

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).

2011 IL App (4th) 100340-U

Filed 8/8/11

NO. 4-10-0340

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
EDWARD L. SWIFT,	)	No. 80CF471
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.  
Presiding Justice Knecht and Justice Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* The court granted appointed counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), and affirmed the trial court's judgment agreeing with counsel's conclusion that no meritorious issues could be raised on appeal as to the following: whether the trial court erred in (1) denying defendant's request for counsel on his motion to allow DNA testing or (2) dismissing defendant's motion to allow DNA testing.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 In February 1981, a jury found defendant, Edward L. Swift, guilty of the October 3, 1980, first degree murder of an older neighbor, Helen Voiles. Ill. Rev. Stat. 1979, ch. 38, par. 9-1(a)(1). In March 1981, the trial court sentenced defendant to 60 years in prison. Defendant appealed, and this court affirmed (*People v. Swift*, No. 17117 (November 17, 1981) (unpublished

order under Supreme Court Rule 23)). Defendant did not seek further review in the Supreme Court of Illinois.

¶ 4 Defendant has, however, directed numerous petitions to his conviction. In April 1991, defendant *pro se* filed a petition for postconviction relief under the Post-Conviction Hearing Act (Act) (Ill. Rev. Stat. 1989, ch. 38, pars. 122–1 through 122–8). Later that month, the trial court dismissed the petition as untimely filed beyond the 10-year limitation period for filing such petitions. Defendant did not appeal.

¶ 5 In April 1993, defendant *pro se* filed a *habeas corpus* petition which the trial court treated as a second petition for postconviction relief. In May 1993, the court dismissed the petition as untimely. Defendant appealed the court's dismissal of his petition, and this court dismissed the appeal as untimely. *People v. Swift*, No. 4–93–0596 (August 10, 1993) (order of dismissal).

¶ 6 In August 1998, defendant filed a third petition for postconviction relief. Later that month, the trial court denied the petition as untimely, and this court affirmed because the earlier petition had been denied and this petition was filed beyond the limit for such petitions. *People v. Swift*, 4–98–0697 (January 12, 2000) (unpublished order under Supreme Court Rule 23). In April 2000, the supreme court denied defendant's petition for leave to appeal. *People v. Swift*, 188 Ill. 2d 579, 729 N.E.2d 503 (2000) (No. 89030) (April 5, 2000).

¶ 7 In June 2000, defendant *pro se* filed a fourth petition for postconviction relief. In January 2002, the trial court dismissed that petition. In February 2002, defendant appealed, and OSAD was appointed. OSAD filed a motion to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). In March 2003, this court granted OSAD's motion and affirmed the trial

court's judgment. *People v. Swift*, No. 4–02–0164 (March 11, 2003) (unpublished order under Supreme Court Rule 23).

¶ 8 In December 2000, while the fourth petition was pending, defendant *pro se* filed a petition for writ of *habeas corpus* under article X (735 ILCS 5/10–101 through 10–137 (West 1998)) of the Code of Civil Procedure (735 ILCS 5/1–101 through 22–105 (West 2000)). In October 2001, the trial court dismissed defendant's petition, and this court affirmed on appeal. *Swift v. Briley*, No. 4–01–1049 (August 23, 2002) (unpublished summary order under Supreme Court R. 23 (c)(2)). In December 2002, defendant filed a fifth petition for postconviction relief. Later that month, the trial court dismissed the petition. On appeal, this court affirmed the trial court's decision. *People v. Swift*, No. 4–03–0385 (January 13, 2004) (unpublished summary order under Supreme Court Rs. 23(c)(2), (c)(4), (c)(6)).

¶ 9 In October 2009, defendant *pro se* filed the instant motion to allow deoxyribonucleic acid (DNA) testing pursuant to section 116–3 of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/116–3 (West 2008)). In March 2010, the trial court denied defendant's motion to allow DNA testing. This appeal followed, and OSAD was appointed to represent defendant. In April 2011, OSAD filed a request to withdraw as defendant's counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967). The record shows service of the motion on defendant. On its own motion, this court granted respondent leave to file additional points and authorities by May 23, 2011, but he did not respond. We grant OSAD leave to withdraw and affirm.

¶ 10 Under *Anders*, a brief must accompany counsel's motion to withdraw outlining any issue in the record that might arguably support the appeal, explain why counsel finds those

issues frivolous, and conclude that the case presents no viable grounds for appeal. *In re S.M.*, 314 Ill. App. 3d 682, 685, 732 N.E.2d 140, 143 (2000).

¶ 11 OSAD raises two possible issues and concludes each would be frivolous. First, OSAD claims no colorable argument can be made that the trial court erred in denying defendant's request for counsel. We agree.

¶ 12 "A defendant has the right to counsel only if the constitution or a statute provides it." *People v. Love*, 312 Ill. App. 3d 424, 426, 727 N.E.2d 680, 683 (2000). The constitutional right to counsel applies to trial and the first appeal of right, but no further. *Id.* Thus, defendant in the present case must show a statutory right to counsel created under section 116–3 of the Code of Criminal Procedure. See *Love*, 312 Ill. App. 3d at 426-27, 727 N.E.2d at 683. We do not find any language in section 116–3 that creates a statutory right to counsel. See 725 ILCS 5/116–3 (West 2008). The court in *Love*, 312 Ill. App. 3d at 427, 727 N.E.2d at 683, distinguished between a motion to allow DNA testing, which does not provide for counsel as of right, and a motion brought under the Act, which provides for counsel by statute. Absent the provision of counsel under section 116–3, defendant was not entitled to any representation on his motion to allow DNA testing. We agree with OSAD that no colorable argument can be made on this issue.

¶ 13 OSAD next argues no colorable argument can be made that DNA testing would reveal any evidence materially relevant to this case. We agree.

¶ 14 For the trial court to grant a motion for forensic DNA testing under section 116–3 of the Code of Criminal Procedure, the evidence at issue must be, *inter alia*, "materially relevant" to an assertion of actual innocence. *People v. Savory*, 197 Ill. 2d 203, 214, 756 N.E.2d 804, 811 (2001) (quoting 725 ILCS 5/116–3(c)(1) (West 2000)). Put another way, a

favorable test result must significantly advance the defendant's claim of actual innocence. *Savory*, 197 Ill. 2d at 213, 756 N.E.2d at 810-11. Whether evidence at issue is "materially relevant" requires consideration of all the evidence introduced at trial, not merely the evidence the defendant seeks to test. *Savory*, 197 Ill. 2d at 214, 756 N.E.2d at 811. We review the court's denial of a defendant's motion for forensic DNA testing not available at trial *de novo*. *People v. Shelton*, 351 Ill. App. 3d 292, 293, 813 N.E.2d 755, 757 (2004).

¶ 15 In *Savory*, 197 Ill. 2d at 205, 756 N.E.2d at 806, a jury convicted the defendant of two counts of murder. He filed a postconviction motion pursuant to section 116–3 of the Code of Criminal Procedure, seeking forensic testing not available at trial to be performed on blood-stained trousers that the State contended defendant had been wearing at the time of the offenses. *Savory*, 197 Ill. 2d at 208-09, 756 N.E.2d at 808. The defendant alleged that the test results would show that the blood did not match that of one of the victims "and would thus eliminate one of the pieces of physical evidence introduced by the State at trial." *Savory*, 197 Ill. 2d at 209, 756 N.E.2d at 808. The motion also requested testing on material found under that victim's fingernails. *Savory*, 197 Ill. 2d at 209, 756 N.E.2d at 808. The supreme court found that the evidence the defendant sought to test was not materially relevant to his claim of actual innocence where "the testimony regarding the possible source of the bloodstain on the pair of trousers was only a minor part of the State's evidence in this case." *Savory*, 197 Ill. 2d at 214-15, 756 N.E.2d at 811. The court found the issue was "essentially a collateral issue at trial and was not central to the State's evidence of guilt." *Savory*, 197 Ill. 2d at 215, 756 N.E.2d at 811.

¶ 16 The facts of the present case are similar to those in *Savory*. Here, defendant also requests DNA testing on a bloodstain from a pair of pants, claiming that tests will show that the

blood was not from the victim. However, as in *Savory*, the blood evidence on the jeans was not central to the State's case. The physical evidence was not even submitted to the jury as an exhibit at the close of trial. The State offered a wide array of evidence, including fingerprint evidence and two separate confessions by defendant, in its case in chief. Thus, proof the blood on the jeans did not come from the victim would not alter the State's case in any significant manner and cannot be deemed materially relevant to defendant's claim of actual innocence.

¶ 17           After reviewing the record consistent with our responsibilities under *Anders*, we agree with OSAD that no meritorious issues can be raised on appeal, and we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 18           Affirmed.