

NOTICE
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2015 IL App (4th) 130610-U
NO. 4-13-0610

FILED
February 20, 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.)	Adams County
GREGORY T. BAKER,)	No. 05CF47
Defendant-Appellant.)	
)	Honorable
)	William O. Mays,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The appellate court granted appellate counsel's motion to withdraw and affirmed the trial court's judgment.

¶ 2 In August 2005, a jury found defendant, Gregory T. Baker, guilty of the offenses of residential burglary and forgery. The trial court sentenced defendant to consecutive terms of 15 years and 5 years in prison, respectively. This court affirmed defendant's convictions and sentences on appeal. In August 2012, defendant filed a *pro se* petition for relief from judgment. In June 2013, the trial court granted the State's motion to dismiss.

¶ 3 On appeal, the office of the State Appellate Defender (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 without merit. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4

I. BACKGROUND

¶ 5 In January 2005, the State charged defendant by information with single counts of residential burglary (720 ILCS 5/19-3 (West 2004)) and forgery (720 ILCS 5/17-3(a)(1) (West 2004)). The State alleged defendant and Mary Kukar committed the offense of residential burglary in that they, or one for whose conduct they were legally responsible, knowingly and without authority entered into the dwelling place of Jason and Sheryl Totsch in Adams County with the intent to commit a theft therein. The State also alleged defendant and Kukar committed the offense of forgery in that they, or one for whose conduct they were legally responsible, with the intent to defraud, knowingly made a document capable of defrauding another. The State alleged defendant and Kukar presented a \$2,000 check dated January 5, 2005, and drawn on Sherry Totsch's account at the Farmers Bank of Liberty (Farmers Bank). Defendant pleaded not guilty.

¶ 6 In August 2005, defendant's jury trial commenced. Prior to opening statements, the State indicated it would seek to introduce defendant's conviction for forgery in Pike County even if he did not testify. The trial court found the evidence more probative than prejudicial and allowed the State to introduce the evidence in its case in chief.

¶ 7 Sherry Totsch testified she was rocking her two-year-old daughter on the evening of January 5, 2005, when she heard the kitchen door open. After 5 or 10 minutes, she went to check on the door and noticed a diaper bag on the floor. The next morning, Totsch looked for her purse but could not find it. After calling her children at school and her husband at work, she decided to call her cell phone company. She then learned someone else had been using her cell phone. She called her bank and was informed that a person had cashed a check for \$2,000 on her account at a bank branch in Payson. She also called her credit card company and learned a

charge had been made the previous evening. Totsch testified her purse contained three checkbooks, including that of her son, Jesse Allensworth, credit cards, her driver's license, her firearm owner's identification card, social security cards for her and her children, her cell phone, and less than \$100 in cash. Totsch testified she never gave defendant or Kukar permission to enter her home or to take her purse.

¶ 8 Kathy Albsmeyer testified she worked as a teller at the Farmers Bank at the Payson facility. Farmers Bank also had facilities in Barry and Liberty. On January 6, 2005, she noticed an African-American male driving a plum-colored van off to the side of the drive-up window. After Albsmeyer waited on a customer and answered the phone, she saw a Caucasian woman drive the van to the drive-up window. Albsmeyer identified a picture of Mary Kukar as the woman driving the vehicle. She also identified a check on the account of Sherry Totsch payable to cash for \$2,000, along with Totsch's driver's license, which had been handed over to another teller. After the transaction had been completed and as the vehicle left, Albsmeyer was unable to read the snow-covered license plate, but she did see another individual in the van besides the driver. She then received a phone call from the Liberty office indicating Totsch had reported a stolen purse and checkbook.

¶ 9 Judy Chapman testified she was working as a teller at the Payson branch of Farmers Bank on January 6, 2005, when a plum-colored van with dark windows drove up. The female driver handed her a check and a driver's license, both in the name of Sherry Totsch. Chapman stated she looked up the signature card to match that on the check and the driver's license, checked the account for sufficient funds, and called the Liberty branch to double-check the customer's identity. Chapman then cashed the \$2,000 check and gave the female two sets of ten \$100 bills. Shortly thereafter, Chapman was informed that Totsch had reported her purse

stolen.

¶ 10 Jeanne Hurt testified she worked at the Farmers Bank facility in Barry. On January 6, 2005, she was given a description of a van and informed that the female driver might attempt to cash a check on Totsch's account. When the van arrived, the female handed over a check and a driver's license and asked if she could cash the \$2,000 check. Hurt had no intention of cashing the check and attempted to stall. She told the driver the computers were down and that she had to go back to the vault to get more money. When Hurt returned, she pretended to count the money before acting like she had a phone call. Hurt testified she stalled for "approximately 20 minutes." The driver then told Hurt that she decided to cash the check later. Hurt handed back the check and the driver's license. The female drove off, and Hurt watched the van travel toward Interstate 72.

¶ 11 Pike County deputy sheriff John Pennock testified he received information from a teller at the Farmers Bank in Barry on January 6, 2005, that an individual had attempted to cash a stolen check. As Deputy Pennock proceeded on Interstate 72, he observed a van matching the description given by the teller. After stopping the vehicle, Pennock asked the driver and the passenger for identification. Pennock identified the driver as Kukar and the passenger as defendant. Pennock returned to his squad car to check the Minnesota license plates and discovered the van had been reported stolen. Kukar and defendant were then arrested. Upon searching the van, Pennock found a brown purse, checkbooks belonging to Sherry Totsch and Jesse Allensworth, a check written out for \$2,000 cash, and Totsch's driver's license, credit cards, and social security card. When Deputy Pennock searched defendant, he found one of Totsch's credit cards and ten \$100 bills. A search of Kukar also revealed ten \$100 bills.

¶ 12 Pennock stated defendant was charged with forgery in Pike County based on the

presentation of Totsch's check to the Farmers Bank in Barry and pleaded guilty. Pennock identified exhibit No. 12 as a guilty-plea form signed by defendant. The trial court admitted the exhibit into evidence and allowed the jury to see the certified copy of defendant's guilty plea.

¶ 13 Mary Kukar, defendant's wife, testified for the defense. They had traveled from Minnesota "to stay off drugs." They picked up a man named Mike, who had provided them with drugs, at a gas station in Iowa. They stopped at different places, and Mike would go in and out carrying bags of clothes and drugs. In Illinois, they stopped for drugs in rural areas near Quincy. Near a bank in Payson, defendant exited the vehicle to "cool off," and Kukar and Mike decided it would "be a good time to go to the bank" to obtain money for more drugs. Kukar wrote out a check and presented it to the teller at the drive-up window. After leaving the bank, Kukar and Mike returned to get defendant. After dropping off Mike at a house where he said he needed to leave some items, Kukar and defendant "kind of [came] to [their] senses" and left Mike. They then went to a bank in Barry, although defendant tried to talk Kukar out of taking more money out of the account. Kukar stated defendant went to Wendy's while she was at the bank. They then traveled the interstate before being pulled over.

¶ 14 On cross-examination, Kukar testified she pleaded guilty to forging the checks of Sherry Totsch in Pike and Adams Counties. In her interview with the police following her arrest, she did not mention anything about Mike committing a burglary.

¶ 15 Defendant exercised his constitutional right not to testify. Following closing arguments, the jury found defendant guilty of both offenses.

¶ 16 In September 2005, defendant filed a posttrial motion, raising the issue of his right to a speedy trial. In October 2005, the trial court found *res judicata* applied and it would not rehear the motion. Thereafter, the court sentenced defendant to 15 years in prison on the

residential-burglary conviction and an extended term of 6 years in prison on the forgery conviction. The court ordered those sentences to run consecutively. In December 2005, defendant filed an amended motion to reduce his sentence. Following a hearing on the motion, the court reduced the sentence for forgery to five years.

¶ 17 On appeal, defendant argued the trial court (1) erred in allowing the State to introduce other-crimes evidence, (2) considered an improper aggravating factor at sentencing, and (3) abused its discretion in imposing consecutive sentences. *People v. Baker*, No. 4-05-1052 (Nov. 1, 2007) (unpublished order under Supreme Court Rule 23). This court affirmed.

¶ 18 In August 2008, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2008)). Defendant raised claims of ineffective assistance of counsel and due process. In October 2008, the trial court summarily dismissed the petition, finding it frivolous and patently without merit.

¶ 19 On August 20, 2012, defendant filed a *pro se* petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401 (West 2012)). Defendant argued his sentences were void because the trial court was prohibited from ordering them to run consecutive to each other. On August 22, 2012, the trial court denied the petition. In November 2012, this court allowed defendant's motion for summary remand under *People v. Laugharn*, 233 Ill. 2d 318, 323, 909 N.E.2d 802, 805 (2009), where our supreme court held a trial court may not dismiss a section 2-1401 petition before it is ripe for adjudication, *i.e.*, before the State has been given 30 days in which to respond to it.

¶ 20 On remand, the State filed a motion to dismiss the petition, contending defendant's sentences were not void. The State argued the petition was barred by the (1) rule that requires section 2-1401 petitions to be filed within two years of the entry of judgment and (2)

doctrine of *res judicata*, as the issue had been resolved on direct appeal.

¶ 21 In June 2013, the trial court granted the State's motion to dismiss. The court found the sentences were not void and defendant's motion was not filed within the appropriate two-year period. The court also stated defendant's petition would fail on the merits, stating the sentencing court took into consideration the statutory factors in sentencing defendant to consecutive terms. This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 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 December 22, 2014. None have been filed.

¶ 24 Section 2-1401 of the Procedure Code sets forth a statutory procedure by which final orders and judgments may be challenged more than 30 days after entry. 735 ILCS 5/2-1401 (West 2012); *People v. Vincent*, 226 Ill. 2d 1, 7, 871 N.E.2d 17, 22 (2007). "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." *People v. Haynes*, 192 Ill. 2d 437, 461, 737 N.E.2d 169, 182 (2000).

¶ 25 Section 2-1401 limits the time in which a defendant may obtain relief, stating "the petition must be filed not later than [two] years after the entry of the order or judgment." 735 ILCS 5/2-1401(c) (West 2012). "The statute further provides for an exception to the time limitation for legal disability and duress or if the ground for relief is fraudulently concealed." *Vincent*, 226 Ill. 2d at 7, 871 N.E.2d at 22. "The two-year limitations period, however, does not

apply to petitions brought on voidness grounds." *People v. Moran*, 2012 IL App (1st) 111165, ¶ 13, 977 N.E.2d 801 (citing *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104, 776 N.E.2d 195, 202 (2002)). This court reviews the dismissal of a section 2-1401 petition *de novo*. *Vincent*, 226 Ill. 2d at 18, 871 N.E.2d at 28.

¶ 26 In the case *sub judice*, defendant's claim in his section 2-1401 petition that his consecutive sentences are void has no merit. Section 5-8-4(b) of the Unified Code of Corrections (730 ILCS 5/5-8-4(b) (West 2004)) provides as follows:

"Except in cases where consecutive sentences are mandated, the court shall impose concurrent sentences unless, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is of the opinion that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record."

Whether a consecutive term should be imposed is within the trial court's discretion, and that decision will not be overturned on appeal absent an abuse of that discretion. *People v. Jefferson*, 260 Ill. App. 3d 895, 914, 631 N.E.2d 1374, 1387 (1994).

¶ 27 Residential burglary, a Class 1 felony, has a sentencing range of 4 to 15 years in prison (730 ILCS 5/5-8-1(a)(4) (West 2004)), while forgery, a Class 3 felony, has a range of 2 to 5 years in prison (730 ILCS 5/5-8-1(a)(6) (West 2004)). Defendant's 15-year sentence for residential burglary and his 5-year sentence for forgery both fell within the relevant statutory sentencing ranges.

¶ 28 The trial court heard defendant's extensive criminal history involving illegal

drugs, aggravated robbery, escape, theft of a vehicle, fleeing the police, burglary to a person, and burglary to a dwelling. The court stated it was obvious that defendant was unlikely to comply "with the laws which every civilized society must have." The court indicated it considered the factors in aggravation and mitigation and concluded a sentence of imprisonment was necessary for the protection of the public. When asked to reconsider the imposition of consecutive sentences, the court stated it was "of the opinion that the sentence which it imposed was necessary to protect society and to deter others from committing similar offenses." As the court had the authority under the statute to impose consecutive terms of imprisonment and made the requisite findings, defendant's sentences are not void. Moreover, any claim that the court abused its discretion in imposing consecutive sentences would be barred by the doctrine of *res judicata*, as this court rejected that claim on direct appeal.

¶ 29 In its motion, OSAD contends an appeal in this cause would be without merit, and our review of the record reveals OSAD is correct. As no argument can be made that defendant was entitled to relief on his section 2-1401 petition, we find the trial court did not err in granting the State's petition.

¶ 30 III. CONCLUSION

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

¶ 32 Affirmed.