2019 IL App (1st) 170221-U

No. 1-17-0221

Order filed October 11, 2019

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 13776
	)	
ANTHONY NASH,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's summary dismissal of defendant's *pro se* postconviction petitions affirmed where defendant asked the court to recharacterize his *pro se* section 2-1401 motions as postconviction petitions under the Post-Conviction Hearing Act (Act) after the court admonished him of the possibility of recharacterization and gave him an opportunity to file an amended petition under the Act pursuant to *People v. Shellstrom*, 216 Ill. 2d 45 (2005).

¶ 2 Defendant Anthony Nash filed two *pro se* motions for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)). After

discussing the nature of his allegations with the circuit court, and given the choice to decide how he wished to proceed, defendant elected to have the court recharacterize his pleadings as petitions filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). The circuit court determined that defendant's allegations were frivolous and patently without merit, and summarily dismissed his petitions. On appeal, defendant contends that the court erred when it recharacterized his pleadings without fully admonishing him of the notice requirements announced in *People v. Shellstrom*, 216 Ill. 2d 45 (2005) and *People v. Pearson*, 216 Ill. 2d 58 (2005). We affirm.[1]

¶ 3 Defendant was charged with one count each of possession of a controlled substance with intent to deliver and criminal fortification of a residence. Following a bench trial, defendant was found not guilty of criminal fortification, and guilty of the lesser included offense of simple possession of a controlled substance. The evidence at trial established that on June 27, 2012, a team of Chicago police officers executed a search warrant for a second-floor apartment in the 3500 block of West Grenshaw Street. Officer John O'Keefe testified that a scissor gate was affixed to the door frame. The officers announced their office and stated that they had a warrant. O'Keefe heard footsteps running away behind the closed door. The police broke down the door and entered the apartment. O'Keefe heard the toilet flushing and went to the bathroom where he observed defendant backing away from the toilet. Inside the toilet, O'Keefe observed two knotted plastic bags containing a rock-like substance which he recovered. Officer Michael Laurie testified that he recovered a bundle of money from the living room table and a second bundle of $14,000 found in a plastic bag at the bottom of the kitchen garbage can. From one of the

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

bedrooms, Laurie recovered defendant's driver's license, social security card, and 16 pieces of mail addressed to defendant. The State presented a stipulation that a forensic chemist tested the contents of one of the bags recovered from the toilet and found it positive for 0.1 gram of cocaine.

¶ 4 At sentencing, the State argued in aggravation that defendant had six prior felony convictions. He had been recently convicted in another case of possession of a controlled substance with intent to deliver and sentenced to a term of 10 years' imprisonment. The State noted that defendant had a bachelor's degree and had been given opportunities, but chose to sell or possess drugs.

¶ 5 In mitigation, defense counsel argued that defendant had a solid history of education and employment, and that the offense in this case was a Class 4 felony that did not involve any violence. In allocution, defendant stated that he had already provided a statement and made reports to the Independent Police Review Authority. Defendant stated that he had addressed his personal issues, became involved in community service, attended church, secured employment, got married, went to school, and worked for an adolescent program for six years. Defendant asserted that he had been "targeted," and that he was in the wrong place at the wrong time.

¶ 6 The trial court sentenced defendant to three years' imprisonment. On direct appeal, this court allowed the State Appellate Defender to withdraw as counsel pursuant to *Anders v. California,* 386 U.S. 738 (1967) and affirmed that judgment. *People v. Nash*, No. 1-16-0265 (2018) (unpublished summary order pursuant to Supreme Court Rule 23(c)).

¶ 7 On December 31, 2015, while his direct appeal was pending, defendant filed a *pro se* motion for relief from judgment pursuant to section 2-1401 of the Code. Defendant alleged that

his fourth amendment rights were violated when the police conducted a search and seizure without probable cause. Defendant alleged that police obtained his address from a contact card during an illegal traffic stop. He alleged that the police then falsified information on the affidavit to obtain the search warrant by claiming they received information from a nonexistent confidential informant. Defendant also alleged that the police testified falsely at the hearing on his motion to suppress and at trial. Defendant further alleged that the State committed discovery violations when it improperly omitted photographs and other information from the arrest report that were pertinent to the case, and misled the court by leading the police officers into testifying falsely. In addition, defendant claimed that he suffered violations of his sixth amendment right to confront his accusers, and his right to due process.

¶ 8 On July 18, 2016, defendant filed a second *pro se* motion for relief from judgment under section 2-1401 of the Code raising the same allegations. In addition, defendant alleged that he received ineffective assistance from both his pretrial and trial counsel. Defendant claimed that his pretrial counsel told the court about false statements an alleged confidential informant had made in a police report and submitted transcripts of "IPRA" reports without defendant's consent on the day he withdrew from defendant's case. Defendant also claimed that his trial counsel was ineffective by failing to call Angela Nash or any character witness to testify at the trial or the sentencing hearing; failing to inform him of the accusations against him; denying him his right to confront a witness who had made false allegations against him; refusing to challenge an officer's false testimony during cross-examination; and failing to investigate and present testimony from an unnamed witness who would have corroborated defendant's theory. Defendant attached to his second motion a two-page "History of Investigation" which appears to be from a police report.

¶ 9 At a status hearing on August 18, 2016, the State pointed out that defendant had raised constitutional claims in his section 2-1401 motions. The State asked the court whether it wanted to admonish defendant about the possibility of recharacterizing his motions as postconviction petitions due to the nature of the issues raised in his pleadings. The court stated that it wanted to review defendant's filings and continued the case.

¶ 10 On September 7, 2016, the State again pointed out that defendant had raised constitutional issues in his pleadings, and therefore, section 2-1401 did not apply to those claims. The State suggested that the court admonish defendant pursuant to *Shellstrom*. The court then advised defendant that the issues he raised were not proper for a section 2-1401 petition, but may be more appropriate in a postconviction petition. The court stated:

> "if you want, I can re-characterize your 2-1401 as a post-conviction petition, or you can, if you want to, file a post-conviction petition, you can do that, a separate one other than what you have already done, this 2-1401. You have to understand that, if I re-characterize it, then it is a post-conviction petition, and then I have 90 days to review it, and I can either dismiss it within the 90 days, or I can advance it to a second stage, but then it is a post-conviction petition at that point, and those rules apply."

Defendant stated "I understand," and noted that his ineffective assistance of counsel claims fell under the sixth amendment. Defendant explained that he had filed his motions under section 2-1401 to raise issues about things that had occurred during trial, and also to raise newly discovered evidence.

¶ 11 The following colloquy then occurred:

"THE COURT: I guess my question to you is do you want to keep it as a 2-1401 [p]etition, do you want me to re-characterize it as a post-conviction petition, or do you want time to consider which way you would like to proceed?

THE DEFENDANT: I would like time to consider which way to proceed.

THE COURT: Okay. I will give you that."

The case was continued.

¶ 12 On September 15, 2016, the court noted that defendant had filed "a 2-1401 [p]etition" and stated "I admonished you on the last court date that I can recharacterize it as a post-conviction petition if you wanted." Defendant stated "[y]es." The court asked defendant "[h]ave you had time to think about that?" Defendant again replied "[y]es," and further stated "I agree for you --." The following exchange occurred:

"THE COURT: Mr. Nash, you understood the admonishment I gave you on the last court date?

THE DEFENDANT: Yes.

THE COURT: You're asking me to recharacterize it as a post-conviction petition?

THE DEFENDANT: Yes.

THE COURT: So defendant's request to characterize the 2-1401 petition as a post-conviction petition is granted."

¶ 13 On November 7, 2016, the circuit court entered a written order finding that the issues raised in defendant's section 2-1401 motions, which had been recharacterized as postconviction petitions, were frivolous and patently without merit. Accordingly, the court summarily dismissed defendant's postconviction petitions.

¶ 14 On appeal, defendant solely contends that the circuit court erred when it recharacterized his section 2-1401 motions as postconviction petitions under the Act without fully admonishing him of the notice requirements announced in *Shellstrom* and *Pearson*. Defendant argues that although the court notified defendant of the recharacterization and gave him an opportunity to withdraw or amend his pleadings, the court failed to warn defendant that any future postconviction petitions would be subject to the Act's restrictions on successive postconviction petitions. Defendant asserts that this court must vacate the circuit court's summary dismissal and remand his petitions with directions to administer the complete *Shellstrom* admonishments, including an opportunity for him to withdraw or amend his pleadings.

¶ 15 The State responds that the circuit court was not required to give defendant the *Shellstrom* admonishments because the court did not recharacterize his motions *sua sponte*, but instead, granted defendant's request to recharacterize his section 2-1401 pleadings under the Act. Nevertheless, the State asserts that although not required in this case, the court gave defendant the full admonishments when it advised him that the postconviction rules would apply to his petitions.

¶ 16 Whether the circuit court followed the proper procedure in complying with the supreme court's mandate in *Shellstrom* is a question of law that we review *de novo*. *People v. Bland*, 2011 IL App (4th) 100624, ¶ 17. In *Shellstrom*, the defendant filed a *pro se* pleading entitled " 'Motion to Reduce Sentence, Alternatively, Petition for Writ of Mandamus to Order Strict Compliance with Terms of Guilty Plea.' " *Shellstrom*, 216 Ill. 2d at 48. The circuit court *sua sponte* recharacterized the defendant's pleading as a postconviction petition filed under the Act and summarily dismissed it. *Id.* at 49. Our supreme court noted that the defendant was not

present in court, had no notice of the recharacterization, and had no opportunity to respond to the court's dismissal of his pleading. *Id.*

¶ 17 On appeal, the defendant argued, in relevant part, that the circuit court erred because it recharacterized his pleading summarily, without giving him notice or an opportunity to respond. *Id.* at 53. The supreme court reiterated its long-standing precedent that where a *pro se* pleading alleges a deprivation of constitutional rights that is cognizable under the Act, the circuit court may treat that pleading as a postconviction petition. *Id.* at 51. The court then agreed with the defendant that a *pro se* litigant should be given notice before the circuit court recharacterizes his pleading as a first postconviction petition. *Id.* at 56-57. The *Shellstrom* court held:

> "when 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." *Id.* at 57.

In *Pearson*, filed the same day as *Shellstrom*, the supreme court extended these same admonishments to situations where a circuit court recharacterizes a *pro se* pleading as a successive postconviction petition. *Pearson*, 216 Ill. 2d at 68.

¶ 18 This court has previously explained that "*Shellstrom* stands for the proposition that, when a trial court *sua sponte recharacterizes* a pleading as a first postconviction petition, the court

must provide the defendant certain admonishments." (Emphasis in original.) *Bland*, 2011 IL App (4th) 100624, ¶ 23. Accordingly, where the trial court does not *sua sponte* recharacterize the defendant's pleading, "the court [is] not required to admonish defendant pursuant to *Shellstrom*." *Id.* ¶ 24. See also *People v. Stoffel*, 389 Ill. App. 3d 238, 243 (2009) ("Because of the defendant's repeated requests to recharacterize his section 2-1401 petition as a postconviction petition, the trial court would not have had to take *sua sponte* action, the concerns raised in *Shellstrom* would not apply, and no *Shellstrom* warnings would need to have been provided."), *aff'd as modified*, 239 Ill. 2d 314 (2010).

¶ 19 Here, the circuit court did not *sua sponte* recharacterize defendant's *pro se* motions filed under section 2-1401 of the Code. The record shows that the State suggested that the court may wish to admonish defendant about the possibility of recharacterizing his motions as postconviction petitions due to the nature of the issues raised in his pleadings. At a status hearing, the court advised defendant that the issues he raised were not proper for a section 2-1401 petition, but may be more appropriate for a postconviction petition. The court then advised defendant "if you want, I can re-characterize your 2-1401 as a post-conviction petition, or you can, if you want to, file a post-conviction petition." The court explained to defendant that, if it recharacterized his pleadings, they would become postconviction petitions, and "those rules" would apply. The court then gave defendant time to consider whether he wanted to keep his pleadings as section 2-1401 motions, or have the court recharacterize them as postconviction petitions.

¶ 20 At a status hearing a week later, the court reminded defendant that it had admonished him on the last court date that it could recharacterize his pleadings as postconviction petitions "if you

wanted." Defendant confirmed that he had understood the court's admonishments, that he had time to think about how he wanted to proceed, and that he wanted the court to recharacterize his section 2-1401 motions as postconviction petitions. The record thus shows that, unlike *Shellstrom*, the circuit court in this case did not unilaterally or *sua sponte* recharacterize defendant's pleadings. Instead, defendant's pleadings were recharacterized pursuant to his request after he had time to consider how he wanted to proceed. Because the court did not *sua sponte* recharacterize defendant's pleadings, the court was not required to admonish defendant pursuant to *Shellstrom*. *Bland*, 2011 IL App (4th) 100624, ¶ 23. Consequently, as no admonishments were required, we find no error with the admonishments given by the court which (1) advised defendant of the *possibility* of recharacterization, (2) explained that a recharacterized petition would be subject to postconviction rules, and (3) gave defendant the opportunity to file a new or amended petition.

¶ 21 For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's postconviction petitions.

¶ 22 Affirmed.