

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).

2016 IL App (4th) 140679-U

NO. 4-14-0679

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

August 30, 2016  
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.	)	Adams County
ROBERT F. RUSSO,	)	No. 01CF84
Defendant-Appellant.	)	
	)	Honorable
	)	Scott H. Walden,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Presiding Justice Knecht and Justice 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 2001, the trial court sentenced defendant, Robert F. Russo, to 60 years in prison following his conviction for first degree murder. This court affirmed his conviction and sentence as modified. In January 2005, defendant filed a *pro se* postconviction petition, which the trial court dismissed. This court affirmed on appeal. In January and April 2009, defendant filed *pro se* petitions for relief from judgment, which the trial court denied. This court affirmed on appeal. In December 2009, defendant filed a *pro se* petition for *habeas corpus*, which the trial court dismissed after finding it frivolous and patently without merit. This court affirmed on appeal. In October 2012, defendant filed a *pro se* petition to vacate judgment under the *habeas* statute, and the trial court found it frivolous and patently without merit. This court affirmed on

appeal. In March 2014, defendant filed a *pro se* successive postconviction petition. In June 2014, the trial court summarily dismissed the petition, finding it frivolous and patently without merit.

¶ 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 any appeal in this cause would be frivolous. We grant OSAD's motion and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In March 2001, the State charged defendant by information with first degree murder, alleging he, without lawful justification and with the intent to kill Dale Smith, struck Smith about the head with a hard object, thereby causing his death in violation of section 9-1(a)(1) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1) (West 2000)). Defendant pleaded not guilty.

¶ 6 In June 2001, defendant's jury trial commenced. The State presented evidence that defendant suggested Smith spend the night at defendant's apartment on March 11, 2001. Defendant was the last person seen with the heavily intoxicated Smith. Mary Russo, defendant's wife, testified defendant told her he wanted her to draw a man away from Ronnie Roberts so he could kill the man. Mary also saw defendant with a meat cleaver in his back pocket. Jerome Shoop testified defendant told him he killed Smith and wanted help rolling Smith in a rug and throwing him in a ravine. Chuck Conover also testified defendant asked him for help carrying Smith's body over a hill or to a ravine. Marlon Tournear saw Terry Hawe mopping the floor and washing the sidewalk outside defendant's apartment, as well as dragging a couch outside. Laura Tournear identified defendant as one of the men moving a couch. Smith's blood was found on

the couch by the Dumpster as well as in defendant's apartment. Defendant stayed in a hotel for a few hours instead of his own apartment, hitchhiked out of town, and threw away his clothes, shoes, and identification.

¶ 7 Mark Johnsey, a forensic anthropologist with the Illinois State Police, testified as an expert and concluded a "sharp[-]bladed knife" was used to cut the victim's arms and legs "around the skin down to the bone." Then, a handsaw was used to cut through the bone. Dr. Travis Hindman, a forensic pathologist, testified he performed an autopsy on Dale Smith in March 2001. Along with the amputation of both arms and both legs, Dr. Hindman observed "multiple deep lacerations of the scalp with brain tissue exuding from at least one of the lacerated wounds of the scalp," "lacerations of his left ear," and "a massive throat[-]cut wound of the neck." Dr. Hindman indicated the cause of death was "massive brain trauma due to narrow surface blunt force trauma to the \*\*\* left side of the head." He opined the trauma could have been caused by a hammer or the end of a tire iron. He concluded the blows to the victim's head caused the death as opposed to the throat wounds or amputations.

¶ 8 Following closing arguments, the jury found defendant guilty of first degree murder. In July 2001, the trial court sentenced him to 60 years' imprisonment. Defendant appealed and raised claims concerning the sufficiency of evidence at trial, violation of the marital privilege, violation of his right to substitution of judge for cause, and credit for time served in custody prior to trial. This court affirmed his conviction and sentence as modified. *People v. Russo*, No. 4-01-0432 (July 20, 2004) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Russo*, 212 Ill. 2d 549, 824 N.E.2d 289 (2004).

¶ 9 In January 2005, defendant filed a *pro se* petition for postconviction relief under

the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2004)). The petition alleged defendant was denied effective assistance of appellate counsel; his due-process rights were violated by the introduction of "false evidence" at trial, namely a saw and a hammer that were not connected to the crime; the prosecutor committed misconduct by introducing the saw and the hammer into evidence and in making his closing argument; the trial court erred in allowing hearsay evidence at trial and in refusing to reopen defendant's case; and the accountability statute (720 ILCS 5/5-2(c) (West 2004)) was unconstitutional because it was ambiguous and violated his right to due process. Defendant also alleged he had newly discovered evidence, *i.e.*, attached statements from Adam and Bobby Joe Heather and an affidavit from Johnny Presley that each detailed Shoop's motive to kill Smith, which defendant asked the trial court to consider as a freestanding claim of actual innocence.

¶ 10 In November 2005, appointed counsel amended the petition, raising claims of ineffective assistance of counsel, improper remarks by the prosecutor, the constitutionality of the accountability statute, and newly discovered evidence regarding Adam Heather's interview and Presley's affidavit.

¶ 11 In December 2005, the State filed a motion to dismiss. In March 2006, the trial court granted the State's motion to dismiss. On appeal, appellate counsel argued defendant was denied a reasonable level of assistance on his postconviction petition where trial counsel was appointed to represent him on that petition. This court affirmed. *People v. Russo*, No. 4-06-0247 (Aug. 20, 2007) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Russo*, 226 Ill. 2d 603, 879 N.E.2d 937 (2007).

¶ 12 In January 2009, defendant filed a *pro se* petition for relief from judgment

pursuant to section 2-1401(f) of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-1401(f) (West 2008)). Defendant alleged his conviction was void because the accountability statute was unconstitutionally vague; the trial court's order compelling his wife to testify "truthfully" was void; and the judgment was void because the trial judge refused to recuse himself while acting with an appearance of bias.

¶ 13 On April 13, 2009, the trial court issued a written order finding defendant was not entitled to relief from judgment. The court noted defendant raised no new issues of fact supported by affidavit. The points alleged were raised in his first appeal and found to be without merit. Further, the accountability argument had been raised in his postconviction petition, the dismissal of which was affirmed on appeal. Defendant filed a notice of appeal (No. 4-09-0291).

¶ 14 On April 20, 2009, defendant filed another petition for relief from judgment. Defendant alleged the judgment was void because the trial court refused to reopen the case to hear testimony of an exculpatory witnesses, namely, the Heathers; Adam Heather's statements supported a freestanding claim of innocence; and the judgment was void based on the prosecutor's improper cross-examination and closing argument.

¶ 15 In May 2009, the State filed a motion to strike, arguing defendant raised no new issues. In August 2009, the trial court ordered the petition denied and stricken as a prohibited successive petition. The court found defendant attempted to avoid the general rule against successive section 2-1401 petitions by claiming the judgment against him was void. However, the points alleged were raised on direct appeal, in his postconviction petition, and his first section 2-1401 petition. Defendant filed a notice of appeal (No. 4-09-0607). This court consolidated defendant's appeals, granted OSAD's motion to withdraw as counsel, and affirmed the trial court's judgments. *People v. Russo*, Nos. 4-09-0291, 4-09-0607 (July 27, 2010) (unpublished

order under Supreme Court Rule 23).

¶ 16 In December 2009, defendant filed a *pro se* petition for *habeas corpus* pursuant to section 10-102 of the Procedure Code (735 ILCS 5/10-102 (West 2008)). Defendant alleged certain errors rendered the trial court's judgment void because it violated due process, including the State's alleged knowing use of false evidence at trial (involving a saw, a hammer, and a blood standard); the court's admission of hearsay and irrelevant testimony; the State's coaching of its witnesses; and the court's refusal to give certain jury instructions. Defendant also claimed his trial counsel was ineffective, which contributed to the court's defective judgment.

¶ 17 In January 2010, the trial court issued a written order *sua sponte*. The court noted defendant had not challenged the court's jurisdiction or raised any occurrence subsequent to his conviction that would entitle him to release. The court found the petition frivolous and patently without merit and dismissed it. This court affirmed. *Russo v. Gaetz*, No. 4-10-0080 (July 7, 2010) (unpublished order under Supreme Court Rule 23).

¶ 18 In October 2012, defendant filed a *pro se* "petition to vacate judgment," citing the *habeas corpus* statute, which he claimed was "supported by intervening [United States] Supreme Court precedent." He also claimed an "occurrence" had taken place since his trial, namely new case law on the issue of accountability, which entitled him to release from custody. Defendant argued the accountability theory allowed the State to prosecute him without notice or the opportunity to respond in violation of his constitutional rights. Further, he argued the elements of accountability were not proved at trial.

¶ 19 In December 2012, the trial court dismissed the petition, finding it frivolous and patently without merit. On appeal, this court affirmed the dismissal. *People v. Russo*, 2013 IL App (4th) 130042-U.

¶ 20 Prior to defendant's first petition for *habeas* relief, and while the appeals were pending in case Nos. 4-09-0291 and 4-09-0607, he filed a motion for leave to file a successive postconviction petition in October 2009. Therein, he alleged he met the cause-and-prejudice test where both counsel appointed on his first postconviction petition and counsel appointed for the appeal from the dismissal of that petition "winnowed" down the issues and denied any meaningful review of all the issues that had been raised.

¶ 21 In October 2009, the trial court denied leave to file a successive postconviction petition. Defendant did not appeal this ruling.

¶ 22 In March 2014, defendant filed a successive postconviction petition, setting forth a claim of actual innocence. Regarding the statement of Adam Heather, defendant admitted the statement had been before the court on a posttrial collateral motion and three judgments were made thereupon: (1) Heather's statement was less credible than that of Conover, who was being implicated in the murder; (2) Heather's statement presented no "factual innocence;" and (3) Heather's statement still made defendant accountable. Nonetheless, defendant argued Heather's statement exonerated him of the murder charge or, at worst, only established concealment of a homicidal death. Defendant also raised errors pertaining to privileged marital communications, hearsay testimony from Kimberly Gooding and Lenora Hogan, and ineffective assistance of appellate counsel for failing to raise the "meritorious issues."

¶ 23 In June 2014, the trial court summarily dismissed the petition, finding it frivolous and patently without merit. The court noted Heather's transcribed interview had been attached to defendant's first postconviction petition, which was denied and the denial affirmed on appeal. The court also noted the other issues had been the basis for requested relief in one or more of defendant's previous posttrial pleadings, each had been denied, and the denials affirmed on

appeal.

¶ 24 Defendant filed a motion for reconsideration. In July 2014, the trial court denied the motion. This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 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 June 3, 2016. Defendant has done so. The State has also filed a brief.

¶ 27 In the case *sub judice*, OSAD contends any appeal in this cause would be frivolous because (1) defendant failed to set forth a colorable claim of actual innocence in his successive postconviction petition and (2) the trial court did not err in summarily dismissing the petition, as the issues raised were barred by the doctrines of *res judicata* or waiver. OSAD argues no reasonable argument can be made that any of defendant's claims are meritorious. Our review of the record and the law reveals OSAD is correct. Accordingly, we grant OSAD's motion to withdraw.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we grant OSAD's motion 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.

¶ 30 Affirmed.