

NOTICE
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2012 IL App (4th) 110141-U

Filed 4/16/12

NO. 4-11-0141

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
JOHN R. HESTER,)	No. 94CF97
Defendant-Appellant.)	
)	Honorable
)	Richard D. Greenlief,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Where any appeal in this case would be frivolous, we grant the motion to withdraw as counsel filed by the office of the State Appellate Defender (OSAD). We agreed any appeal would be frivolous because no colorable argument could be made that defendant's consecutive sentences were void.

¶ 2 In May 1996, a jury found defendant, John R. Hester, guilty of criminal sexual assault and aggravated criminal sexual assault. The trial court sentenced him to consecutive terms of 15 and 30 years in prison, respectively. This court affirmed his convictions and sentences on appeal. Defendant filed three *pro se* postconviction petitions, all of which were dismissed by the trial court and those decisions affirmed by this court. In February 2011, defendant filed an amended *pro se* motion to modify his consecutive sentences to concurrent sentences. The trial court granted the State's motion to dismiss defendant's amended motion.

¶ 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 May 1996, a jury found defendant guilty of criminal sexual assault (720 ILCS 5/12-13(a)(4) (West 1994)) and aggravated criminal sexual assault (720 ILCS 5/12-14(b)(1) (West 1994)). The trial court sentenced him to consecutive terms of 15 years' and 30 years' imprisonment, respectively. This court affirmed the trial court's judgment on direct appeal, finding, in part, the court did not abuse its discretion in sentencing the 65-year-old defendant to a total of 45 years in prison. *People v. Hester*, No. 4-96-0651 (May 7, 1997) (unpublished order under Supreme Court Rule 23).

¶ 6 In May 1998, 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 1998)), alleging, *inter alia*, he was denied the effective assistance of counsel at trial and the trial court failed to consider his rehabilitative potential when imposing sentence. The trial court dismissed the petition as frivolous and patently without merit. The judgment was affirmed on appeal. *People v. Hester*, No. 4-98-0878 (Apr. 10, 2000) (unpublished order under Supreme Court Rule 23).

¶ 7 In 1999, defendant filed a second *pro se* petition for postconviction relief, alleging the aggravated-criminal-sexual-assault statute was unconstitutional. The trial court dismissed the petition as frivolous and patently without merit. This court affirmed by way of summary order. After defendant filed a petition for rehearing claiming his sentence was void, this court rejected his argument and again affirmed the trial court's judgment. *People v. Hester*, No. 4-00-0062 (Mar. 12, 2001) (unpublished order under Supreme Court Rule 23).

¶ 8 In May 2004, defendant filed a third *pro se* petition for postconviction relief, arguing appellate counsel was ineffective on direct appeal. In June 2004, the trial court dismissed the petition as not timely filed and lacking in merit. In September 2005, this court granted OSAD's motion to withdraw as counsel and affirmed the trial court's judgment. *People v. Hester*, No. 4-04-0637 (Sept. 2, 2005) (unpublished order under Supreme Court Rule 23).

¶ 9 In October 2010, defendant filed a *pro se* motion to change his consecutive sentences to concurrent sentences. In January 2011, defendant filed a *pro se* motion to allow his appointed counsel to withdraw. After being granted leave to proceed *pro se*, defendant filed an amended motion to modify his consecutive sentences to concurrent sentences. The motion alleged the sentence was void because consecutive sentences were not authorized by statute.

¶ 10 In February 2011, the State filed a motion to strike and dismiss. The State argued defendant raised the same issues that were considered by this court on direct appeal. Moreover, the State argued the sentences were not void and the trial court properly exercised its discretion in ordering the sentences to run consecutively. The trial court found the issue to be one of *res judicata* and granted the State's motion to dismiss. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 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 February 29, 2012. None have been filed. Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be frivolous.

¶ 13 In the case *sub judice*, defendant filed an amended motion in 2011 to modify his

consecutive sentences to concurrent sentences, which was nearly 15 years after the trial court imposed the original sentences. Although defendant's claim the court abused its discretion in sentencing him has been decided before, he argued his consecutive sentences were void. A sentence that is not authorized by statute is void and may be attacked at any time or in any court. *People v. Jackson*, 2011 IL 110615, ¶ 10, 955 N.E.2d 1164, 1168. However, "the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts. If a court lacks jurisdiction, it cannot confer any relief, even from prior judgments that are void." *People v. Flowers*, 208 Ill. 2d 291, 308, 802 N.E.2d 1174, 1184 (2003).

¶ 14 Defendant's claim that his sentences were void would be proper in a collateral proceeding under the Act (see *People v. Ramey*, 393 Ill. App. 3d 661, 670, 913 N.E.2d 670, 679 (2009)), but he did not label his amended motion as a postconviction petition. Nonetheless, the trial court has the discretion to treat a pleading as a postconviction petition even though not labeled as such. *People v. Shellstrom*, 216 Ill. 2d 45, 52-53, 833 N.E.2d 863, 868 (2005).

¶ 15 Here, the trial court did not state it was treating defendant's *pro se* motion as a postconviction petition. However, the court appointed counsel, entertained the State's motion to dismiss, and dismissed the motion on the grounds of *res judicata*. Thus, it appears the court treated the motion as a postconviction petition and thus had jurisdiction to consider defendant's claim.

¶ 16 Now on appeal, OSAD argues no colorable argument can be made that defendant's consecutive sentences were void. Section 5-8-4(b) of the Unified Code of Corrections authorized the imposition of consecutive sentences when the trial court, "having regard to the nature and circumstances of the offense and the history and character of the defendant, *** is of

the opinion that such a term is required to protect the public from further criminal conduct by the defendant[.]" 730 ILCS 5/5-8-4(b) (West 1994). At the sentencing hearing, the trial court clearly was of the opinion that consecutive sentences were necessary for the protection of the public, stating "the evil" defendant had committed was over because he was "not going to have the opportunity to ever again harm another child."

¶ 17 Defendant also alleged the trial court imposed consecutive sentences under the mistaken belief that consecutive sentencing was mandated by section 5-8-4(a) of the Unified Code of Corrections (730 ILCS 5/5-8-4(a) (West 1994)). Section 5-8-4(a) provided that when a defendant was convicted of criminal sexual assault and aggravated criminal sexual assault, and the offenses were committed as a part of a single course of conduct, the sentences were required to run consecutively. 730 ILCS 5/5-8-4(a) (West 1994). Here, while the offenses were not committed as part of a single course of conduct, nothing indicates the trial court believed consecutive sentences were mandated. Instead, the trial judge stated "the sentence will be ordered to run consecutive because I can do that under the law clearly."

¶ 18 As the trial court had the discretion to impose consecutive sentences pursuant to section 5-8-4(b), no colorable argument can be made that the consecutive sentences were void. Thus, any appeal in this matter would be frivolous. Accordingly, we grant OSAD's motion to withdraw as counsel.

¶ 19 III. CONCLUSION

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

¶ 21 Affirmed.