

¶ 8 On August 22, 2011, the State appeared in court and filed a motion to dismiss defendant's petition. In its filing, the State asserted defendant's claims were untimely and that his filing failed to allege factual errors that would lead the court to vacate the judgment. The court stated

defendant would be brought to court to be asked if he would like to respond to the State's motion to dismiss. On September 15, 2011, defendant appeared in court without representation and filed a *pro se* answer to the State's motion, asking the court to consider his contentions as post-conviction claims brought under the Act.

¶ 9 On November 9, 2011, defendant again appeared *pro se*, and the court heard arguments on the State's motion to dismiss defendant's petition. The State contended the petition was untimely and failed to raise claims that could be considered under section 2-1401, and the State also argued the court could not consider defendant's contentions as post-conviction claims. Defendant argued he presented newly discovered evidence from his co-defendants showing that he did not commit the crime. The court granted the State's motion to dismiss defendant's petition. Defendant now appeals that ruling.

¶ 10 On appeal, defendant raises two main arguments in contending the November 9, 2011, order should be reversed and this case remanded for additional proceedings under the Act, including the appointment of counsel. First, defendant contends the circuit court erred when, after appointing counsel for him during the July 7, 2011, court date, the court proceeded to hear arguments and rule on the petition in the absence of counsel. Second, he asserts the circuit court erred in denying his request to recharacterize his *pro se* claims brought pursuant to section 2-1401 as a post-conviction filing, arguing his contentions were "clearly cognizable" under the Act.

¶ 11 The State responds to defendant's second contention by asserting this court cannot review the circuit court's ruling. The State cites the supreme court's holding in *People v. Stoffel*, 239 Ill. 2d 314, 324 (2010), that a circuit court's decision not to recharacterize a section 2-1401 petition as a post-conviction filing may not be reviewed for error. In addition, the State responds that the

circuit court did not in fact appoint counsel for defendant and even had counsel been appointed, defendant was not prejudiced in proceeding *pro se* because defendant has conceded both that his petition was untimely and that his claims could not be considered under section 2-1401.

¶ 12 Section 2-1401 of the Code provides a statutory procedure by which final orders and judgments may be vacated after 30 days from their entry but no more than two years after the judgment. *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). The purpose of a section 2-1401 petition is to bring facts to the attention of the circuit court which, if known at the time of judgment, would have precluded its entry. *People v. Haynes*, 192 Ill. 2d 437, 463 (2000). Although a section 2-1401 petition is a civil remedy, its remedial powers have been extended to criminal cases. *Vincent*, 226 Ill. 2d at 8. There is no explicit right to the assistance of counsel in connection with a section 2-1401 petition. See *People v. Pinkonsly*, 207 Ill. 2d 555, 568 (2003) (section 2-1401 of the Code does not specify any level of assistance by counsel).

¶ 13 Even if a petition cites section 2-1401, the circuit court may treat a defendant's *pro se* pleading as a post-conviction petition if the pleading alleges a deprivation of rights cognizable in a post-conviction proceeding. *People v. Shellstrom*, 216 Ill. 2d 45, 51 (2005). However, the circuit court is not required to do so. *Id.* at 53 n.1.

¶ 14 More recently, as the State points out, our supreme court held in *Stoffel* that a circuit court has no obligation to recharacterize a *pro se* pleading as a post-conviction filing under the Act. *Stoffel*, 239 Ill. 2d at 324. In *Stoffel*, the defendant, during the pendency of his direct appeal, filed a *pro se* petition for relief from judgment citing section 2-1401 and the federal and state constitutions, and counsel was appointed to represent the defendant. *Id.* at 317-18 (noting the circuit court proceedings in *Stoffel* took place before three different judges in succession).

The State filed a motion to dismiss the petition, asserting the defendant failed to assert any factual errors or newly discovered evidence that would warrant relief pursuant to section 2-1401. *Id.* at 318. Counsel for defendant asked that the petition be treated as a post-conviction petition, and the State did not object to that request. *Id.* at 319.

¶ 15 Counsel for the defendant in *Stoffel* filed two supplements to the defendant's petition, along with a Rule 651 certificate and a response to the State's motion to dismiss. *Id.* at 321. The circuit court agreed with the State that the defendant's counsel could not "caption his supplemental pleading as a post-conviction petition and thereby magically transform" a petition for relief from judgment into a post-conviction petition, and the court granted the State's motion to dismiss the defendant's petition for relief from judgment. *Id.* at 322.

¶ 16 The supreme court disagreed with that reasoning, finding that under *Shellstrom*, the circuit court was not required to treat a *pro se* pleading as a post-conviction petition. *Id.* at 324. However, the supreme court in *Stoffel* held that once the court reviewed the defendant's filing and treated it as a post-conviction petition, appointing counsel and ordering counsel to proceed under the rules of the Act, the petition had advanced to the second stage of post-conviction proceedings. *Id.* at 327. The supreme court held the circuit court, having deemed the filing to be a post-conviction petition, could not later treat the petition as being brought under section 2-1401. *Id.* at 329.

¶ 17 The supreme court in *Stoffel* noted the language of section 122-1(d) of the Act regarding post-conviction filings:

"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."

(Emphasis added.) 725 ILCS 5/122-1(d) (West 2010).

The supreme court noted its holding in *Shellstrom* that the circuit court may, but is not required to, treat a *pro se* pleading as a post-conviction petition. *Stoffel*, 239 Ill. 2d at 324. The court in *Stoffel* held:

"*Shellstrom* makes plain that a trial court has *no obligation* to recharacterize a *pro se* pleading pursuant to section 122-1(d). It cannot be error for a trial court to fail to do something it is not required to do.

Accordingly, we hold that, in light of section 122-1(d), a trial court's decision *not* to recharacterize a defendant's *pro se* pleading as a postconviction petition may not be reviewed for error." (Emphasis in original). *Id.*

¶ 18 The supreme court's holdings in *Shellstrom* and *Stoffel* govern our disposition of this case. Defendant filed a *pro se* motion citing section 2-1401 of the Code. Although the circuit court initially referred to defendant's filing interchangeably as a section 2-1401 petition and a "post conviction matter" and indicated counsel would be appointed, the court ultimately did not appoint counsel for defendant, and defendant proceeded to represent himself. Therefore, defendant's petition was not treated as a post-conviction filing under the Act. Here, in contrast to *Stoffel*, where the circuit court interpreted the defendant's filing as a post-conviction petition, the court in this case, after its initial remarks, proceeded on the defendant's filing as a petition for

relief from judgment under section 2-1401, which was the basis cited in the petition. Although defendant asked in his *pro se* answer to the State's motion that the court consider his contentions as post-conviction claims, the circuit court did not indicate it was recharacterizing defendant's claims as being brought under the Act. While the circuit court in this case had the authority to recast defendant's pleading as a post-conviction petition, "trial courts should be hesitant to use this authority and do so only in 'unusual and compelling circumstances.'" *People v. Hood*, 395 Ill. App. 3d 584, 588 (2009). The supreme court in *Stoffel* clearly held that the circuit court's decision not to consider defendant's filing as a post-conviction petition cannot be reviewed for error.

¶ 19 In contending that review is allowable, defendant cites *People v. Smith*, 386 Ill. App. 3d 473, 478 (2008), which preceded *Stoffel* and held that a trial court's decision not to recharacterize a *pro se* petition may be reviewed under an abuse of discretion standard. However, even before *Stoffel's* clear holding, this court questioned and declined to follow *Smith*. See *People v. Santana*, 401 Ill. App. 3d 663, 666-67 (2010) (rejecting defendant's claim that the circuit court erred by declining to recharacterize his section 2-1401 petition as a post-conviction filing and calling the abuse-of-discretion standard set out in *Smith* "questionable"); *People v. Bean*, 389 Ill. App. 3d 579, 583-84 (2009) (acknowledging *Smith* but noting that *Shellstrom* provides circuit courts "unfettered discretion" to decline to consider a filing as a post-conviction petition and "to refuse to so recharacterize a petition").

¶ 20 As *Santana* stated in rejecting *Smith's* holding, "[t]he trial court is under no obligation to recharacterize a pleading on its own." *Santana*, 401 Ill. App. 3d at 667. Furthermore, the court in *Santana* noted that the defendant's petitions in that case were time-barred under both section

2-1401 and also under the Act. The same is true of the defendant's filing in this case, which was brought almost 15 years after his direct appeal.

¶ 21 Defendant contends *Santana* and similar cases are distinguishable because here, the circuit court deemed defendant's petition "had sufficient merit so as to necessitate the appointment of counsel." We decline to reach such a conclusion because the record reflects that the court's initial impression that counsel was required was made before any review of the petition's substance and because counsel was never, in fact, appointed.

¶ 22 Defendant's remaining contention on appeal is that the circuit court erred in proceeding on his petition in the absence of counsel. In this case, defendant filed a petition seeking relief under section 2-1401 that was treated as such by the circuit court. As we have noted, unlike the right to post-conviction counsel present in the Act, section 2-1401 does not similarly confer a right to counsel. See *Pinkonsly*, 207 Ill. 2d at 568.

¶ 23 Accordingly, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.