

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).

2012 IL App (4th) 110214-U

NO. 4-11-0214

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

November 6, 2012

Carla Bender

4<sup>th</sup> District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
CLARENCE P. SMITH,	)	No. 90CF652
Defendant-Appellant.	)	
	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.  
Justices Appleton and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirm the trial court's second-stage dismissal of defendant's postconviction petition where defendant's petition was untimely filed.

¶ 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 any request for review would be frivolous and without merit. For the following reasons, we agree and affirm.

¶ 3 On January 8, 1992, a jury convicted defendant, Clarence P. Smith, of first degree murder, armed robbery, and aggravated battery (Ill. Rev. Stat. 1991, ch. 38, ¶¶ 9-1(a), 12-4(b)(1), 18-1(a)). On March 3, 1992, the trial court sentenced defendant to concurrent 60-year terms of imprisonment for murder and armed robbery. This court affirmed on direct appeal.

*People v. Smith*, 236 Ill. App. 3d 812, 820, 602 N.E.2d 946, 953 (1992).

¶ 4 On July 5, 1994, defendant filed his first *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 1994)). On July 13, 1994, the trial court dismissed the petition as frivolous and patently without merit. Defendant appealed, and this court affirmed. *People v. Smith*, No. 4-94-0730 (Sept. 29, 1995) (unpublished order under Supreme Court Rule 23).

¶ 5 On September 1, 1998, defendant filed a petition for leave to file a successive postconviction petition, together with the petition itself. On September 10, 1998, the trial court dismissed defendant's petition as frivolous and patently without merit, and defendant appealed.

¶ 6 In a summary order filed October 19, 2000, this court initially affirmed on the basis that the trial court properly determined the successive postconviction petition was untimely. *People v. Smith*, 316 Ill. App. 3d 1309, 779 N.E.2d 530 (2002) (unpublished summary order under Supreme Court Rules 23(c)(2) and (c)(6)). Defendant sought leave to appeal to the supreme court. Pursuant to its supervisory authority, the supreme court issued an order on December 27, 2002, vacating this court's judgment and remanding with directions that this court reconsider the case in light of *People v. Boclair*, 202 Ill. 2d 89, 789 N.E.2d 734 (2002). *People v. Smith*, No. 90483 (Dec. 27, 2002) (nonprecedential supervisory order). This court reconsidered its prior decision, and reversed and remanded to the circuit court for second-stage proceedings "where the State may file a motion to dismiss that includes a ground of untimeliness." *People v. Smith*, No. 4-98-0831, slip order at 3 (Jan. 28, 2003) (unpublished order under Supreme Court Rule 23).

¶ 7 On March 25, 2003, the State filed its motion to dismiss, alleging untimeliness and also challenging the merits of the petition. The trial court appointed counsel to represent

defendant at the second-stage postconviction proceedings. On October 9, 2009, counsel filed a response to the State's motion to dismiss, together with amendments to defendant's petition and a memorandum of law. On September 2, 2010, the State filed its memorandum of law in support of its motion to dismiss, asserting the defendant did not overcome the burden of showing that his low education level and limited reading ability excused his culpable negligence for filing his successive postconviction petition late. The State also addressed the substantive issues raised in the defendant's petition, including his claims of ineffective assistance of counsel for failing to investigate witnesses or to dismiss certain jurors.

¶ 8 Following a hearing on January 26, 2011, the trial court granted the State's motion to dismiss, finding defendant's successive postconviction petition was untimely filed.

¶ 9 Defendant filed a timely notice of appeal with the trial court, and the court appointed OSAD to serve as his attorney. On February 28, 2012, OSAD moved to withdraw as appellate counsel, 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 April 2, 2012. None have been filed. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the court's judgment.

¶ 10 OSAD claims the trial court properly dismissed the petition as untimely. We agree.

¶ 11 The Act provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 243-44, 757 N.E.2d 442, 445 (2001). "Under the Act, a post-conviction proceeding not involving the death penalty contains three stages." *Edwards*, 197 Ill. 2d at 244, 757 N.E.2d at 445. A petition will

survive the first stage if it states the gist of a constitutional claim (*People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)) or if the trial court fails to make a finding that it is frivolous within 90 days, as required under section 122-2.1 of the Act (*People v. Vasquez*, 307 Ill. App. 3d 670, 672-73, 718 N.E.2d 356, 358 (1999); 725 ILCS 5/122-2.1 (West 1998)). At the second stage of postconviction proceedings, the defendant may be appointed counsel.

*People v. Greer*, 212 Ill. 2d 192, 203-04, 817 N.E.2d 511, 518-19 (2004). At the second stage, defendant's counsel may file an amended postconviction petition and the State may file a motion to dismiss or an answer to the petition. *Gaultney*, 174 Ill. 2d at 418, 675 N.E.2d at 106 (citing 725 ILCS 5/122-5 (West 1992)). If the trial court does not dismiss or deny the petition, the proceeding advances to the third and final stage, at which the trial court conducts an evidentiary hearing on the defendant's petition. *Gaultney*, 174 Ill. 2d at 418, 675 N.E.2d at 106. The petition here was dismissed at the second stage.

¶ 12 At the time defendant filed his petition, the Act stated: "No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if no brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 1998).

¶ 13 Defendant conceded his petition was not timely. However, he alleged he was not culpably negligent for his failure to file within the time period contemplated by the statute

because he had a second- to third-grade reading level at the time he was convicted, and it took him until 1998 to get his literacy level to a point where he could research and write his successive postconviction petition. We agree with OSAD that this explanation does not establish defendant's freedom from culpable negligence. As OSAD observes, "the defendant's illiteracy argument is belied by the record, because he previously had filed a *pro se* post[ conviction] petition raising many of the same issues raised in his successive petition." Defendant's illiteracy claim did not demonstrate good cause for the filing of an untimely and successive postconviction petition.

¶ 14 Because defendant's successive amended petition was untimely, we decline to address the issues raised in his petition.

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

¶ 16 Affirmed.