NOTICE
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2015 IL App (4th) 130532-U

NO. 4-13-0532

FILED
May 8, 2015
Carla Bender
4th 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.	)	Champaign County
GREGORY L. BOATMAN,	)	No. 97CF1076
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The motion of the office of the State Appellate Defender to withdraw as appellate counsel is granted and the trial court's dismissal of defendant's *pro se* petition for relief from judgment is affirmed.

¶ 2 Defendant, Gregory L. Boatman, appeals the trial court's dismissal of his *pro se* petition for relief from judgment. On appeal, the office of the State Appellate Defender (OSAD) was appointed to represent him. OSAD has filed a motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), alleging an appeal would be frivolous. We grant OSAD's motion and affirm the court's dismissal of defendant's petition.

¶ 3 I. BACKGROUND

¶ 4 In December 1997, a jury found defendant guilty of attempt (first degree murder of a peace officer) (720 ILCS 5/8-4(a) (West 1996)), two counts of aggravated criminal sexual

assault (720 ILCS 5/12-14(a)(1) (West 1996)), aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(2) (West 1996)), and unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 1996)). In January 1998, the trial court sentenced defendant to consecutive 60-year prison sentences for his two aggravated-criminal-sexual-assault convictions and ordered them to be served concurrently with a 14-year prison sentence for unlawful possession of a stolen vehicle and a 160-year sentence for attempt (first degree murder of a peace officer). On direct appeal, this court reduced defendant's sentence for attempt to 60 years. *People v. Boatman*, 312 Ill. App. 3d 340, 345, 726 N.E.2d 1178, 1182 (2000).

¶ 5 The record reflects defendant thereafter initiated several collateral proceedings, seeking various forms of relief. Relevant to this appeal, in December 2006, he filed a *pro se* motion for postconviction forensic testing pursuant to section 116-3 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/116-3 (West Supp. 2007)). Defendant sought deoxyribonucleic acid (DNA) testing of a sexual assault kit collected during a 1997 medical examination of the victim, B.M., and clothing worn by himself and B.M. He alleged that neither the sexual assault kit nor the clothing had been subjected to forensic testing at the time of his trial. In January 2008, the trial court granted the State's motion to dismiss defendant's motion. Defendant appealed and this court reversed the trial court's dismissal. *People v. Boatman*, 386 Ill. App. 3d 469, 473, 898 N.E.2d 277, 280 (2008).

¶ 6 Following that reversal, defendant obtained legal counsel and was granted leave to file an amended petition for postconviction forensic testing, which he filed on August 14, 2009. He asserted his convictions for aggravated criminal sexual assault were obtained without the benefit of any scientific forensic evidence linking him to the case. Defendant alleged the

sexual assault kit collected from B.M. was never submitted for forensic testing but its chain of custody and integrity had been maintained. He requested "that the sexual assault kit and all other relevant evidence in [his] case be submitted to forensic DNA testing."

¶ 7 On February 9, 2010, the parties entered into an agreed order for forensic testing. Specifically, they agreed defendant was entitled to forensic testing on the "sexual assault kit that was never submitted for forensic testing." The parties stipulated "that the chain of custody and integrity of the evidence within the sexual assault kit ha[d] been maintained sufficient to establish that it ha[d] not been substituted, tampered with, replaced[,] or altered in any material aspect." On May 5, 2010, an agreed supplemental order for forensic testing was filed. The order stated the Illinois State Police forensic science laboratory had identified potential genetic material in samples from the sexual assault kit—including vaginal and anal swabs, root material on head hair combings, and fingernail scrapings—which could not be submitted to forensic DNA testing without consuming the entire sample. Defendant agreed to authorize consumption of the samples as necessary to complete the testing.

¶ 8 On October 11, 2011, the parties appeared before the trial court and the court allowed a motion by defendant's counsel to withdraw. (Although not expressly demonstrated by the record, the parties' subsequent filings indicate forensic testing was completed on the sexual assault kit and testing linked defendant to evidence contained within the kit.) The same day, defendant filed a *pro se* pleading entitled "A Challenge To The Chain of Custody, In The Absence of Actual Evidence of Tampering, Substitution, or Contamination for Forensic Testing on Evidence not Subjected to Testing At The Time of Trial, Pursuant to" section 116-3. He argued the seal on the sexual assault kit was broken in July 2009, outside the presence of defense counsel,

and that material found within the kit, *i.e.*, fingernail scrapings and hair combings, had not been collected during B.M.'s 1997 medical examination.

¶ 9 Defendant attached a police report dated July 24, 2009, to his filing showing that, upon the request of the State, a police officer broke the integrity seal on the sexual assault kit to determine whether it contained an inventory sheet. The officer found no inventory sheet and, on July 16, 2009, resealed the sexual assault kit. The report further showed that, on July 24, 2009, the contents of the sexual assault kit were inventoried in the presence of defendant's counsel and it was found to contain a forensic lab report and several sealed white envelopes. The sealed white envelopes contained "sheet and debris," rectal specimens, oral specimens, vaginal specimens, pubic hair comings, head hair combings, blood on filter paper, and fingernail specimens.

¶ 10 On October 24, 2011, the State filed a motion to dismiss defendant's *pro se* pleading. On January 25, 2012, the trial court entered an order dismissing the pleading, finding defendant had been granted the relief authorized by section 116-3 of the Criminal Code and was not entitled to any further relief under that section. Defendant appealed but his appeal was later dismissed on his own motion. *People v. Boatman*, No. 4-12-0832 (Sept. 13, 2012) (order dismissing appeal).

¶ 11 On March 4, 2013, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2012)), asserting his aggravated-criminal-sexual-assault convictions should be dismissed. He acknowledged that forensic testing did not exclude him as a contributor of genetic material found in fingernail scrapings in the sexual assault kit. However, as in his previous *pro se* motion, he complained that the seal on the sexual assault kit had been broken between July 15 and 16, 2009,

outside of defense counsel's presence, and that medical records failed to show that hair combings or fingernail scrapings that were inventoried as being inside the kit in 2009 were collected from B.M. when she was examined in 1997. Defendant asserted the State and the officer who broke the seal tampered with materially exculpatory evidence in violation of his due-process rights. Further, he maintained his counsel was ineffective for failing to object to the tampering after observing the sexual assault kit. Defendant attached various documents to his petition, including the July 24, 2009, police report and an August 18, 1997, emergency room note, which showed only that "[c]ultures were taken" and an "[e]vidence kit was completed" on B.M.

¶ 12 On March 27, 2013, the State filed a motion to dismiss defendant's *pro se* petition. It argued defendant's petition was not "supported by affidavit or other appropriate showing as to matters not of record" as required by section 2-1401(b) of the Civil Code (735 ILCS 5/2-1401(b) (West 2012)). The State further asserted that the police report attached to defendant's pleading failed to suggest that evidence was altered or destroyed. It argued nothing in the police report indicated a lapse in the chain of custody of the sexual assault kit, the genetic material inside the kit was not affected by the breaking of the outer seal because it had been located within separately sealed envelopes, and the emergency room note attached to defendant's pleading did not purport to give an inventory of all of the evidence collected from B.M. and contained within the sexual assault kit. Additionally, the State denied the evidence at issue would have been materially exculpatory.

¶ 13 On April 16, 2013, the trial court entered an order dismissing defendant's section 2-1401 petition, finding he failed to set forth any meritorious claim. The court determined that, even if true, defendant's allegations, which related to postconviction forensic-testing procedures,

could not form a basis for relief from the original judgment. Further, it found his petition was not properly supported as required by section 2-1401(b). The court stated as follows:

> "[Defendant's] claim alleges rank speculation rather than fact. His motion alleges that after his post-trial DNA motion was granted a police officer opened and resealed an evidence package. This, according to [defendant], constitutes bad faith destruction of evidence. This allegation fails to meet the requirement that the claim be supported by affidavit or other appropriate showing."

Defendant filed a motion for rehearing of the court's dismissal, which it denied.

¶ 14 This appeal followed. As stated, OSAD was appointed to represent defendant on appeal. On September 15, 2014, it filed a motion to withdraw as appellate counsel. This court granted defendant leave to file additional points and authorities and he has responded. The State has also filed a brief. 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 On appeal, OSAD argues defendant's *pro se* petition for relief from judgment was frivolous and correctly dismissed by the trial court. It maintains defendant's contention that evidence in the sexual assault kit was tampered with or substituted amounted to a bare and baseless claim. The State argues defendant's petition was insufficient as a matter of law because he relies on events that occurred well after his convictions to support his request for relief.

¶ 17 Section 2-1401 of the Civil Code allows a party to obtain relief from a final judgment more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2012). "Relief under sec-

tion 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871 N.E.2d 17, 22 (2007); see also *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000) ("A section 2-1401 petition for relief from a final judgment is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to the petitioner and court at the time judgment was entered, which, if then known, would have prevented its rendition."). The trial court's dismissal of a defendant's section 2-1401 petition is subject to *de novo* review. *Vincent*, 226 Ill. 2d at 18, 871 N.E.2d at 28.

¶ 18 Here, we agree that the trial court correctly dismissed defendant's section 2-1401 petition for relief from judgment. The record reflects that in December 1997, a jury found defendant guilty of two counts of aggravated criminal sexual assault without the benefit of forensic testing on material contained within the sexual assault kit. Years later, defendant initiated proceedings to obtain forensic testing of that evidence. In his *pro se* petition for relief from judgment, defendant alleged the sexual assault kit was tampered with in July 2009, and he challenged his aggravated-criminal-sexual-assault convictions on that basis. However, as the State points out, the alleged tampering that defendant claims happened in 2009—more than 10 years following his convictions—cannot constitute a defense or claim that would have precluded him from being found guilty of aggravated criminal sexual assault at the time of his December 1997 trial. Thus, defendant failed to state a claim upon which relief could be granted under section 2-1401 and the court correctly dismissed his *pro se* petition.

¶ 19 Additionally, we find no error in the trial court's determination that defendant's

allegations of tampering consisted of "rank speculation rather than fact." A petition for relief from judgment "must be supported by affidavit or other appropriate showing as to matters not of record." 735 ILCS 5/2-1401(b) (West 2012). Defendant did not submit any affidavit with his petition and the documents that were attached to his petition failed to support his claim of evidence tampering. We note the police report attached to his petition established only that the outer seal on the sexual assault kit was broken, while the samples containing the genetic material to be tested remained inside separate, sealed envelopes within the kit. Additionally, although defendant claimed fingernail scrapings and hair combings, which were inventoried as within the sexual assault kit in 2009, were never collected from B.M. in 1997, the emergency room note he attached to his petition states only that "[c]ultures were taken" and an "[e]vidence kit was completed." The emergency room note does not contain an exhaustive inventory of material contained within the sexual assault kit at the time of B.M.'s 1997 examination, nor does it establish that fingernail scrapings and hair combings were not among the material collected for kit.

¶ 20 Finally, we note defendant's section 2-1401 petition also alleged his counsel was ineffective for failing to "object to the tampering." "However, a defendant may not complain of inadequate assistance of counsel if she or he had no right to counsel." *People v. Love*, 312 Ill. App. 3d 424, 426, 727 N.E.2d 680, 682 (2000). The constitutional right to counsel applies only during a defendant's trial and first appeal of right, while section 116-3 of the Criminal Code provides no statutory right to counsel. *Love*, 312 Ill. App. 3d at 426-27, 727 N.E.2d at 683; see also *People v. Patterson*, 2012 IL App (4th) 090656, ¶ 20, 971 N.E.2d 1204 (recognizing that a defendant is not entitled to counsel "on an independent section 116-3 motion"). Here, defendant had no right to counsel during his section 116-3 proceedings and, therefore, he may not raise an

ineffective-assistance-of-counsel claim.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we grant OSAD's motion to withdraw as appellate counsel and affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 23 Affirmed.