

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. 4-09-0874

Order Filed 3/11/11

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
TERRY W. FINLEY,)	No. 97CF829
Defendant-Appellant.)	
)	Honorable
)	Timothy J. Steadman,
)	Judge Presiding.

JUSTICE MYERSCOUGH delivered the judgment of the court. Justices Appleton and McCullough concurred in the judgment.

ORDER

Held: The trial court did not err by dismissing defendant's petition for relief from judgment filed under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). Granted appointed counsel's motion to withdraw on appeal on ground no meritorious issues could be raised.

In February 1998, defendant, Terry W. Finley, was convicted of attempt (first degree murder of a police officer) (720 ILCS 5/8-4(a), (c) (1), 9-1(a) (1), (b) (1) (West 1996)) and later sentenced to 80 years' imprisonment. His conviction was affirmed on direct appeal. *People v. Finley*, 312 Ill. App. 3d 892, 728 N.E.2d 101 (2000). However, his sentence was reduced to 60 years' imprisonment because the statute under which defendant was sentenced violated the single-subject rule. In August 2009, defendant filed a petition for relief from judgment pursuant to

section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2008)). The trial court dismissed defendant's petition, and defendant appeals. Appointed counsel, the office of the State Appellate Defender (OSAD), now moves to withdraw as counsel on appeal on the ground that no meritorious argument can be made that defendant's petition should not have been dismissed. We grant OSAD's motion to withdraw on appeal and affirm the trial court's dismissal of defendant's petition.

I. BACKGROUND

We will only discuss the facts necessary to resolve the issues in this appeal. However, a more complete recitation of the facts can be found in *Finley*, 312 Ill. App. 3d at 893-95, 728 N.E.2d at 102-03.

In February 1998, defendant was convicted of attempt (first degree murder of a police officer). The trial court later sentenced defendant to the maximum, 80 years' imprisonment. On direct appeal, defendant claimed (1) error in an improper reference by a State's witness to defendant's refusal to take a polygraph examination, (2) trial counsel was ineffective for failing to object to the admission of a weapon with no nexus to the defendant, (3) the statute under which he was sentenced violated the single-subject rule of the Illinois Constitution (Ill. Const. 1970, art. IV, §8(d)), and (4) his sentence was excessive. This court concluded (1) the trial court did not

abuse its discretion in denying a mistrial based on a witness's testimony that defendant refused to take a polygraph and (2) trial counsel was not ineffective for failing to object to the introduction of a weapon with insufficient nexus to defendant. *Finley*, 312 Ill. App. 3d at 897-98, 728 N.E.2d at 105-06. This court also concluded defendant's maximum sentence was not excessive but reduced defendant's sentence to 60 years' imprisonment after noting the supreme court had recently held in *People v. Cervantes*, 189 Ill. 2d 80, 91, 723 N.E.2d 265, 270 (1999), that the statute under which defendant had been sentenced violated the single-subject rule. *Finley*, 312 Ill. App. 3d at 898, 728 N.E.2d at 106.

In August 2009, defendant filed a petition for relief from judgment under section 2-1401 of the Civil Code. Defendant's petition raised the following arguments: (1) his conviction was based solely on circumstantial evidence and did not support a conviction for attempted first degree murder of a peace officer, (2) the prosecutor "overstepped his boundaries" when he submitted a gun that was found nine days after the attempted murder, (3) the statute under which defendant was sentenced violated the single-subject rule, (4) the prosecutor knowingly used the false testimony of a witness who was an inmate in the Macon County jail, and (5) the trial court relied on an improper factor in sentencing defendant to 80 years' imprisonment.

The same day defendant filed his motion for relief from judgment, defendant also filed a motion for forensic testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/116-3 (West 2008)). That motion asked the trial court to enter an order allowing defendant's motion for forensic testing of "a chrome .25 [c]aliber semi-automatic, secured in relation to the trial which resulted in the conviction of the petition in the case at bar." In support of his request, defendant's motion stated as follows:

"1. That this Motion for Forensic Testing is being made in good faith and not intended to hinder, harass or delay these proceedings.

2. That the evidence being sought for testing has not been subject to the testing which is now being requested at the time of trial."

In September 2009, the State filed a motion to dismiss defendant's petition for relief from judgment. Following a November 2009 hearing on the State's motion to dismiss, the trial court dismissed defendant's petition for relief from judgment. In dismissing defendant's petition, the court stated as follows:

"The petition fails to allege a legal basis for relief under 735 ILCS 5/2-1401. And you

don't have to put this in the docket entry, but there are no facts alleged which do not appear in the record that if known at the time judgment was entered would have prevented the judgment's entry and no facts alleged to support the existence of a meritorious claim or defense, and there is no showing of due diligence in presenting the claims alleged and no reason or excuse for defendant's undue delay in filing the petition as mentioned in the State's [m]otion to [d]ismiss. The petition was filed--was not timely filed within two years of entry of judgment. So the motion is well taken. Show petition dismissed. Clerk directed to notify defendant in care of IDOC."

The record shows a copy of the docket entry was mailed to defendant.

This appeal followed.

Appointed counsel, OSAD, has filed a motion to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), asserting no issues of arguable merit warrant appeal. The record shows service of the motion on defendant. On our own motion, we granted defendant leave to file additional points and authorities

by January 6, 2011. Defendant filed none.

II. ANALYSIS

Neither defendant nor the State raise the issue of this court's jurisdiction to hear this appeal. However, "this court has a duty to determine if jurisdiction to hear this appeal exists and to dismiss this appeal if jurisdiction is lacking." *In re Application of the County Collector*, 395 Ill. App. 3d 155, 159, 917 N.E.2d 574, 578 (2009).

Here, defendant filed a motion for forensic testing under section 116-3 of the Criminal Code on the same day he filed his petition for relief from judgment under section 2-1401 of the Civil Code. The trial court did not rule on that motion before dismissing defendant's motion for relief from judgment. Nonetheless, this court has jurisdiction over this appeal. The motion for forensic testing was filed separately and not made a part of defendant's petition for relief from judgment. In fact, the petition for relief from judgment makes no mention of defendant's motion for forensic testing. Instead, he only briefly mentions the motion for forensic testing in his reply to the State's motion to dismiss. However, to the extent it can be argued this is an appeal from a final judgment that does not dispose of an entire proceeding, we have jurisdiction over this appeal pursuant to Supreme Court Rule 304(b)(3). Ill. S. Ct. R. 304(b)(3) (eff. February 26, 2010) (permitting appeal from a judgment or order

denying relief requested under section 2-1401 of the Civil Code even if other matters are pending).

Turning to the merits of defendant's 2-1401 petition, we agree with OSAD that no meritorious issues can be raised on appeal. "Section 2-1401 of the [Civil] Code provides a comprehensive statutory procedure by which final orders, judgments, and decrees may be challenged more than 30 days after their entry." *People v. Taylor*, 349 Ill. App. 3d 715, 718, 812 N.E.2d 581, 582 (2004). "While section 2-1401 usually provides a civil remedy, its remedial powers also extend to criminal cases." *Taylor*, 349 Ill. App. 3d at 719, 812 N.E.2d at 582. This court has stated the following with respect to petitions brought under section 2-1401:

"The purpose of a petition under section 2-1401 is to bring before the trial court facts not appearing in the record which, if known to the court and petitioner when judgment was entered, would have prevented its entry. [Citation.] The petition is addressed to errors of fact, not law. Thus it has been held that a petition under section 2-1401 is not a proper vehicle to collaterally attack alleged denials of constitutional rights. [Citation.] Further, it is not a proper

means of raising issues such as whether a defendant was properly admonished as to the consequences of a plea of guilty or whether a defendant had incompetent counsel. [Citation.]" *People v. Lawton*, 335 Ill. App. 3d 1085, 1087, 781 N.E.2d 1122, 1124 (2002).

"Points previously raised at trial and other collateral proceedings cannot form the basis of a section 2-1401 petition for relief." *People v. Addison*, 371 Ill. App. 3d 941, 945, 864 N.E.2d 831, 836 (2007)) (quoting *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000)); see also *In re Marriage of Baumgartner*, 226 Ill. App. 3d 790, 794, 590 N.E.2d 89, 92 (1992) ("Issues which could have been raised in a motion for rehearing or on direct appeal are *res judicata* and may not be relitigated in the section 2-1401 proceeding ***."). Finally, the dismissal of a section 2-1401 petition is subject to *de novo* review. *People v. Vincent*, 226 Ill. 2d 1, 14, 871 N.E.2d 17, 26 (2007).

As stated, defendant raised five allegations in his section 2-1401 petition: (1) his conviction was based solely on circumstantial evidence and did not support a conviction for attempted first degree murder of a peace officer, (2) the prosecutor "overstepped his boundaries" when he submitted a gun that was found nine days after the attempted murder, (3) the statute

under which he was sentenced violated the single-subject rule, (4) the prosecutor knowingly used the false testimony of a witness who was an inmate in the Macon County jail, and (5) the trial court relied on an improper factor in sentencing defendant to 80 years' imprisonment. Defendant's petition contained no information that was unknown at the time of trial and which would have prevented entry of the judgment against him. The second and third issues in defendant's petition regarding the gun with the allegedly insufficient nexus to defendant being introduced as evidence and the statute under which defendant was sentenced being in violation of the single-subject rule were raised on direct appeal. This court (1) rejected defendant's claim that trial counsel was ineffective for failing to object to the introduction of the gun and (2) agreed with defendant that the statute under which he was sentenced violated the single-subject rule and reduced defendant's sentence to 60 years' imprisonment. The remaining three issues in defendant's section 2-1401 petition could have been raised by defendant at the time of his direct appeal but were not. Defendant's claims that (1) his conviction was based solely on circumstantial evidence, (2) the prosecution knowingly used false testimony, and (3) the trial court relied on an improper factor when sentencing defendant are clearly issues that could have been raised on direct appeal but were not. See *Baumgartner*, 226 Ill. App. 3d at 794, 590 N.E.2d at 92 ("Issues

which could have been raised in a motion for rehearing or on direct appeal are *res judicata* and may not be relitigated in the section 2-1401 proceeding ***."). Defendant makes no claim that any of his potential claims were concealed from him.

Defendant's section 2-1401 petition seeks general review of trial issues that either could have been or were raised with the trial court and on direct appeal. His petition includes nothing that would entitle him to relief under section 2-1401. The trial court did not err by dismissing defendant's petition, and an appeal on that basis would be frivolous and without merit.

As an aside, we note defendant's motion for forensic testing pursuant to section 116-3 of the Criminal Code is still pending before the trial court. Our decision in this appeal is not an indication of our view of the merits of defendant's 116-3 motion.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment and grant OSAD's motion to withdraw as counsel on appeal.

Affirmed.