

NOTICE

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2015 IL App (4th) 130675-U
NOS. 4-13-0675, 4-14-0328 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
THESIS D. JONES,)	No. 07CF462
Defendant-Appellant.)	
)	Honorable
)	Scott B. Diamond,
)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* We grant appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirm the trial court's judgment where no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. For the following reasons, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Evidence at Defendant's Trial

¶ 5 On March 29, 2007, Decatur, Illinois, police officers answered a call regarding a shooting at Stashaun Wheeler's house. Upon their arrival, police discovered Brandon Read

inside Wheeler's house, unconscious on the floor. Read died several days later. The cause of death was a gunshot wound to the head.

¶ 6 Earl Campbell, who lived across the alley from the scene of the shooting, testified he saw defendant shoot out the window of a car earlier in the day on the day of the shooting. He testified defendant was not shooting at anyone in particular. Later that same day Campbell also saw Emmanuel Lewis driving a car in which defendant and Christopher Graves were passengers. Defendant was seated in the passenger seat and Christopher Graves was sitting in the back seat. Lewis pulled over and told Campbell, "On the G, I'm going to get that nigger." Both defendant and Graves had guns.

¶ 7 Keirsean Bond testified he was at Wheeler's house on the day of the shooting. Bond was on the front porch when he saw defendant's car driving down the street. Shots were fired from the car at the house. Bond ran into the house. He heard one or two additional shots and saw Read fall down.

¶ 8 Sergeant Chris Peters located a vehicle matching the description of the one involved in the shooting. Peters observed two bullet defects in the passenger side front door and noticed the vehicle's hood was still warm. Peters went up to the house where the car was parked and told the occupants the car had been involved in an incident he was investigating. One of the men, defendant's father, went into the house and brought defendant out. Peters took defendant for questioning.

¶ 9 During the police interview, defendant told Sergeant Chris Copeland he, Lewis, and Graves were riding around in his vehicle when they heard a gunshot. Defendant told Copeland they chased the shooter to Wheeler's house and as they passed the house, Wheeler and

other individuals shot at them. They then drove to defendant's aunt's house. While at defendant's aunt's house, defendant received a phone call informing him Read had been shot.

¶ 10 During their investigation, police discovered a black bag containing a single-shot, revolver-style handgun on the back porch of defendant's aunt's house. The gun was determined to be the one used to kill Read. Photographs from defendant's cell phone dated a few days prior to the shooting showed defendant holding a handgun consistent with the class and characteristics of the one police found in the black bag.

¶ 11 The jury found defendant guilty of first degree murder and found he personally discharged a firearm.

¶ 12 On May 29, 2009, he was sentenced to 45 years in prison. Defendant's sentence included a mandatory 20-year enhancement for personally discharging a firearm.

¶ 13 B. Defendant's Direct Appeal

¶ 14 On direct appeal, defendant argued the trial court abused its discretion in not ruling on his motion *in limine* regarding gang evidence prior to *voir dire*. We affirmed. *People v. Jones*, No. 4-09-0418 (Jan. 27, 2011) (unpublished order pursuant to Illinois Supreme Court Rule 23) (petition for leave to appeal denied at No. 112111, 949 N.E.2d 1101 (table) (May 25, 2011)).

¶ 15 C. Defendant's Initial Postconviction Petition

¶ 16 On February 27, 2012, defendant filed a *pro se* petition for postconviction relief, arguing a variety of ineffective assistance of counsel claims regarding both his trial and appellate counsel.

¶ 17 On March 1, 2012, the trial court dismissed defendant's petition as frivolous and

patently without merit. Defendant appealed and the parties agreed to remand the matter to the trial court to vacate certain improperly assessed fees.

¶ 18 D. Defendant's Section 2-1401 Petition (No. 4-13-0675)

¶ 19 On May 16, 2013, defendant filed a section 2-1401 (735 ILCS 5/2-1401 (West 2012)) petition for relief from judgment, arguing (1) he was actually innocent based on newly discovered evidence, (2) the trial court erred in not discharging jurors who had fallen asleep during trial, and (3) Illinois truth-in-sentencing laws violate due process. In support of his motion, defendant attached his own affidavit and an affidavit from Lewis. Lewis' affidavit stated at the time of the shooting he, defendant, and Graves were driving to the office of Brandi Brown, who worked for the Cease Fire organization. Lewis stated he heard defendant say, "don't shoot," and then heard gunshots. According to Lewis' affidavit, he did not see defendant with a gun and they never discussed shooting anyone. Defendant's affidavit stated he had purchased a gun but returned it after finding it did not work. Defendant also averred he, Lewis, and Graves were in the car together on the way to Brown's office. According to defendant's affidavit, after Graves said he was going to shoot and defendant told him not to, Graves shot anyway.

¶ 20 On May 30, 2013, the State filed a motion to dismiss defendant's petition, arguing (1) it was not filed within the two-year statute of limitations, (2) the affidavits did not constitute newly discovered evidence and were contradicted by other evidence, and (3) defendant's due-process and sleeping-juror claims were not proper claims for a section 2-1401 petition.

¶ 21 On June 21, 2013, the trial court dismissed defendant's section 2-1401 petition.

¶ 22 Following the trial court's July 22, 2013, denial of defendant's motion to reconsider, defendant filed his notice of appeal. That appeal was docketed as appellate court

case No. 4-13-0675.

¶ 23 E. Defendant's Successive Postconviction Petition (No. 4-14-0328)

¶ 24 On February 21, 2014, defendant filed a motion for leave to file a successive postconviction petition. In his petition, defendant argued his appellate counsel was ineffective for failing to argue on direct appeal: (1) the trial court erred in denying the motion *in limine* regarding gang violence, (2) his trial counsel was ineffective for not properly conducting *voir dire* on the issue of gang bias, and (3) his trial counsel was ineffective for failing to preserve the argument the court erred in not removing a sleeping juror.

¶ 25 On February 27, 2014, the trial court denied defendant's motion for leave to file a successive postconviction petition, finding defendant failed to demonstrate cause for why his claims were not raised in his initial postconviction petition.

¶ 26 On March 14, 2014, defendant filed his notice of appeal. Defendant's appeal was docketed as appellate court case No. 4-14-0328.

¶ 27 On November 24, 2014, defendant filed a motion to consolidate the two appeals, which we granted.

¶ 28 On December 9, 2014, OSAD moved to withdraw as appellate counsel on the ground no meritorious issues can be raised on appeal, and OSAD included a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Notice of OSAD's motion was sent to defendant. On its own motion, this court granted defendant leave to file additional points and authorities by January 15, 2015. Defendant has not done so. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 29

II. ANALYSIS

¶ 30 OSAD moves to withdraw pursuant to *Finley*, arguing no meritorious arguments can be raised on appeal. Specifically, OSAD asserts defendant's contentions fail to present a meritorious basis for an appeal from the trial court's dismissal of either his section 2-1401 petition or his successive postconviction petition. After a review of the record consistent with our responsibilities under *Finley*, we agree.

¶ 31 A. Defendant's Section 2-1401 Petition (No. 4-13-0675)

¶ 32 Section 2-1401 of the Code of Civil Procedure allows for relief from final judgments more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2012). "Relief under section 2-1401 is predicated upon proof, by a preponderance of [the] 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). To be entitled to relief under section 2-1401, the petitioner must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition. *People v. Bramlett*, 347 Ill. App. 3d 468, 473, 806 N.E.2d 1251, 1255 (2004) (quoting *In re Estate of Barth*, 339 Ill. App. 3d 651, 662, 792 N.E.2d 315, 324 (2003)); see also *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 15, 962 N.E.2d 517. This court reviews a trial court's dismissal of a section 2-1401 petition for an abuse of discretion. *People v. Davis*, 2012 IL App (4th) 110305, ¶ 11, 966 N.E.2d 570.

¶ 33 A section 2-1401 petition must be filed within two years after entry of the

judgment being challenged. 735 ILCS 5/2-1401(c) (2012); *People v. Pinkonsly*, 207 Ill. 2d 555, 562, 802 N.E.2d 236, 241 (2003). A section 2-1401 petition filed beyond the two-year limitation will normally not be considered. *People v. Caballero*, 179 Ill. 2d 205, 210, 688 N.E.2d 658, 660 (1997). Here, defendant filed his petition on February 27, 2012, more than two years after his May 29, 2009, sentencing date. See *People v. Gray*, 2013 IL App (1st) 112572, ¶ 8, 988 N.E.2d 1045 (two-year statute of limitations for a section 2-1401 petition begins to run when a defendant is sentenced). Thus, defendant's petition was not timely filed. Further, defendant did not allege anything prevented him from filing his petition until after the limitations period had run. See *People v. Harvey*, 196 Ill. 2d 444, 447, 753 N.E.2d 293, 295 (2001) (relief sought more than two years after the entry of the judgment will not be considered without a clear showing the petitioner was under a legal disability or duress or the grounds for relief were fraudulently concealed).

¶ 34 However, section 2-1401(f) provides, "[n]othing contained in this Section affects any existing right to relief from a void order or judgment." 735 ILCS 5/2-1401(f) (West 2012). Accordingly, Illinois courts have held "[p]etitions brought on voidness grounds need not be brought within the two-year time limitation." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104, 776 N.E.2d 195, 202 (2002); see also *Gray*, 2013 IL App (1st) 112572, ¶ 7, 988 N.E.2d 1045 ("The two-year limitation *** does not apply to petitions brought on voidness grounds."); *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 30, 981 N.E.2d 1010 ("A petition challenging a judgment as void is not subject to the limitations period ***.").

¶ 35 Here, only defendant's truth-in-sentencing claim arguably alleges his sentence is void. As such, this issue could potentially be raised in an untimely section 2-1401 petition. That

said, defendant's contention in this regard is without merit.

¶ 36 In his petition, defendant argues Public Act 90-592 was unconstitutional where it was enacted before the supreme court was "allowed the opportunity to perform their judicial duties of interpreting whether or not Public Act 89-404 violated the single subject clause of the Illinois Constitution." We disagree.

¶ 37 The Illinois truth-in-sentencing statute was first enacted in 1995, pursuant to Public Act 89-404 (Pub. Act 89-404, § 40 (eff. Aug. 20, 1995)). Before its passage, those convicted of certain crimes were eligible to earn one day of good-conduct credit for each day in prison. See 730 ILCS 5/3-6-3(a)(2) (West 1994). In *People v. Reedy*, 295 Ill. App. 3d 34, 36, 692 N.E.2d 376, 379 (1998), the Second District held Public Act 89-404 unconstitutional as it was in violation of the single-subject rule of the Illinois Constitution of 1970 (Ill. Const. 1970, art. IV, § 8(d)). That decision was appealed to the supreme court.

¶ 38 During the pendency of the appeal, the Illinois General Assembly reenacted the truth-in-sentencing provision in Public Act 90-592 (Pub. Act 90-592, § 5 (eff. June 19, 1998) (deleting and recodifying the entire truth-in-sentencing provision originating from Public Act 89-404)). Thereafter, the supreme court affirmed the Second District, finding Public Act 90-592 validly reenacted the truth-in-sentencing law. *People v. Reedy*, 186 Ill. 2d 1, 17-18, 708 N.E.2d 1114, 1121-22 (1999).

¶ 39 Contrary to defendant's claim in his petition, the supreme court specifically upheld the constitutionality of Public Act 90-592. *Reedy*, 186 Ill. 2d at 17, 708 N.E.2d at 1121 ("we note that, unlike all preceding amendments to Public Act 89-404, Public Act 90-592 truly served to cure the effect that the former act's invalidation had on the truth-in-sentencing law").

¶ 40 Because defendant's petition was not timely filed and his voidness claim is without arguable merit, we grant OSAD's motion to withdraw as counsel in case No. 4-13-0675.

¶ 41 B. Defendant's Successive Postconviction Petition (No. 4-14-0328)

¶ 42 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)) grants criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. Relief under the Act is only available for constitutional deprivations occurring at the defendant's original trial. *Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. The Act generally limits a defendant to one postconviction petition and expressly states any claim cognizable under the Act that is not raised in the original or amended petition is deemed forfeited. *Guerrero*, 2012 IL 112020, ¶ 15, 963 N.E.2d 909.

¶ 43 However, there are two bases upon which the bar against successive proceedings will be relaxed. *People v. Edwards*, 2012 IL 111711, ¶ 22, 969 N.E.2d 829. "The first basis for relaxing the bar is when a petitioner can establish 'cause and prejudice' for the failure to raise the claim earlier." *Edwards*, 2012 IL 111711, ¶ 22, 969 N.E.2d 829. "The second basis by which the bar to successive postconviction proceedings may be relaxed is what is known as the 'fundamental miscarriage of justice' exception." *Edwards*, 2012 IL 111711, ¶ 23, 969 N.E.2d 829. However, "[t]o demonstrate such a miscarriage of justice, a petitioner must show actual innocence." *People v. Pitsonbarger*, 205 Ill. 2d 444, 459, 793 N.E.2d 609, 621 (2002). Here, defendant's postconviction petition does not make a claim of actual innocence.

¶ 44 Section 122-1(f) of the Act provides the following:

"Leave of court [to file a successive postconviction petition] may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2012).

¶ 45 "[T]he cause-and-prejudice determination [is] made on the pleadings prior to the first stage of postconviction proceedings." *People v. Smith*, 2014 IL 115946, ¶ 33, 21 N.E.3d 1172. A petitioner must submit enough in the way of documentation to allow a trial court to determine whether the cause-and-prejudice test has been met. *Smith*, 2014 IL 115946, ¶ 35, 21 N.E.3d 1172. Thus, leave of court to file a successive postconviction petition will be denied "when it is clear, from a review of the successive petition and the documentation submitted by the petitioner, that the claims alleged by the petitioner fail as a matter of law or where the successive petition with supporting documentation is insufficient to justify further proceedings." *Smith*, 2014 IL 115946, ¶ 35, 21 N.E.3d 1172.

¶ 46 In his successive petition, defendant argues his appellate counsel was ineffective for not arguing on direct appeal the following: (1) the trial court erred in denying his motion *in*

limine, (2) his trial counsel was ineffective for not properly conducting *voir dire*, and (3) his trial counsel was ineffective for failing to preserve the argument the court erred in failing to remove a sleeping juror. Each of these claims could have been raised in his initial postconviction petition but were not. Further, defendant's successive petition does not plead facts demonstrating any objective factors which impeded his ability to raise these claims in the initial petition. See 725 ILCS 5/122-1(f) (West 2012). Thus, defendant has not established cause for failing to include those claims in his initial postconviction petition.

¶ 47 Because defendant has failed to meet the cause prong of the cause-and-prejudice requirement for filing a successive postconviction petition, we need not address whether defendant has demonstrated prejudice. The trial court did not err in denying defendant's petition for leave to file a successive postconviction petition. As defendant's claims are without arguable merit, we grant OSAD's motion to withdraw as counsel in case No. 4-14-0328.

¶ 48 III. CONCLUSION

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

¶ 50 No. 4-13-0675, Affirmed.

¶ 51 No. 4-14-0328, Affirmed.