

**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).

NO. 4-09-0747

Order Filed 3/16/11

IN THE APPELLATE COURT  
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
SCOTT A. STOUTENBOROUGH,	)	No. 05CF102
Defendant-Appellant.	)	
	)	Honorable
	)	John B. Huschen,
	)	Judge Presiding.

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

**ORDER**

*Held:* As no meritorious issues could be raised on appeal, the office of the State Appellate Defender's motion to withdraw as the defendant's counsel on appeal was granted and the trial court's judgment affirmed.

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

In August 2008, defendant, Scott A. Stoutenborough, filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2006)), attacking his March 2006 convictions of one count of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2004)) and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-

16(c)(1)(i) (West 2004)). In September 2009, the trial court dismissed defendant's petition following the appointment of postconviction counsel and an evidentiary hearing. In September 2009, defendant filed his notice of appeal and, in October 2009, the court appointed OSAD to serve as his attorney.

In August 2010, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by October 1, 2010. Defendant has done so. The State has filed its response, and defendant his reply. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

OSAD argues that this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief. Specifically, OSAD contends that the trial court did not err in dismissing defendant's postconviction petition and rejecting defendant's argument that his trial counsel provided ineffective assistance. In his additional points and authorities, defendant also argues (1) the court lacked subject-matter jurisdiction after it amended one count of the indictment against defendant, (2) the court erred by instructing the jury on the

amended count of the indictment rather than the preamended count, and (3) the amendment of his indictment was the product of prosecutorial misconduct. We conclude each of defendant's contentions of error lacks merit.

The Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)) provides a remedy for violations of a defendant's federal or state constitutional rights. *People v. Coleman*, 206 Ill. 2d 261, 277, 794 N.E.2d 275, 286 (2002). "A post[.]conviction action is a collateral proceeding and not an appeal from the underlying judgment." *Id.* In postconviction proceedings, "*res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered waived." *Id.* Further, an appeal from the denial of a postconviction petition is limited to issues actually raised in the petition. *People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004), citing 725 ILCS 5/122-1(b) (West 1998). That is, "any issues to be reviewed [on appeal] must be presented in the petition filed in the circuit court." *Jones*, 211 Ill. 2d at 148, 809 N.E.2d at 1239.

At an evidentiary hearing on a postconviction petition, the defendant must make a substantial showing of a deprivation of his constitutional rights. *Coleman*, 206 Ill. 2d at 277, 794 N.E.2d at 286. A trial court's decision following such a hearing

will not be disturbed unless it is manifestly erroneous. *Id.* That is, we will reverse only if an error is "clearly evident, plain, and indisputable." (Internal quotation marks omitted.) *Id.*

Each of defendant's arguments arises from the amendment of his indictment. In September 2005, the grand jury indicted defendant in a three-count instrument. Count III alleged, in pertinent part, defendant committed an act of sexual conduct with a minor under age 13 having the initials B.Z. At a November 4, 2005, pretrial hearing, the State moved to amend count III to change the alleged victim's initials from B.Z. to A.G. Defense counsel did not object to the amendment as he was aware of the mistake through discovery and believed the amended charge was supported by probable cause. The trial court amended the indictment as requested. Defendant was convicted of count III under the amended indictment along with the other two counts.

We first consider defendant's jurisdiction argument. Although defendant did not raise this argument either at trial or on direct appeal, lack of subject-matter jurisdiction is not subject to waiver. *People v. Flowers*, 208 Ill. 2d 291, 303, 802 N.E.2d 1174, 1182 (2003).

Specifically, defendant argues his conviction is void as the trial court lost subject-matter jurisdiction when it amended count III of the indictment. Defendant claims subject-

matter jurisdiction was lost because the amendment was neither adopted by the grand jury nor subject to a probable-cause determination after a preliminary hearing. To the contrary, however, "[t]he jurisdiction of the circuit courts is not conferred by indictment or information, but by article VI of the constitution [(Ill. Const. 1970, art. VI)]." *People v. House*, 202 Ill. App. 3d 893, 906, 560 N.E.2d 1224, 1233 (1990). Accordingly, even if an amendment to a charging instrument is erroneously allowed without a new arraignment and preliminary hearing, the trial court would not thereby lose jurisdiction over the amended charge. *Id.* As its sole basis is the allegedly improper amendment of count III of his indictment, defendant's claim that his conviction is void for lack of subject-matter jurisdiction lacks merit.

Next, we consider defendant's ineffective-assistance and prosecutorial-misconduct claims. Specifically, defendant argues he was denied the effective assistance of trial counsel when his attorney declined to object to the State's oral motion to amend count III of the indictment. Defendant further argues the State's motion to amend the indictment constituted prosecutorial misconduct in that the State (1) mischaracterized the error it sought to correct as a scrivener's error and (2) should have moved to dismiss preamended count III and either sought an indictment or refiled an information and requested a preliminary

hearing using the amended charge. These issues were not raised on direct appeal although they could have been. With respect to the ineffective-assistance argument, as defendant was represented by different counsel at trial and on direct appeal, fundamental fairness does not necessitate our relaxation of the rules of *res judicata* and forfeiture. *Cf. People v. Gaines*, 105 Ill. 2d 79, 91, 473 N.E.2d 868, 875 (1984) (relaxing strict application of doctrines of *res judicata* and forfeiture regarding a postconviction ineffective-assistance claim where the same attorney represented the defendant at trial and on appeal, concluding "[i]t would be unreasonable to expect appellate counsel to convincingly raise and argue his own incompetency"). Accordingly, we consider these arguments waived. As neither party addresses the applicability of the plain-error doctrine, we will not substantively evaluate defendant's claims. Thus, these issues are nonmeritorious insofar as defendant could not rely upon them to obtain relief.

Finally, we conclude defendant procedurally defaulted his argument that the jury was improperly instructed on amended, rather than preamended, count III as he failed to raise it in his postconviction petition. Accordingly, this argument would not support defendant's claim for appellate relief.

For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment. As part of our

judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

Affirmed.