



trial counsel's ineffective assistance for failing to file a motion to suppress evidence following a warrantless arrest and search of his hotel room. We affirmed his conviction and sentence.

*People v. Hill*, No. 4-06-0205 (Nov. 16, 2007) (unpublished order under Supreme Court Rule 23).

¶ 5 On May 15, 2008, defendant filed a *pro se* petition for postconviction relief pursuant to section 122-1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)), again raising the issue of trial counsel's ineffectiveness for failure to file a motion to suppress evidence. On May 28, 2008, the trial court denied defendant's petition for postconviction relief as frivolous and patently without merit. Defendant appealed. Appellate counsel moved to withdraw as counsel on appeal under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and this court allowed the motion to withdraw as counsel and affirmed the dismissal of the post conviction petition as the issue raised was *res judicata*. *People v. Hill*, No. 4-08-0520 (May 28, 2009) (unpublished order under Supreme Court Rule 23).

¶ 6 On September 30, 2010, defendant filed a second *pro se* petition for postconviction relief. He argued appellate counsel on direct appeal was ineffective because although counsel argued no exigent circumstances justified a seizure of evidence without a warrant, he failed to challenge the unlawful entry into defendant's hotel room without a warrant. On October 6, 2010, the trial court dismissed the petition for failure to obtain leave of court to file a second postconviction petition. On November 17, 2010, defendant filed a motion for leave to file a second postconviction petition. He argued he only realized appellate counsel's omission after the court denied his petition for *habeas corpus* relief, and the court denied that petition because appellate counsel had not challenged the unlawful, warrantless entry into his hotel room.

On November 29, 2010, the court denied leave to file a second postconviction petition, finding the issue raised in the proposed petition was barred by *res judicata* because the appellate court on direct appeal found trial counsel's failure to file a motion to suppress evidence was harmless due to ample evidence supporting defendant's conviction.

¶ 7 On December 16, 2010, defendant filed a timely notice of appeal and the trial court appointed OSAD to represent him. OSAD has filed a motion to withdraw as counsel under *Finley*, 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 February 27, 2012. He filed those on February 9, 2012. He has repeated his arguments from his proposed postconviction petition, alleging he was denied effective assistance of appellate counsel because counsel failed to challenge his unconstitutional and unlawful arrest without a warrant or exigent circumstances. On March 14, 2012, the State filed its response to defendant's points and authorities. On March 29, 2012, defendant filed a "reply brief." After examining the record in accordance with our duties under *Finley*, we affirm the trial court's judgment and grant OSAD's motion to withdraw as counsel on appeal.

¶ 8 II. ANALYSIS

¶ 9 OSAD argues no colorable argument can be made the trial court erred by denying defendant's petition for leave to file a second postconviction petition. Specifically, OSAD contends, after reviewing the facts and applicable law, an appeal in this case would be frivolous.

¶ 10 The Act (725 ILCS 5/122-1 to 122-8 (West 2008)) established a three-step process for adjudicating postconviction petitions. In the first stage, a defendant files a petition and the trial court determines whether it presents the "'gist' of a constitutional claim." *People v.*

*Jones*, 211 Ill. 2d 140, 144, 809 N.E.2d 1233, 1236 (2004). The judge's decision to summarily dismiss a postconviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 378-89, 701 N.E.2d 1063, 1070-75 (1998).

¶ 11 Only one postconviction petition may be filed without leave of court.

¶ 12 Any claim of substantial denial of constitutional rights not raised in the original or amended petition is waived. 725 ILCS 5/122-3 (West 2010); *People v. Holman*, 191 Ill. 2d 204, 210, 730 N.E.2d 39, 43 (2000). Section 122-1(f) of the Act provides the legislature's limited grant of authority for successive petitions:

"Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

Both elements or prongs of the cause and prejudice test must be satisfied in order for the defendant to prevail. *People v. Thompson*, 383 Ill. App. 3d 924, 929, 890 N.E.2d 1119, 1125

(2008).

¶ 13 The trial court's decision denying leave to file a successive petition is reviewed *de novo*. *People v. Edgeston*, 396 Ill. App. 3d 514, 518, 920 N.E.2d 467, 471 (2009). A reviewing court may sustain a trial court's decision on any grounds contained in the record regardless of the original basis for the decision. *People v. Caballero*, 179 Ill. 2d 205, 211, 688 N.E.2d 658, 661 (1997).

¶ 14 Defendant claims he has cause for not raising the issue of the unlawfulness of his arrest in his first postconviction petition because he did not realize appellate counsel's error until his *habeas corpus* petition was denied. Failing to "realize" counsel's error does not qualify as an "objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings." 725 ILCS 5/122-1(f) (West 2010). Defendant was convicted in September 2005 and this court affirmed his conviction and sentence on November 16, 2007. He did not file his first postconviction petition until May 15, 2008, which the trial court dismissed on May 28, 2008. The record does not indicate when his petition for *habeas corpus* relief was filed or denied. Defendant had almost three years from the time of his conviction to "realize" counsel's error and include the issue in his original postconviction proceedings. The record does not indicate why this did not occur. Defendant also contends the court denied his petition for *habeas corpus* relief because counsel did not challenge his arrest as unlawful. Again, the record does not show the reason for the *habeas* petition's denial.

¶ 15 Defendant has failed to demonstrate cause as to why the issue of his alleged wrongful arrest was not raised in his first postconviction petition. It is forfeited. Defendant failed to establish cause. The denial of his motion for leave to file a successive postconviction

petition was properly denied despite the trial court espousing a different reason for its denial.

¶ 16 After reviewing the trial court record, we find the court properly denied defendant's motion for leave to file a second post-conviction petition and OSAD's motion to withdraw as counsel on appeal is granted.

¶ 17 III. CONCLUSION

¶ 18 We grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of \$50 against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2006).

¶ 19 Affirmed.