

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) 100589-U

Filed 9/8/11

NO. 4-10-0589

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Pike County
DONALD L. ANDRUS,)	No. 08CF54
Defendant-Appellant.)	
)	Honorable
)	Michael R. Roseberry,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court did not err in summarily dismissing defendant's postconviction petition, we grant OSAD's motion to withdraw as counsel and affirm the court's judgment.

¶ 2 In September 2008, a jury found defendant, Donald L. Andrus, guilty of burglary. In November 2008, the trial court sentenced him to 22 years in prison. This court affirmed his conviction and sentence. In May 2010, defendant filed a *pro se* petition for postconviction relief, which the trial court summarily dismissed. Thereafter, the office of the State Appellate Defender (OSAD) was appointed to represent defendant.

¶ 3 On appeal, OSAD moves to withdraw its representation of defendant pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending an appeal in this cause would be frivolous. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4

I. BACKGROUND

¶ 5 In June 2008, a grand jury indicted defendant on one count of burglary (720 ILCS 5/19-1(a) (West 2008)), alleging he knowingly and without lawful authority entered a building, a shed, of Gary Barker's with the intent to commit a theft therein. Defendant pleaded not guilty.

¶ 6 In September 2008, a jury found defendant guilty. In November 2008, the trial court sentenced him to 22 years in prison. Thereafter, the court denied defendant's motion to reconsider sentence. On appeal, this court affirmed defendant's conviction and sentence. *People v. Andrus*, No. 4-08-0897 (March 29, 2010) (unpublished order under Supreme Court Rule 23).

¶ 7 In May 2010, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2010)). Defendant alleged his constitutional rights were violated when Pike County Sheriff Paul Petty gave false testimony to the grand jury to obtain an indictment against him. He alleged Petty testified defendant "broke into" Barker's shed. At the jury trial, Barker stated no break-in occurred. Defendant contended he should not have been indicted on the charge of burglary given Petty's false testimony.

¶ 8 The trial court noted defendant did not file transcripts of the grand jury or trial proceedings. Even assuming defendant's allegations were true, the court found defendant failed to set forth a substantial deprivation of his constitutional rights. The court concluded defendant's claims were frivolous and patently without merit and dismissed the petition. This court granted defendant's late notice of appeal.

¶ 9

II. ANALYSIS

¶ 10 On appeal, OSAD has filed a motion to withdraw as counsel and has included a

supporting memorandum pursuant to *Finley*. Proof of service has been shown on defendant.

This court granted defendant leave to file additional points and authorities on or before June 13, 2011. Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be frivolous.

¶ 11 The Act "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 12 The Act establishes a three-stage process for adjudicating a postconviction petition. *Beaman*, 229 Ill. 2d at 71, 890 N.E.2d at 509. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,], and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2010); *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2010). Our review of the first-stage dismissal of a postconviction petition is *de novo*.

People v. Ligon, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010).

¶ 13 In his postconviction petition, defendant alleged his constitutional rights were violated when Sheriff Petty falsely testified to the grand jury that defendant broke into Barker's shed. At the jury trial, Petty testified he thought the door of the shed was closed because Barker told him, prior to the sheriff's grand-jury testimony, that a break-in occurred. Barker testified he never shut the door to the shed.

¶ 14 Whether a "break-in" occurred in this case is irrelevant, since defendant was not charged with breaking into the shed. Instead, the indictment alleged he "knowingly and without lawful authority entered a building of Gary Barker, being a shed, with the intent to commit a theft therein." Section 19-1(a) of the Criminal Code of 1961 (720 ILCS 5/19-1(a) (West 2008)) states a person commits burglary when "without authority he knowingly enters *** with intent to commit therein a felony or theft." Thus, the issue of whether a "break-in" of the shed occurred is irrelevant to whether defendant entered the shed without authority with the intent to commit a theft. As no colorable argument can be made that the trial court erred in dismissing defendant's postconviction petition, we grant OSAD's motion to withdraw as counsel.

¶ 15 III. CONCLUSION

¶ 16 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 17 Affirmed.