

NOTICE  
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2012 IL App (4th) 110270-U  
NOS. 4-11-0270, 4-11-0426, cons.

FILED  
October 26, 2012  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Clark County
TERRY E. SHOTTS,	)	No. 91CF13
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Glenn,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.  
Justices Steigmann and Pope concurred in the judgment.

**ORDER**

¶ 1 *Held:* The office of the State Appellate Defender's motion to withdraw as counsel on appeal is granted and the trial court's judgments are affirmed as defendant can raise no meritorious issues in this appeal.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant, Terry E. Shotts, is currently serving consecutive prison sentences totaling 64 years for aggravated criminal sexual assault and criminal sexual assault. This is, by our count, his eighth appeal stemming from his prosecution for those crimes. The procedural history of this case is, as this court has noted in a previous appeal, tortuous.

¶ 5 In April 1991, the State charged defendant with 21 counts of aggravated criminal sexual assault, criminal sexual assault, and aggravated criminal sexual abuse of three minor victims: Jane Doe, R.K., and A.B. The allegations of defendant's crimes against Jane Doe were severed and later nol-prossed. In August 1991, a jury found defendant guilty of one count of aggravated criminal sexual assault, four counts of aggravated criminal sexual abuse, and four counts of criminal sexual assault. In October 1991, the trial court sentenced defendant to consecutive prison terms of 25 years for the May 1989 aggravated criminal sexual assault of R.K. and 13 years, each, for the April 1991 criminal sexual assault of R.K. and two separate April 1991 criminal sexual assaults of A.B. The court did not enter judgments on the lesser counts because they arose out of the same conduct as the four convictions for which the court sentenced defendant. In December 1992, this court affirmed the convictions and sentences on direct appeal. *People v. Shotts*, No. 4-91-0791 (Dec. 23, 1992) (unpublished order under Supreme Court Rule 23).

¶ 6 In March 1993, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 1992)), which the trial court dismissed *sua sponte*. Defendant appealed, and this court remanded for a resentencing hearing due to the sentencing court's apparent erroneous belief that consecutive sentences were mandatory. *People v. Shotts*, Nos. 4-93-0514, 4-93-0613 cons. (Oct. 19, 1994) (unpublished order under Supreme Court Rule 23).

¶ 7 At the May 1995 resentencing hearing, the trial court again imposed consecutive sentences totaling 64 years in prison. In January 1997, this court affirmed the reimposed sentences. *People v. Shotts*, No. 4-95-0716 (Jan. 16, 1997) (unpublished order under Supreme

Court Rule 23).

¶ 8 In May 1997, defendant filed a *pro se* section "2-1401 PETITION FOR RELIEF OF JUDGMENT." See 735 ILCS 5/2-1401 (West 1996). Later that month, the trial court *sua sponte* dismissed the petition, which the court construed as a postconviction petition, finding it "frivolous and patently without merit" as his arguments were barred by *res judicata*. In January 1999, this court affirmed. *People v. Shotts*, No. 5-97-0404 (Jan. 27, 1999) (unpublished order under Supreme Court Rule 23).

¶ 9 In June 1997, while his appeal was pending, defendant filed a *pro se* postconviction petition. More than one year later, in October 1998, defendant filed an amended *pro se* postconviction petition and moved for the trial court to appoint counsel for him. In November 1998, the court summarily dismissed the October 1998 amended postconviction petition on the grounds that the court lacked jurisdiction to consider the petition while defendant's earlier appeal regarding his May 1997 postjudgment petition was pending. On appeal, this court dismissed defendant's appeal for lack of jurisdiction, finding the November 1998 order was nonfinal as it did not dispose of the June 1997 petition. *People v. Shotts*, No. 4-98-0981 (Jan. 30, 2001) (unpublished summary order under Supreme Court Rule 23(c)(1) and (c)(2)).

¶ 10 In March 2001, the State filed a motion to dismiss the June 1997 petition. Later that month, the trial court dismissed the petition. In April 2003, this court reversed and remanded, concluding the trial court erred in not appointing counsel for defendant since more than 90 days had passed from the petition's June 1997 filing. *People v. Shotts*, No. 4-01-0374 (Apr. 8, 2003) (unpublished order under Supreme Court Rule 23).

¶ 11 In June 2005, the trial court granted the State's motion to dismiss defendant's postconviction petition after appointment of counsel and counsel's amendment of his petition, finding all of defendant's arguments were barred by *res judicata* or forfeited. In August 2006, this court affirmed. *People v. Shotts*, No. 4-05-0916 (Aug. 1, 2006) (unpublished order under Supreme Court Rule 23).

¶ 12 More than five years later, in December 2010, defendant filed the motion for leave to file a successive postconviction petition at issue in this case. Defendant claimed that counsel in prior appeals had been ineffective for not arguing that trial counsel was ineffective for not objecting to certain off-record communications between the trial judge and the jury during deliberations. Defendant identified three jury communications appearing in the record that he alleged were improper: (1) in response to a question from the jury on accountability, the judge consulted with the parties' attorneys and then reread the accountability instruction to the jurors in the courtroom; (2) in response to the jury's question whether the language "sexual conduct" in the issues instruction should have been "sexual penetration" instead, the judge corrected and resubmitted the instruction to the jurors after consulting with defense counsel; and (3) in response to a note from the jury asking whether a phrase was a misprint, the judge entered the jury room with permission of the parties' attorneys to tell the jury the instruction accurately stated the law. Defendant further submitted a 1993 affidavit from a person who averred that his wife, who had served on the jury, said that she did not think it was right, when she and two other jurors felt that defendant was not guilty of the first three charges, that if they found him guilty of any following charges, he had to be found guilty of all charges. Although no such instruction is found in the record, defendant asserted that the trial judge communicated it to the jurors off the

record. Defendant also alleged he was denied a fair trial in that the judge who dismissed his initial postconviction petition was later convicted of a theft that occurred before he became a judge; according to defendant, the judge should not have qualified for office and his judgments were void. In February 2011, the trial court denied defendant's motion, finding "the claims asserted therein were raised or could have been raised" in defendant's previous collateral attacks and were, therefore, forfeited. Several days later, defendant filed his notice of appeal from that judgment, which was assigned case No. 4-11-0426.

¶ 13 In February 2011, while his motion for leave to file a successive postconviction petition was pending, defendant filed a "MEMORANDUM OF LAW IN SUPPORT OF THE PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO 735 ILCS 5/2-1401." In that memorandum, defendant claimed that the imposition of a term of mandatory supervised release in his case was unconstitutional and void. In a March 2011 docket entry, the trial court dismissed defendant's section 2-1401 petition with prejudice "for lack of diligence." The court also found defendant failed to provide the State with the required notice of filing. It noted that the applicable statute of limitations had expired. "In addition," the court stated, "said action is susceptible to a judgment on the pleadings for not providing a legal basis for relief under the cited statute[,] as it fails to express the existence of a meritorious claim[,] presents claims that are barred by the rule of waiver[,] and fails to present facts not appearing in the record which[,] if known when the judgment was entered[,] would have prevented its entry." Finally, the court appointed OSAD as defendant's counsel on appeal "only as to Court's denial of Defendant's Motion for Leave to File Successive Post-Conviction Petition." Defendant later filed his notice of appeal from this judgment, which was assigned case No. 4-11-0270.

¶ 14 Defendant's appeals in case Nos. 4-11-0270 and 4-11-0426 have been consolidated for our review. In June 2012, OSAD moved to withdraw, attaching to 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 July 12, 2012. Defendant has done so, the State has responded. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 15 II. ANALYSIS

¶ 16 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief as the trial court properly dismissed defendant's petitions. We agree. Additionally, defendant's *pro se* response to OSAD's motion, in which he claims his convictions and sentences are void due to an alleged deficiency in the charging instrument, lacks merit.

¶ 17 OSAD identifies four potential arguments that it asserts would lack merit if raised on appeal. First, OSAD claims defendant could not reasonably argue that the trial court erred in dismissing his February 2011 section 2-1401 petition in that his term of mandatory supervised release was unconstitutional and void. We agree. Except for a life sentence, "every sentence shall include as though written therein a term [of mandatory supervised release] in addition to the term of imprisonment." 730 ILCS 5/5-8-1(d) (West 2010) (text eff. until July 1, 2009). The supreme court has held that mandatory supervised release does not violate the separation of powers or due process. *People ex rel. Scott v. Israel*, 66 Ill. 2d 190, 194, 361 N.E.2d 1108, 1110 (1977). Accordingly, defendant could not reasonably claim on appeal that his term of mandatory

supervised release is unconstitutional and void, and that the court erred in dismissing his postjudgment petition.

¶ 18 Second, OSAD asserts that defendant could not reasonably argue on appeal that the timing of the trial court's dismissal of his February 2011 postjudgment petition was improper. We agree. Because the State is given 30 days to answer or otherwise respond to a section 2-1401 petition, the trial court is prohibited from dismissing such petitions *sua sponte* before 30 days have lapsed. *People v. Laugharn*, 233 Ill. 2d 318, 323, 909 N.E.2d 802, 805 (2009). After the expiration of the 30-day period, the trial court may dismiss such petitions on its own motion. *Id.* In this case, the court waited more than 30 days before it dismissed defendant's section 2-1401 petition. Accordingly, defendant could not reasonably argue that the dismissal was premature.

¶ 19 Third, OSAD claims that defendant could not reasonably argue that the court erred in denying his December 2010 motion for leave to file a successive postconviction petition. We agree. Leave to file a successive postconviction petition is appropriate only where the defendant shows cause for his failure to bring the claim in the initial postconviction proceedings and resulting prejudice. 725 ILCS 5/122-1(f) (West 2010). Cause exists if an objective factor impeded the defendant's ability to raise the specific claim during the initial postconviction proceedings. 725 ILCS 5/122-1(f) (West 2010). Prejudice exists if the claimed error so infected the trial that the resulting conviction or sentence violated due process. 725 ILCS 5/122-1(f) (West 2010).

¶ 20 Defendant raised the issue of improper jury communications in both his original March 1993 postconviction petition and his June 1997 second postconviction petition, which was amended by appointed postconviction counsel in 2004. In the second petition, defendant for the

first time asserted that his counsel on direct appeal provided ineffective assistance in failing to raise the jury-communications issue. On appeal from the dismissal of the March 1993 petition, this court remanded for resentencing without addressing defendant's jury-communications claim. On appeal from the dismissal of the 1997 petition, this court found the claim was forfeited as it "could have been raised in his direct appeal, in his first postconviction petition, or in his section 2-1401 petition." "Further," this court held, "the ruling on defendant's initial petition has a *res-judicata* effect as to all claims that were raised or could have been raised. Moreover, there was no fundamental deficiency in the proceedings on defendant's initial postconviction petition."

¶ 21 OSAD asserts that this court's "forfeiture holding was likely erroneous," but we disagree. While defendant now claims that the reason he did not raise his jury-communications issue on direct appeal was ineffective assistance of counsel, defendant asserts no cause for failing to raise the issue in his May 1997 "section 2-1401" petition, which was essentially a postconviction petition. At any rate, OSAD concedes that "the issue was technically litigated" in defendant's June 1997 postconviction petition even though its merits were not reached.

¶ 22 Further, OSAD asserts that, even if the rules of *res judicata* and forfeiture were relaxed, defendant's claim would lack merit because he was not deprived of any substantive right when the trial judge discussed matters of jury instructions outside his presence but with consent of his trial counsel. *People v. McLaurin*, 235 Ill. 2d 478, 491, 922 N.E.2d 344, 352-53 (2009). Nor did defendant's trial counsel provide ineffective assistance by failing to object to the judge's off-record responses to the jury's questions. Ineffective assistance of counsel occurs when counsel's objectively unreasonable performance prejudices the defendant. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Here, defense counsel's failure to object did not

prejudice defendant by depriving him of his right to a public trial. See *United States v. Patterson*, 23 F.3d 1239, 1255 (7th Cir. 1994) (holding the trial judge's handling of a jury inquiry off the record was harmless error). Defendant's further claim that the trial court improperly instructed the jury that it must find defendant guilty of all offenses if it found him guilty of any would lack merit because it relies exclusively on the improper hearsay of a nonjuror and is, therefore, unsupported. See *People v. Morales*, 339 Ill. App. 3d 554, 565, 791 N.E.2d 1122, 1132 (2003). Finally, defendant's claim that appellate and postconviction counselors provided ineffective assistance would lack merit because the underlying allegations of error are unfounded and would not have succeeded if presented on appeal or in a postconviction proceeding. See *People v. Mack*, 167 Ill. 2d 525, 532, 658 N.E.2d 437, 441 (1995) ("As applied to claims involving the failure of appellate counsel to raise a particular issue, the defendant must show that the failure to raise that issue was objectively unreasonable, as well as a reasonable probability that, but for this failure, his sentence or conviction would have been reversed." (Internal quotation marks omitted.)). As defendant failed to show cause and prejudice with respect to his jury-communications claims, defendant could not reasonably argue on appeal that the trial court erred in denying his motion for leave to file a successive postconviction petition.

¶ 23 Fourth, OSAD asserts that defendant could not reasonably argue on appeal that the trial court erred in denying his motion for leave to file a successive postconviction petition with respect to his claim of a due-process violation based on the theft conviction of the judge who had summarily dismissed defendant's March 1993 postconviction petition. We agree. Defendant's claim of the judge's conviction lacks evidentiary support required by the Post-Conviction Hearing Act. 725 ILCS 5/122-2 (West 2010) ("The petition shall have attached

thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." ). Moreover, even assuming that the judge was convicted, defendant would be unable to show any prejudice resulting from that fact and his claim that it would retroactively disqualify the judge and void every judgment he entered lacks legal support. Accordingly, defendant could not reasonably argue that the court erred in denying his motion for leave to file a successive postconviction petition.

¶ 24 Finally, in his *pro se* additional points and authorities submitted in response to OSAD's motion to withdraw, defendant asserts that his convictions and sentences are void because the instruments charging him with the offenses against two of the victims were instituted by a sheriff's deputy rather than the State's Attorney. According to defendant, the deficiency in the charging instrument stripped the trial court of its jurisdiction to hear the State's claims. Assuming, for the purposes of argument, that defendant's factual allegation is true, this argument is *res judicata* as it could have been raised before. Generally, as an exception to the rules of *res judicata* and forfeiture, a void judgment can be challenged at any time and in any court, either directly or collaterally. *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203 (2004). However, deficiencies in a charging instrument do not affect the trial court's jurisdiction or void the resulting judgment. *People v. Benitez*, 169 Ill. 2d 245, 256, 661 N.E.2d 344, 350 (1996). Because, even taking his allegations as true, the judgment against him is not void for the stated reasons, defendant cannot raise this claim for the first time in this appeal. Accordingly, this claim is barred by *res judicata*. *People v. Flores*, 153 Ill. 2d 264, 274, 606 N.E.2d 1078, 1083 (1992) (a ruling on an initial postconviction petition has a *res judicata* effect as to all claims that were raised or could have been raised).

¶ 25

### III. CONCLUSION

¶ 26 For the foregoing reasons, we conclude no meritorious issues can be raised on appeal in this case and, accordingly, we grant OSAD's motion to withdraw and affirm the trial court's judgments. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 27 Affirmed.