

NOTICE
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2012 IL App (4th) 100651-U

Filed 1/10/12

NO. 4-10-0651

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JEFFERY T. DAVIS,)	No. 07CF151
Defendant-Appellant.)	
)	Honorable
)	Thomas M. Harris, Jr.,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The court granted appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the trial court's judgment denying defendant's request to file a successive postconviction petition, agreeing with counsel's conclusion the issues raised by defendant in his current petition were raised or could have been raised in his previous petition.

¶ 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. We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2007, the State charged defendant, Jeffery T. Davis, by indictment with aggravated battery (720 ILCS 5/12-4(b)(8) (West Supp. 2007)). In April 2008, a jury found defendant guilty of aggravated battery. In June 2008, the trial court sentenced defendant to four

years' imprisonment. Defendant did not file a direct appeal.

¶ 5 In January 2009, defendant filed a *pro se* petition for postconviction relief, alleging, *inter alia*, (1) he was subjected to an unreasonable strip search; (2) he received ineffective assistance of counsel where his trial counsel failed to (a) challenge the strip search, (b) demand a preliminary hearing, and (c) "disjoin" the present case from proceedings in McLean County case No. 07-CF-152; (3) the State (a) failed to provide medical records pertaining to the complaining witness, and (b) "coached" the complaining witness; and (4) the trial court incorrectly instructed the jury on aggravated battery. In February 2009, the court dismissed defendant's petition during the first stage of proceedings. Defendant appealed, arguing (1) his trial attorney was ineffective for failing to object to the admission of his prior aggravated-battery conviction, and (2) the circuit clerk did not have authority to assess drug-court and children's-advocacy-center fees. We vacated several of defendant's fees but affirmed the dismissal of his postconviction petition. *People v. Davis*, No. 4-09-0241, at 12-13 (May 19, 2010).

¶ 6 In June 2010, defendant filed a motion for leave to file a successive postconviction petition, alleging (1) the trial court misinterpreted the issues raised in his original petition, and (2) he received ineffective assistance of appellate counsel when counsel presented issues not contained in the original petition on appeal. Defendant's proposed second postconviction petition alleged (1) trial counsel failed to (a) properly prepare his defense, (b) "disjoin" the present case from pending case No. 07-CF-152, and (c) object to the admission of defendant's criminal history at trial; (2) the State improperly coached the complaining witness; and (3) the State withheld material information showing the complaining witness had a long

history of psychological treatment, including the use of psychotropic medications. In August 2010, the trial court denied defendant's motion for leave to file a successive postconviction petition, finding the claims in defendant's current petition were either raised or could have been raised in his first petition. Defendant filed the instant appeal, and the court appointed OSAD to represent him.

¶ 7 In September 2011, 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 17, 2011. Defendant filed none. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 8 II. ANALYSIS

¶ 9 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief. We agree.

¶ 10 The Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-7 (West 2010)) provides a remedy to criminal defendants who have suffered substantial violations of their constitutional rights. *People v. Purnell*, 356 Ill. App. 3d 524, 529, 825 N.E.2d 1234, 1239 (2005). At the first stage of postconviction proceedings, the court determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); see also *Purnell*, 356 Ill. App. 3d at 529, 825 N.E.2d at 1239. A petition is frivolous and patently without merit if its claims, taken as true and liberally construed, fail to present the gist of a constitutional claim. *Purnell*, 356 Ill. App. 3d at 529, 825 N.E.2d at 1239.

¶ 11 Only one postconviction petition may be filed without permission from the trial court. 725 ILCS 5/122-1(f) (West 2010). To obtain leave to file a successive petition, the petitioner must establish cause for his failure to raise any new claims and prejudice arising from the denial of a hearing on those new claims. 725 ILCS 5/122-1(f) (West 2010). This court has stated:

“ ' Pursuant to the cause and prejudice test, the defendant must show "cause" for failing to raise the issue in a prior proceeding and actual "prejudice" resulting from the claimed error. [Citation.] "Cause" is defined as an objective factor external to the defense that impeded defense counsel's attempts to raise the claim in an earlier proceeding. [Citation.] "Prejudice" is defined as an error so infectious to the trial proceeding that the resulting conviction violates due process. [Citation.]' ” *Purnell*, 356 Ill. App. 3d at 529, 825 N.E.2d at 1239 (quoting *People v. Leason*, 352 Ill. App. 3d 450, 453, 816 N.E.2d 747, 751 (2004)).

"A ruling on an initial postconviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised in the petition." *People v. Thompson*, 383 Ill. App. 3d 924, 931, 890 N.E.2d 1119, 1126 (2008). A court's decision denying leave to file a successive postconviction petition is reviewed *de novo*. *People v. Simmons*, 388 Ill. App. 3d 599, 606, 903 N.E.2d 437, 445 (2009).

¶ 12 Defendant's proposed second postconviction petition alleged (1) trial counsel failed to (a) properly prepare his defense, (b) "disjoin" the present case from pending case No.

07-CF-152, and (c) object to the admission of defendant's criminal history at trial; (2) the State improperly coached the complaining witness; and (3) the State withheld material information showing the complaining witness had a long history of psychological treatment, including the use of psychotropic medications. Defendant's claims regarding (1) counsel's failure to prepare his defense and "disjoin" the pending cases, (2) the State improperly coaching the witness, and (3) the State's failure to disclose exculpatory evidence were all included in his initial petition which was properly dismissed at the first stage of review. Accordingly, those claims are barred by *res judicata*.

¶ 13 Though defendant's remaining claim he received ineffective assistance of counsel where trial counsel failed to object to the admission of his criminal history at trial was argued on appeal, we declined to reach the issue because it was not properly raised in defendant's initial postconviction petition. *Davis*, slip order at 4-6. There, we noted defendant's only recourse was to file a successive petition and present the issue under the cause-and-prejudice test. *Davis*, slip order at 5-6. Defendant's successive petition does not argue any cause for his failure to include this issue in his original petition. Therefore, we need not reach the issue of prejudice. Because defendant could have raised the issue in his initial petition but did not, the issue is forfeited and cannot now be raised in a successive petition.

¶ 14 In his motion for leave to file a successive postconviction petition, defendant claims he received ineffective assistance of appellate counsel where the only issue counsel raised on appeal was not included in the original petition. "A petitioner who contends that appellate counsel rendered ineffective assistance of counsel must show that the failure to raise an issue on direct appeal was objectively unreasonable and that the decision prejudiced petitioner." *People*

v. Childress, 191 Ill. 2d 168, 175, 730 N.E.2d 32, 36 (2000). However, appellate counsel is not ineffective for failing to raise frivolous or otherwise nonmeritorious issues on appeal because the defendant suffered no prejudice. *Id.* Here, the arguments made in defendant's initial petition were conclusory and frivolous. Appellate counsel did not provide ineffective assistance by failing to raise defendant's frivolous arguments on appeal.

¶ 15

III. CONCLUSION

¶ 16 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD defendant cannot raise any meritorious issues in his appeal, and we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 17 Affirmed.