2011 IL App (5th) 090448-U

NO. 5-09-0448

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Madison County.
	)	
v.	)	No. 87-CF-27
	)	
ERNEST PERRY,	)	Honorable
	)	James Hackett,
Petitioner-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court.
Justices Donovan and Wexstten concurred in the judgment.

O R D E R

¶ 1 *Held*: Even though the trial court appeared to recharacterize a complaint for *habeas corpus* relief as a petition for postconviction relief, there was no merit to the petitioner's contention that the court erred by again recharacterizing it as a *habeas corpus* complaint where the petitioner and his attorney continued to treat it as such and treating it as a postconviction petition would not have entitled him to relief.

¶ 2 The petitioner, Ernest Perry, appeals a trial court order dismissing his complaint for *habeas corpus* relief for failure to allege grounds upon which *habeas corpus* relief could be granted. He points out that the complaint raised claims of constitutional deprivations that would be cognizable under the Post-Conviction Hearing Act, but not under the *habeas corpus* provisions. He argues that by appointing counsel for him and repeatedly referring to the proceedings as "post-conviction" proceedings, the court treated the complaint as a postconviction petition. He further argues that once the court treated his complaint as a postconviction petition, it could not recharacterize it as a *habeas corpus* complaint without

notice. We affirm.

¶ 3 Perry was convicted on two counts each of first-degree murder and home invasion in 1988. He confessed to acting as a lookout while another man attempted to rob the two victims in their home. He made this confession while in custody on unrelated charges. Perry filed a motion to suppress his confession, which was denied. He was convicted on all charges and sentenced to concurrent terms of 30 years for each charge of home invasion and natural life in prison for each of the two murders.

¶ 4 Perry appealed his convictions, arguing that the court erred in denying his motion to suppress. This court reversed on that basis (*People v. Perry*, 205 Ill. App. 3d 655, 661, 563 N.E.2d 1144, 1147 (1990)); however, our decision was reversed by the Illinois Supreme Court (*People v. Perry*, 147 Ill. 2d 430, 435-36, 590 N.E.2d 454, 455-56 (1992) (citing *McNeil v. Wisconsin*, 501 U.S. 171 (1991), which was decided after this court's decision in *Perry*)). On remand, this court rejected additional claims of error related to (1) the propriety of imposing natural-life sentences on a defendant charged on a theory of accountability and (2) the court's handling of a *pro se* posttrial motion alleging ineffective assistance of counsel. *People v. Perry*, 230 Ill. App. 3d 720, 722, 595 N.E.2d 736, 738 (1992).

¶ 5 Perry subsequently filed several collateral challenges to his convictions and sentences. In July 1992, while his direct appeal was pending, he filed a petition seeking relief under the Post-Conviction Hearing Act (Ill. Rev. Stat. 1991, ch. 38, par. 122-1 *et seq.* (now at 725 ILCS 5/122-1 *et seq.* (West 2010))). Perry alleged that his constitutional rights were violated because (1) he was not proven guilty beyond a reasonable doubt and (2) the State used its peremptory challenges to excuse the only two black venire members in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). He alleged that he received ineffective assistance of counsel because trial counsel (1) failed to discover and call potential defense witnesses, (2) did not object to the lack of potential black jurors in the venire or file a proper motion

pursuant to *Batson*, (3) did not object to improper closing arguments, (4) failed to preserve issues for appeal, and (5) "did not allow" Perry to testify in his own defense. Perry further alleged that he received ineffective assistance of appellate counsel because appellate counsel did not raise any of these issues in Perry's direct appeal.

¶ 6 The postconviction court summarily dismissed Perry's petition, finding it to be frivolous and patently without merit. Four months later, Perry filed with this court a petition for leave to file a late notice of appeal from that ruling. This court denied the petition in February 1993.

¶ 7 Perry next filed a petition for a writ of *habeas corpus* in federal court. The federal district court for the southern district of Illinois dismissed his petition in February 1996. We note that although Perry mentioned this petition in pleadings in the record, neither the petition itself nor the district court's ruling is included in the record. Thus, we do not know what precise issues Perry raised in the federal petition.

¶ 8 In December 2000, Perry filed a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)). He challenged his sentence, relying on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The State filed a motion to dismiss, which the trial court granted. Perry appealed, and this court affirmed the trial court's ruling in October 2002. *People v. Perry*, No. 5-01-0404 (Oct. 11, 2002) (unpublished order pursuant to Supreme Court Rule 23 (eff. July 1, 1994)).

¶ 9 In April 2003, Perry filed the complaint for *habeas corpus* relief that forms the basis of this appeal. The complaint named "Ernest Perry, *pro se*," as the plaintiff and "Jonathan Walls, Warden of the Menard Maximum Security Prison" as the respondent. In it, Perry asserted the following as grounds for relief: (1) he was denied due process due to the alleged *Batson* violation, (2) he was not proven guilty beyond a reasonable doubt of either murder or home invasion, and (3) he was denied due process because he agreed to make an untrue

confession because he suffered from a mental disability. He stated that the plaintiff "sets forth a case of actual innocence and is only here due to his ignorance and inability to understand the severity of making such a false statement even under coercion."

¶ 10 Between April 2003 and June 2005, the court entered numerous orders continuing the case and resetting the hearing in the matter. In all of these orders, the court captioned the case as "People v. Perry" rather than "Perry v. Walls." In addition, the court used the same file number that had been assigned to the defendant's criminal case rather than assigning a new case number. Three of those orders noted that the case was "called for post-conviction" or "set for post-conviction petition." However, the court did not enter a substantive order expressly finding that it would be appropriate to treat Perry's complaint as a petition for postconviction relief.

¶ 11 In a June 15, 2005, order continuing the case, the court gave the State 30 days in which to respond to Perry's complaint. On July 14, 2005, the Attorney General (AG) filed a special limited appearance contesting jurisdiction. In it, the AG argued that the court lacked jurisdiction in the matter because the warden of Menard was never properly served. In a footnote, the AG noted that the case should have been assigned a new case number and styled as "Ernest Perry v. Alan Uchtman, Warden of Menard," rather than "People v. Perry."

¶ 12 The case was again continued numerous times. The record contains nine orders continuing the case between November 2005 and May 2007. Of these, two refer to resetting a "post-conviction hearing" or "pending post-conviction matters."

¶ 13 On September 25, 2007, the court again entered an order continuing the case. This time, however, the court stated, "Cause called this date on Petition [for] Writ of *Habeas Corpus* filed by Defendant." The court noted that the AG had filed a special limited appearance contesting jurisdiction, and it set that motion for a hearing.

¶ 14 The case was continued twice more before the court held a hearing in the matter on

February 27, 2008. At the beginning of the hearing, the court stated, "And what we have is the Petition for Writ of *Habeas Corpus* filed in this case by Mr. Perry." The assistant Attorney General (AAG) argued that the court lacked personal jurisdiction over the warden because he had not been personally served in the matter. Counsel for Perry pointed out that Perry was incarcerated and acting *pro se* when he filed his complaint, but he made an effort to serve the State's Attorney of Madison County. Counsel argued that this "procedural defect" was due to "excusable neglect" under the circumstances and requested 30 days to cure the defect.

¶ 15 Perry addressed the court and stated that he gave the warden a copy of his complaint at the time he filed it. He noted, however, that there had been three or four new wardens since that time, and he did not know what became of the copy. The court explained that this was not the same as being "served properly so that [the warden is] then obligated to respond properly." The AAG agreed to allow Perry to properly serve the warden. The same day, the court entered an order granting Perry 30 days to perfect service of process and again continuing the case.

¶ 16 The case was again continued several times. On April 13, 2009, Donald Gaetz (another new warden) was served with process in the matter. On June 22 (after two more continuances), Gaetz filed a motion to dismiss Perry's complaint. He argued that the claims raised in the complaint are not cognizable under the *habeas corpus* provisions (see 735 ILCS 5/10-124 (West 2008)).

¶ 17 On August 12, 2009, the court held a hearing on Gaetz's motion. The AAG argued that the only claims that can be brought under *habeas corpus* are challenges to the underlying jurisdiction of the court that conducted Perry's trial. He also argued that all of Perry's claims could have been raised on direct appeal. Perry's attorney argued that the constitutional claims should survive the motion to dismiss. The court noted that *habeas corpus* is not the

proper venue for raising the types of claims included in Perry's complaint.

¶ 18 Perry then addressed the court. He stated: "I would like to know can it be taken in some other petition ***? Could I file–can you relax whatever it is so I can file a post-conviction proceeding ***?" The court explained that "there are other mechanisms" for raising the issues Perry wanted to raise. The court noted, however, that he may be barred from filing appropriate pleadings either because too much time had passed or because he may have already "filed something *** that should have raised the issue or did raise the issue." The court then noted that Perry had previously filed a direct appeal, a postconviction petition, and a federal *habeas corpus* petition. Finally, the court stated: "So the short answer is, yes, there are other avenues. The long answer is you've already used a couple of them. If that's been closed off to you, then so be it. But this one is also going to be closed off to you." The same day, the court entered an order granting the warden's motion to dismiss. This appeal followed.

¶ 19 This case involves a common scenario in which a *pro se* litigant files a pleading raising the types of claims that are cognizable under the Post-Conviction Hearing Act but does not label his or her pleading a postconviction petition. In such cases, trial courts often decide to treat the pleading as a postconviction petition. Although this case involves a common scenario, it reaches this court after a somewhat unusual and lengthy procedural history. Perry argues that the trial court, by its actions, properly decided that his complaint should be treated as a postconviction petition. He contends that once the court made this determination, it could not decide to treat the petition as a *habeas corpus* proceeding without giving a reason for doing so or providing him with notice. The AG, by contrast, argues that the court never actually characterized Perry's complaint as postconviction petition and, as such, was under no obligation to do so. See 725 ILCS 5/122-1(d) (West 2004).

¶ 20 In *People v. Shellstrom*, our supreme court held that "where a *pro se* pleading alleges

a deprivation of rights cognizable in a postconviction proceeding, a trial court may treat the pleading as a postconviction petition, even where the pleading is labeled differently." *People v. Shellstrom*, 216 Ill. 2d 45, 52-53, 833 N.E.2d 863, 868 (2005). Although trial courts are *allowed* to treat such pleadings as postconviction petitions, they are not *required* to do so. However, our supreme court encouraged courts to treat pleadings as postconviction petitions if it is appropriate under the circumstances. *Shellstrom*, 216 Ill. 2d at 57, 833 N.E.2d at 870.

¶ 21 In reaching this result, the court noted that in many cases, there are "good reasons" for a trial court to recharacterize a pleading as a postconviction petition. For one, this allows "issues to be properly framed." *Shellstrom*, 216 Ill. 2d at 51, 833 N.E.2d at 867. It also can avoid the harsh results "of holding a *pro se* litigant to the letter of whatever label he happens to affix to his pleading." *Shellstrom*, 216 Ill. 2d at 52, 833 N.E.2d at 867. In addition, treating a *pro se* pleading as a postconviction petition gives the petitioner a right to have counsel appointed to help him make his case. *Shellstrom*, 216 Ill. 2d at 52, 833 N.E.2d at 868.

¶ 22 However, the court also recognized that there can be disadvantages to treating a *pro se* pleading as a postconviction petition in some circumstances. One crucial problem is the limitations on successive petitions under the Post-Conviction Hearing Act. *Shellstrom*, 216 Ill. 2d at 56, 833 N.E.2d at 870. As the court pointed out, if a trial court treats a pleading as a postconviction petition, the limitations on successive petitions would be applicable should that petitioner later decide to file a postconviction petition. These consequences would be unfair if the court determined that the pleading should be recharacterized as a postconviction petition without allowing any input from the petitioner. *Shellstrom*, 216 Ill. 2d at 56, 833 N.E.2d at 870. As such, the supreme court placed limits on its holding. It held that a trial court may only recharacterize a pleading as a postconviction petition if it provides the petitioner with (1) notice that it intends to treat the pleading as a postconviction petition, (2)

admonitions regarding the limits on successive postconviction petitions, and (3) an opportunity to withdraw or amend the petition. *Shellstrom*, 216 Ill. 2d at 57, 833 N.E.2d at 870. We note that in the instant case, Perry contends that the court failed to comply with these requirements prior to converting his petition back to a *habeas corpus* complaint.

¶ 23 Recently, the supreme court reaffirmed and elaborated on its *Shellstrom* decision in *People v. Stoffel*, 239 Ill. 2d 314, 941 N.E.2d 147 (2010). The *Stoffel* case, like the case before us, involved a dispute as to whether the trial court had in fact decided to treat a *pro se* pleading as a postconviction petition in the first place. There, a prisoner filed a *pro se* pleading styled as a petition for relief from judgment which raised a claim that his sentence was unconstitutional. *Stoffel*, 239 Ill. 2d at 317, 941 N.E.2d at 149-50. The court appointed counsel for the defendant. At a status hearing, appointed counsel asked for a continuance, telling the court: "This is another post-conviction petition. It's going to take considerably more work on my part." *Stoffel*, 239 Ill. 2d at 317, 941 N.E.2d at 150.

¶ 24 Prior to the next scheduled hearing date, the State filed a motion to dismiss the defendant's petition for relief from judgment on the grounds that the allegations in the petition did not entitle him to relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure. *Stoffel*, 239 Ill. 2d at 318, 941 N.E.2d at 150. At the next status hearing, a different judge presided. The second trial judge asked defense counsel whether the pleading was "a petition for *habeas corpus* or a petition for post-conviction." Counsel informed the court that the defendant was seeking postconviction relief and requested an extension of time to respond to the State's motion to dismiss. Counsel explained that he anticipated making "substantial" amendments to the defendant's petition, "which may take care of" the motion to dismiss. *Stoffel*, 239 Ill. 2d at 318, 941 N.E.2d at 150.

¶ 25 At the next two hearings, counsel and the court again discussed whether the petition should be treated as a postconviction petition. *Stoffel*, 239 Ill. 2d at 318-19, 941 N.E.2d at

150-51. The court ordered defense counsel to file a Rule 651 certificate. *Stoffel*, 239 Ill. 2d at 319, 941 N.E.2d at 150. Counsel filed two supplements to the defendant's postconviction petition, a Rule 651 certificate, and a response to the State's motion to dismiss. *Stoffel*, 239 Ill. 2d at 319, 941 N.E.2d at 151. The State filed a motion to strike these pleadings, arguing that the defense counsel cannot supplement a postconviction petition when the only pleading filed was a petition for relief from judgment. *Stoffel*, 239 Ill. 2d at 320, 941 N.E.2d at 151. The court granted the State's motion to dismiss, finding that "the defendant's attorney cannot caption his supplemental pleading as a post-conviction petition and thereby magically transform" a petition for relief from judgment into a postconviction petition. *Stoffel*, 239 Ill. 2d at 322, 941 N.E.2d at 152.

¶ 26 On appeal, the *Stoffel* court emphasized that while a trial court may decide to treat a pleading as a postconviction petition, it is not required to do so. *Stoffel*, 239 Ill. 2d at 324, 941 N.E.2d at 153 (quoting *Shellstrom*, 216 Ill. 2d at 53 n.1, 833 N.E.2d at 868 n.1). The court further held that because a court is not required to recharacterize a pleading, its decision not to do so "cannot be reviewed for error." *Stoffel*, 239 Ill. 2d at 324, 941 N.E.2d at 154. This is because "[i]t cannot be error for a trial court to fail to do something it is not required to do." *Stoffel*, 239 Ill. 2d at 324, 941 N.E.2d at 154. The court stated, however, that once a trial court decides to treat a pleading as a postconviction petition, this rule is no longer applicable. *Stoffel*, 239 Ill. 2d at 324-25, 941 N.E.2d at 154. Under the facts before it, the *Stoffel* court concluded that the trial court had decided to treat the defendant's petition as a postconviction petition.

¶ 27 It is important to note that the supreme court explained that "it is possible that even after a pleading has been deemed a postconviction petition, further investigation by counsel will reveal that the substantive claims in the petition would be more appropriately addressed in another procedural vehicle." *Stoffel*, 239 Ill. 2d at 329, 941 N.E.2d at 156. However, the

trial court in that case did not "offer any reasonable basis for treating the pleading as a [petition for relief from judgment] after the pleading had already been 'recharacterized' as a postconviction petition." (Emphasis omitted.) *Stoffel*, 239 Ill. 2d at 329, 941 N.E.2d at 156.

¶ 28 Perry argues that the trial court in this case, like the court in *Stoffel*, deemed his *pro se* pleading a petition for postconviction relief. He points to language in the *Stoffel* decision emphasizing the fact that the trial court there had appointed counsel for the defendant. See *Stoffel*, 239 Ill. 2d at 326-27, 941 N.E.2d at 155. He notes that the trial court in this case likewise appointed counsel and referred to the complaint as a "post-conviction petition" numerous times in docket entries and scheduling orders. He argues that by doing so, the court recharacterized his complaint as a postconviction petition. Perry then argues that the court decided to once again treat the pleading as a complaint for *habeas corpus* relief without providing the types of admonitions required by *Shellstrom*.

¶ 29 The AG argues that Perry cannot rely on the court's use of the term "post-conviction" in docket entries and scheduling orders because they did not decide any substantive issues. In addition, the AG argues that the appointment of counsel is not dispositive because trial courts have the discretion to appoint counsel in *habeas corpus* proceedings. See *Tedder v. Fairman*, 92 Ill. 2d 216, 227, 441 N.E.2d 311, 315 (1982). Thus, according to the AG, the court never deemed the complaint a postconviction petition in the first place. The AG also points out that the admonitions required by *Shellstrom* are not applicable where a petitioner/defendant is represented by counsel. See *Stoffel*, 239 Ill. 2d at 327-28, 941 N.E.2d at 155-56.

¶ 30 We are not entirely persuaded by either party's position. In the instant case, unlike *Stoffel*, the trial court did not discuss with Perry or his attorney the merits of treating Perry's complaint as a postconviction petition. As previously noted, the court never made any express statement that it found it appropriate to treat Perry's pleading as a postconviction

petition. However, the court did more than merely refer to the complaint multiple times as a postconviction petition. The court docketed the case as "People v. Perry" and continued to use the original case number assigned to Perry's criminal case rather than assigning the case a new civil docket case number. This certainly seems to be consistent with a deliberate decision to treat the case as a postconviction proceeding.

¶ 31 We need not resolve this argument. Even assuming the court did in fact decide to treat the petition as a claim for postconviction relief, we find no error in the court's ultimate decision to treat it as a complaint for *habeas corpus* relief under the facts and circumstances of the present case. As we have discussed, the petitioner in *Stoffel* was represented by an attorney who determined that it would be in his best interest to treat the petition as a postconviction petition. The attorney in *Stoffel* specifically argued to the court that the petition should be treated as such, and the court appeared to agree. Here, by contrast, appointed counsel never requested that the court treat Perry's complaint as one seeking relief under the Post-Conviction Hearing Act. He addressed all his arguments to the *habeas corpus* provisions. It would make little sense to hold that a trial court may not reverse its decision to treat a *pro se* pleading as a postconviction petition where, as here, the party who filed the pleading does not treat it as such.

¶ 32 It is important to note that asking the court to treat Perry's complaint as a postconviction petition would not have helped him. Perry was convicted in 1988 and this petition was filed 15 years later. Moreover, Perry had already filed a postconviction petition raising identical claims. The only claim that was not raised in his postconviction petition was his claim that his due process rights were violated when police persuaded him to confess falsely and he agreed to do so because of a mental disability. Had the court treated Perry's pleading as a postconviction petition, he would not have been entitled to relief. The petition would have been both untimely and successive.

¶ 33 In sum, this case does not involve a situation like *Stoffel* where a trial court apparently agrees to treat a pleading as a postconviction petition pursuant to the petitioner's request and then reverses its decision without an explanation or obvious reason. It also does not involve the circumstances the *Shellstrom* court had in mind when it held that a trial court must provide a *pro se* litigant with notice and admonitions about the consequences before designating a pleading as a postconviction petition. As previously discussed, the *Shellstrom* court was concerned with the possibility that a *pro se* litigant might later be foreclosed from raising issues in a postconviction petition due to the limitations on filing successive petitions. Here, Perry had previously filed a postconviction petition; thus, the limitations on filing successive petitions were applicable to him long before he even filed the complaint at issue here. Moreover, Perry was represented by counsel, and the court explained to him that he might be barred from filing a postconviction petition due to the fact that he had previously filed a petition that should have raised or did raise the same issues. Under the circumstances, we find no error.

¶ 34 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 35 Affirmed.