ATTACHMENTS

(1) Illinois Supreme Court attached Decision.

(2) Issues that Counsel refused to raise on petitioner's behalf.

(3) These issues are meritorious.

Suggested Issue For Appeal:

MEMORANDUM OF LAW

(I) THE TRIAL COURT ERRED BY NOT ADDRESSING OR RULING ON SMITH'S "INITIAL" SECTION 2-1401 PETITION.

(II) THE TRIAL COURT ERRED BY IMPERMISSIBLY "RECHARACTERIZING" SMITH'S SECTION 2-1401 PETITION INTO A "SUCCESSIVE POST-CONVICTION PETITION" WITHOUT PROVIDING SMITH WITH NOTICE AND OPPORTUNITY TO AMEND OR WITHDRAW HIS 2-1401 PETITION.

(III) THE TRIAL COURT ERRED BY NOT FINDING THAT SMITH'S CLAIM THAT THE LAYPERSON AND POLICE TESTIMONY REGARDING SURVEILLANCE VIDEO HAD MERIT AND PRESENTED GROUNDS FOR RELIEF.

(IV) THE TRIAL COURT'S DENIAL ORDER WAS PREMATURE WHERE NOTHING IN THE RECORD INDICATED THAT THE STATE HAD BEEN PROPERLY SERVED.

STATE OF ILLINOIS)
) SS
COUNTY OF RANDOLPH)

AFFIDAVIT

I, MICHAEL SMITH being first duly sworn upon my oath depose and state that the following matters are both true and correct made upon personal knowledge and belief, and if called as a witness, I am competent to testify thereto:

I HAVE SUBMITTED A WRIT OF CERT TO THE UNITED STATES SUPREME COURT STATING MY CONSTITUTIONAL VIOLATIONS UNDER DUE PROCESS OF LAW.
I ALSO MAILED MY PETITION IN A TIMELY MANNER.
I ALSO SERVED COPIES TO ALL PARTIES INVOLVED.

Subscribed and sworn to before me on the 5 day of Dec, 2018

Respectfully submitted,

Michael C. Smith B18007

NOTARY PUBLIC

OFFICIAL SEAL
PATRICIA B. STEWART
Notary Public - State of Illinois
My Commission Expires 1/03/2022

APPENDIX A
Opinion of the Illinois Appellate Court

People v. Smith

Appellate Court of Illinois, Fourth District

May 11, 2018, Filed

NO. 4-15-0856

Reporter
2018 IL App (4th) 150856-U *; 2018 Ill. App. Unpub. LEXIS 807 **

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL CRAIG SMITH, Defendant-Appellant.

Subsequent History: Appeal denied by *People v. Smith, 2018 Ill. LEXIS 1012 (Ill., Sept. 26, 2018)*

Prior History: **[**1]** Appeal from Circuit Court of Champaign County. No. 08CF286. Honorable Michael Q. Jones, Judge Presiding.

People v. Smith, 394 Ill. App. 3d 1126, 985 N.E.2d 1089, 2009 Ill. App. LEXIS 5287, 369 Ill. Dec. 103 (Ill. App. Ct. 4th Dist., Dec. 7, 2009)

Disposition: Affirmed in part and vacated in part.

Core Terms

postconviction, trial court, pro se, fines, recharacterize, supplemental petition, sentencing, void, vacate, improperly imposed, admonishments, ineffective, video, relief from judgment, habitual criminal, direct appeal, argues, robber

Judges: PRESIDING JUSTICE HARRIS delivered the judgment of the court. Justices Turner and Knecht concurred in the judgment.

Opinion by: HARRIS

Opinion

ORDER

[*P1] *Held*: (1) The trial court did not recharacterize defendant's *pro se* pleading as a successive postconviction petition and thus was not required to give admonishments that must be given when a recharacterization is made. (2) Fines improperly imposed by the circuit clerk are vacated.

[*P2] Defendant, Michael Craig Smith, appeals the trial court's denial of his *pro se* supplemental petition for relief from judgment, citing *section 2-1401* of the Code of Civil Procedure (Civil Code) (*735 ILCS 5/2-1401* (West 2014)). He argues the court improperly characterized his *pro se* pleading as a successive postconviction petition without giving him the proper admonishments and the opportunity to withdraw or amend his pleading. On appeal, defendant also argues this court should vacate three fines improperly assessed by the circuit clerk at the time of his sentencing. We affirm in part and vacate in part.

[*P3] I. BACKGROUND

[*P4] In July 2008, a jury found defendant guilty of armed robbery **[**2]** (*720 ILCS 5/18-2(a)(1)* (West 2006)) based on allegations that, in November 2007, he robbed a convenience store in Champaign, Illinois, while armed with a box cutter. In September 2008, the trial court sentenced defendant to life in prison as a habitual criminal (*720 ILCS 5/33B-1* (West 2006)).

[*P5] On direct appeal, defendant challenged the sufficiency of the evidence against him and this court affirmed the trial court's judgment. *People v. Smith, , 394 Ill. App. 3d 1126, 985 N.E.2d 1089, 369 Ill. Dec. 103(2009)* (unpublished order under *Illinois Supreme Court Rule 23*). In affirming, we summarized the evidence against defendant, stating as follows:

"In this case, a rational trier of fact could reasonably

find defendant guilty of armed robbery. The robbery was captured on video. This video was introduced into evidence, and the jury was allowed to evaluate if defendant was the robber in the video. A police officer saw defendant in the [convenience store] parking lot minutes before the robbery took place and testified defendant is the robber shown in the surveillance video. Defendant's palm print was found on the store's exit door, in the same location where the video shows the robber touching the door. The robber even reported [to the convenience store clerk] that he had the same 1968 birthday **[**3]** as defendant."

[*P6] In December 2010, defendant filed a *pro se* petition for postconviction relief. He alleged his trial counsel was ineffective for failing to object to other crimes evidence and subject the State's efforts to establish him as a habitual criminal to meaningful adversarial testing. Defendant also asserted his appellate counsel was ineffective on direct appeal for failing to raise trial counsel's ineffectiveness. That same month, the trial court summarily dismissed the petition, finding it was frivolous and patently without merit.

[*P7] Defendant appealed the dismissal of his postconviction petition, arguing two of his claims—those relating to other crimes evidence and trial counsel's ineffectiveness, and appellate counsel's ineffectiveness—had arguable bases in law and fact. *People v. Smith, 2012 IL App (4th) 110046-U, ¶ 2*. In June 2012, this court affirmed. *Id. ¶ 43*. We held that defendant forfeited his claim of ineffective assistance of his trial counsel as it was "based entirely on facts appearing in the trial transcript" and could have been raised on direct appeal. *Id. ¶ 40*. Further, we held that appellate counsel's decision not to raise an ineffective-assistance-of-counsel claim on direct appeal was not patently wrong, **[**4]** in that counsel could have reasonably decided that establishing prejudice from the presentation of other-crimes evidence "was impossible, given the overwhelming evidence of defendant's guilt." *Id. ¶ 41*.

[*P8] In May 2015, defendant filed a *pro se* motion to vacate judgment, citing *section 2-1401* of the Civil Code (*735 ILCS 5/2-1401* (West 2014)). He argued the trial court lacked subject matter jurisdiction to enter the judgment of conviction or to sentence him based on that conviction because "the sole victim of the alleged offense," *i.e.*, the convenience store clerk, did not identify him as the robber. He also maintained that his natural life sentence as a habitual criminal was void where he was not admonished during his arraignment that sentencing as habitual criminal was possible. Finally, defendant asserted the judgment against him was void because he was subjected to sentencing as a habitual criminal without entering a plea to that "entirely new charge."

[*P9] In August 2015, defendant filed a *pro se* supplemental petition for relief from judgment and again cited *section 2-1401*. He referenced his previous petition and additionally argued that his conviction was void because two State witnesses gave improper lay opinion identification testimony **[**5]** when they were permitted to identify defendant as the perpetrator on the video surveillance tape.

[*P10] In September 2015, the trial court entered an order denying defendant's supplemental petition. In reaching its decision, the court initially set forth the procedural history of defendant's case and noted that the State had not filed a responsive pleading. The court further stated as follows:

"Analysis

[Defendant] has filed this petition under *[section] 2-1401* of the [Civil Code]. For multiple reasons, the petition must be denied. The court finds that *[section 2-1401]* is not applicable to [defendant's] pleading. Further, that section, if applicable, requires a filing within [two] years of the judgment from which relief is sought ***. The only exceptions listed do not apply here. More importantly, the claims defendant seeks to bring in his supplemental petition have already been litigated in his direct appeal and post[]conviction petition; in both instances the [appellate court] considered those very claims and ruled against defendant. *** This court further notes that although the supplemental petition cites the [Civil Code], *Article 122 of the Code of Criminal Procedure [of 1963* (*725 ILCS 5/122-1* to *122-7* (West 2014))] only allows one **[**6]** petition without leave of court. Such leave was not sought, nor would it be granted as these claims have already been presented and ruled upon."

Finding

The court finds that the claims brought by the defendant are barred as they have already been brought and ruled upon. Accordingly, the Supplemental Petition for Relief From Judgment *** is denied."

[*P11] This appeal followed.

[*P12] II. ANALYSIS

[*P13] A. The Trial Court's Characterization of Defendant's *Pro Se* Pleading

[*P14] On appeal, defendant argues the trial court acted improperly because it recharacterized his supplemental *section 2-1401* petition as a successive postconviction petition without giving him the proper admonishments and the opportunity to withdraw or amend his pleading. Defendant maintains that, therefore, the court's denial of his supplemental petition must be vacated and the matter remanded for proper admonishments.

[*P15] The State responds to defendant's claim, arguing the trial court did not recharacterize defendant's *pro se* filing as a successive postconviction petition. Rather, it asserts the court denied the filing "pursuant to the same section" under which it was filed by defendant, *i.e.*, *section 2-1401*. The State maintains any references by the court to postconviction **[**7]** proceedings was "surplusage" and unnecessary to the court's ultimate decision.

[*P16] Where a defendant's *pro se* pleading alleges claims cognizable in a postconviction proceeding, a trial court may recharacterize the pleading as a postconviction petition, even when the pleading is labeled differently. *People v. Shellstrom, 216 Ill. 2d 45, 53, 833 N.E.2d 863, 868, 295 Ill. Dec. 657 (2005)*. The trial court is not required to take such action, but if it chooses to do so, it must first do the following:

> "(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*.

The court must take the same actions when characterizing a *pro se* pleading as a successive postconviction petition. *People v. Pearson, 216 Ill. 2d 58, 68, 833 N.E.2d 827, 832, 295 Ill. Dec. 621 (2005)*.

[*P17] Here, we agree with the State that the trial court did not recharacterize defendant's *pro se* pleading as a successive postconviction petition. Rather, the court treated the pleading as it was labeled, a petition **[**8]** for relief from judgment filed pursuant to *section 2-1401*. The court's written order was titled "Order on Denial of Supplemental Petition for Relief From Judgment" and the court explicitly noted that defendant "filed [his] petition under *[section] 2-1401* of the [Civil] Code." The record reflects the court then made findings relative to *section 2-1401*. In particular, it found *section 2-1401* was inapplicable to defendant's claims and that his pleading did not meet *section 2-1401*'s two-year filing requirement. The court also emphasized its finding that the claims raised in defendant's petition had already been litigated and resolved against him.

[*P18] We note the purpose of a *section 2-1401* petition is "to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition." *People v. Haynes, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182, 249 Ill. Dec. 779 (2000)*. To be entitled to relief, "the petitioner must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the *section 2-1401* petition." *People v. Lee, 2012 IL App (4th) 110403, ¶ 15, 979 N.E.2d 992, 366 Ill. Dec. 191*. Additionally, the State's failure to answer a defendant's **[**9]** *section 2-1401* petition constitutes an admission of all well-pleaded facts and presents a question for the trial court as to whether the allegations in the petition entitle the defendant to relief as a matter of law. *People v. Vincent, 226 Ill. 2d 1, 9-10, 871 N.E.2d 17, 24, 312 Ill. Dec. 617 (2007)*.

[*P19] On appeal, defendant does not challenge the trial court's denial of his petition on the basis that it failed to meet the requirements of *section 2-1401*. Further, a review of the record provides a sufficient basis for the court's determination that *section 2-1401* was "not applicable" to defendant's claims. In particular, defendant failed to allege any error of fact, which was unknown at the time of prosecution and would have prevented his conviction and sentence. Thus, the court did not err in *sua sponte* denying defendant's supplemental petition.

[*P20] Finally, we acknowledge that after making findings relative to *section 2-1401* in its written order,

the trial court went on to "note" that (1) defendant could only file one postconviction petition without leave of the court, (2) defendant never sought leave to file a successive postconviction petition, and (3) it would not grant leave based on the claims defendant raised in his *pro se* pleading because they had "already been presented and ruled upon." After reviewing the record, we **[**10]** find the court's comments fall short of a recharacterization of defendant's *pro se* pleading. As discussed, the court's order was titled as an order on the denial of a supplemental petition for relief from judgment. Also, the court acknowledged that defendant's pleading was filed under *section 2-1401* and made findings relative to that section. Under the circumstances presented, there was no recharacterization; and admonishments, which are required when a court elects to recharacterize a defendant's *pro se* pleading, were unnecessary.

[*P21] B. Clerk Imposed Fines

[*P22] On appeal, defendant also argues that certain fines should be vacated because they were improperly imposed by the circuit clerk. He specifically challenges a $10 "Arrestee's Medical" assessment, a $50 "Court Finance Fee" assessment, and a $5 "Drug Court Program" assessment.

[*P23] In response, the State does not challenge defendant's assertion that the specified fines were improperly imposed by the circuit clerk. Rather, it argues that defendant has raised the issue for the first time on appeal and, as a result, his claim should be barred. Additionally, the State contends this court lacks jurisdiction to address the issue because "fines/fees" were not **[**11]** mentioned in defendant's notice of appeal.

[*P24] "[T]he imposition of a fine is exclusively a judicial act." *People v. Smith, 2014 IL App (4th) 121118, ¶ 18, 385 Ill. Dec. 367, 18 N.E.3d 912*. Thus, "[a]lthough circuit clerks can have statutory authority to impose a *fee*, they lack authority to impose a *fine*[.]" (Emphasis in original.) *Id.* "[A]ny fines imposed by the circuit clerk are void from their inception." *People v. Larue, 2014 IL App (4th) 120595, ¶ 56, 381 Ill. Dec. 550, 10 N.E.3d 959.* Further, "[i]t is a well-settled principle of law that a void order may be attacked at any time or in any court, either directly or collaterally." *People v. Thompson, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203, 282 Ill. Dec. 183 (2004)*. Where the issue of voidness is raised in the context of a proceeding that is properly pending in the courts, there is no jurisdictional impediment to granting relief from a void order. *Id. at 28-29* (finding that because the defendant's postconviction petition was properly before the circuit court and his appeal of the dismissal of that petition was properly before the appellate court, there was "no jurisdictional impediment to the granting of relief from the void portion of the circuit court's sentencing order"); see also *People v. Gutierrez, 2012 IL 111590, ¶ 12, 962 N.E.2d 437, 356 Ill. Dec. 752* (stating a "notice of appeal, which clearly indicated that [the] defendant was appealing from the [trial] court's final judgment, was sufficient to confer jurisdiction on the appellate court to consider defendant's **[**12]** entire conviction[,]" including whether a fee was improperly imposed by circuit clerk).

[*P25] Here, the record supports defendant's contentions that a $10 "Arrestee's Medical" assessment, a $50 "Court Finance Fee" assessment, and a $5 "Drug Court Program" assessment were improperly imposed by the circuit clerk rather than the trial court at the time of defendant's sentencing. See *Smith, 2014 IL App (4th) 121118, ¶ 46* (stating the "arrestee's medical" assessment is a fine); *In re Dustyn W., 2017 IL App (4th) 170103, ¶ 33, 414 Ill. Dec. 822, 81 N.E.3d 88* (holding "the court finance assessment amounts to a fine"); *People v. Warren, 2016 IL App (4th) 120721-B, ¶ 138, 404 Ill. Dec. 21, 55 N.E.3d 117* (noting the "drug-court assessment imposed by the circuit clerk was a fine" as the defendant never participated in drug court and the assessment did not reimburse the State for costs associated with the defendant's prosecution). Thus, those assessments were void and subject to challenge at any time. Additionally, defendant has timely appealed from a final judgment of the trial court and, as a result, we have jurisdiction to grant relief from void orders of that court. Therefore, we reject the State's assertion that jurisdiction is lacking and vacate the $10 "Arrestee's Medical" assessment, the $50 "Court Finance Fee" assessment, and the $5 "Drug Court Program" assessment improperly imposed by the **[**13]** circuit clerk.

[*P26] III. CONCLUSION

[*P27] For the reasons stated, we vacate the fines improperly imposed by the circuit clerk at the time of sentencing and otherwise affirm the trial court's judgment. Since the State has been partially successful in defending the appeal, as part of our judgment, we award it its $50 statutory assessment against defendant as costs of this appeal. *55 ILCS 5/4-2002* (West 2016).

[*P28] Affirmed in part and vacated in part.

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APPENDIX B
Order Denying Petition For Leave to Appeal

SUPREME COURT OF ILLINOIS

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September 26, 2018

In re: People State of Illinois, respondent, v. Michael Craig Smith, petitioner. Leave to appeal, Appellate Court, Fourth District. 123783

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 10/31/2018.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court