

NOTICE

Decision filed 05/23/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 140294-U

NO. 5-14-0294

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 97-CF-431
	)	
RINANDO TUCKER,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

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PRESIDING JUSTICE SCHWARM delivered the judgment of the court.  
Justices Stewart and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* Because the defendant failed to show cause and prejudice, the circuit court's order denying the defendant leave to file a successive postconviction petition was proper. Additionally, where the filing was frivolous and patently without merit, the circuit court is allowed to impose a filing fee on the defendant.

¶ 2 The defendant, Rinando Tucker, appeals the dismissal of his motion for leave to file a successive postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and

granted an extension of time to file briefs, objections, or any other document supporting his appeal. The defendant filed a response. We considered OSAD's motion to withdraw as counsel on appeal and the defendant's response. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of St. Clair County.

¶ 3

### BACKGROUND

¶ 4 On June 6, 1997, a grand jury indicted the defendant on two counts of first-degree murder. The indictment charged only intentional murder. It did not charge felony murder. Prior to trial, the State filed a notice of its intent to submit jury instructions on multiple theories of first-degree murder, one of which was felony murder predicated on armed robbery. At trial, the State presented evidence that near the date of the murders, the defendant and his coconspirator, Brandon Craighead, were together with a third party when Craighead told the third party that he needed money and was going to kill a woman. At which point, the defendant told Craighead to be quiet because the third party might tell someone. The State asserted that the defendant committed armed robbery during the course of the murders, making him eligible for a conviction of felony murder. At trial the defendant testified that Craighead shot each of the victims, and he prevented the defendant from being able to leave. A jury instruction regarding felony murder was given without objection. On November 21, 1997, the jury returned a general verdict of guilty to both counts of first-degree murder. On December 4, 1997, the circuit court sentenced the defendant to a term of

natural life on each count. On direct appeal, this court affirmed the convictions. *People v. Tucker*, 317 Ill. App. 3d 233 (2000).

¶ 5 In January 2000, the State tried coconspirator, Brandon Craighead, in connection with the murder for which the defendant was convicted. The Illinois Department of Corrections' online inmate search indicates that Craighead was convicted of murder and received a natural-life sentence.<sup>1</sup> The defendant alleges that at Craighead's trial, the State argued that Craighead committed attempted armed robbery in connection with the murders.

¶ 6 While his direct appeal was pending, the defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1998)), raising numerous issues irrelevant to this case. Following an evidentiary hearing, the circuit court denied the defendant's motion for postconviction relief. The defendant appealed the denial of his postconviction petition, and OSAD was appointed to represent the defendant on appeal. After reviewing the matter, OSAD filed a *Finley* motion seeking leave to withdraw as counsel on appeal because there was no merit to the appeal. This court granted OSAD's motion and affirmed the circuit court. *People v. Tucker*, No. 5-03-0725 (Aug. 23, 2005) (unpublished order under Supreme Court Rule 23).

¶ 7 In August 2006, the defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2004)). Relevant

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<sup>1</sup><https://www.illinois.gov/IDOC/OFFENDER/Pages/InmateSearch.aspx> (last visited Feb. 16, 2016), of which we may take judicial notice (*Cordrey v. Prisoner Review Board*, 2014 IL 117155, ¶ 12).

to this case, the defendant argued that the indictment was void because the indictment did not reference any statute regarding armed robbery. The circuit court denied the section 2-1401 petition on the grounds that it was not brought within two years, as required by section 2-1401(c). Further, the circuit court found that the petition failed to recite any facts that would have precluded entry of the defendant's conviction. The defendant appealed the denial of his section 2-1401 petition. Again, OSAD filed a *Finley* motion seeking leave to withdraw from the case because there was no merit to the appeal. This court granted OSAD's motion and affirmed the circuit court. *People v. Tucker*, No. 5-06-0572 (Sept. 2, 2008) (unpublished order under Supreme Court Rule 23).

¶ 8 In 2011, the defendant filed a second section 2-1401 petition for relief from judgment. The defendant raised a number of issues related to the State's introduction of the issue of armed robbery by way of a jury instruction. First, he alleged that the State impermissibly broadened the indictment by introducing a jury instruction regarding armed robbery, something not charged in the indictment. Second, he alleged that the State's failure to indict him on the charge of armed robbery deprived the circuit court of jurisdiction. The circuit court denied his petition, and the defendant did not appeal.

¶ 9 On May 1, 2014, the defendant filed a motion for leave to file a successive postconviction petition. He raised two issues. First, he argued that he could not be convicted of felony murder because a moment-to-moment status of a felony was not included in the charging instrument. He asserted that this omission resulted in a void judgment because the circuit court lacked jurisdiction due to the omission in the indictment. He did not assert any reason for his failure to raise this issue in his initial petition. Second,

he argued that the State relied on inconsistent theories in its prosecution of him and Craighead: armed robbery versus attempted armed robbery. The defendant argued that he could show cause for failing to bring this argument in his initial postconviction petition because prior to filing his initial postconviction petition, he attempted to obtain copies of the trial transcripts of Craighead's trial by contacting Craighead, but Craighead never responded to the defendant's request. The defendant argues that despite his efforts, he had no knowledge of Craighead's trial. In June 2013, the defendant received transcripts of Craighead's trial and an affidavit from Craighead indicating that he did not respond to the defendant's initial requests because he was worried that he would incriminate himself. On May 6, 2014, the circuit court denied the defendant's request for leave to file a successive postconviction petition. The circuit court stated that the defendant failed to show cause and prejudice, as required by section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)), and imposed a \$90 filing fee on the defendant. On May 23, 2014, the defendant filed a motion to reconsider. On May 28, 2014, the circuit court denied the motion. The defendant then filed a timely notice of appeal resulting in this appeal.

¶ 10

#### ANALYSIS

¶ 11 The Act allows a person convicted of a crime to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Evidence of the claim must be attached to the petition in the form of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The Act provides a three-stage process for dealing with postconviction petitions. *People v.*

*Tate*, 2012 IL 112214, ¶ 9. At the first stage the court determines whether the petition is frivolous or patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court does not dismiss the petition as being frivolous or patently without merit, the petition moves to second stage proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the second stage of the proceeding, the State files an answer to the petition or a motion to dismiss. *Id.* at 10-11. When confronted with a motion to dismiss a postconviction petition, "the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *Coleman*, 183 Ill. 2d at 380. At this stage of the proceedings the circuit court is not to engage in any fact finding. *Id.* at 380-81. All facts not rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). A third-stage "hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Coleman*, 183 Ill. 2d at 381.

¶ 12 The Act only allows a defendant to file one postconviction petition without leave of court. 725 ILCS 5/122-1(f) (West 2012). A court may only grant leave for a petitioner to file a successive petition when the petitioner shows cause and prejudice. *Id.*

"[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; \*\*\* 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." *Id.*

"Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012). The quantum of proof required to show cause and prejudice is greater than that required at first-stage proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35.

"[L]eave of court to file a successive postconviction petition should 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." *Id.* (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 463 (2002)).

Finally, *res judicata* and waiver apply to claims in a postconviction petition, and they are a valid basis for a trial court to dismiss a claim in a postconviction petition *sua sponte*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). We review *de novo* whether defendant has satisfied the cause-and-prejudice test. *People v. Williams*, 394 Ill. App. 3d 236, 242 (2009).

#### ¶ 13 Faulty Indictment

¶ 14 Regardless of the rules described above, attacks on void judgments may be made at any time. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104 (2002). "[O]ur supreme court has 'consistently held that a judgment is void if and only if the court that entered it lacked jurisdiction.'" *People v. Moran*, 2012 IL App (1st) 111165, ¶ 15 (quoting *People v. Hubbard*, 2012 IL App (2d) 101158, ¶ 16). "Generally, once a court has acquired jurisdiction, no subsequent error or irregularity will oust the jurisdiction thus acquired. Accordingly, a court may not lose jurisdiction because it makes a mistake in determining either the facts, the law or both." *People v. Davis*, 156 Ill. 2d 149, 156 (1993) (citing 22

C.J.S. *Criminal Law* § 176 (1989)). At least since the 1970 Constitution, the jurisdiction of a circuit court in criminal matters "is derived from the state constitution \*\*\*." *People v. Kliner*, 2015 IL App (1st) 122285, ¶ 11 (citing *People v. Hughes*, 2012 IL 112817, ¶ 20; Ill. Const. 1970, art. VI, § 9; and *People v. Benitez*, 169 Ill. 2d 245, 256 (1996)); *People v. Williams*, 79 Ill. App. 3d 806, 807 (1979). Even constitutional violations do not deprive a circuit court of jurisdiction. *People v. Raczkowski*, 359 Ill. App. 3d 494, 498-99 (2005).

¶ 15 Defendant did not attempt to meet the cause-and-prejudice test outlined above with regard to his argument that the indictment was invalid. Instead, he argued that the failure to charge felony murder in his indictment made his conviction void. As discussed above, the circuit court had jurisdiction by virtue of the Illinois Constitution; it was not dependent on the indictment. As such, the circuit court had jurisdiction over the defendant's trial. It did not lose jurisdiction due to any potential flaw in the indictment. Therefore, the defendant's conviction was not void, and he was required to show cause and prejudice before the circuit court could grant him leave to file a successive postconviction petition. He did not do so. Furthermore, the issue of the propriety of the indictments was barred by *res judicata*, it having been previously rejected by this court. *Tucker*, No. 5-06-0572, order at 3-4. The circuit court properly denied the defendant leave to file a successive postconviction petition on the issue of the propriety of the indictment.

¶ 16 Inconsistent Theories of Prosecution

¶ 17 The defendant asserts that it was a violation of due process for the State to rely on inconsistent theories in its prosecutions of the defendant and Craighead. The inconsistency alleged by the defendant is that in his prosecution, the State asserted that he had committed



armed robbery, while in Craighead's prosecution, the State argued that Craighead had committed attempted armed robbery. These differences are only significant if the defendant was convicted of felony murder, something that is not indicated on the verdict form. "[I]t is the law in this State that a general verdict finding defendant guilty of murder is presumed to be based on any good count as charged to which the proof was applicable. [Citations.]" *People v. Whitt*, 140 Ill. App. 3d 42, 50 (1986). So even if the theory of felony murder is somehow improper, we can still rely on any other theory of murder supported by the evidence. The first-degree murder statute (720 ILCS 5/9-1 (West 1996)) allows conviction of first-degree murder if it is proved, among other things, that a person kills another when he intends to kill or do great bodily harm or he knows that his acts create a strong probability of death. In this case, the defendant testified that Craighead shot both victims. Proof of this is sufficient to convict the shooter of first-degree murder. In the defendant's case, he was convicted under an accountability theory. This means the defendant was found accountable for Craighead's actions. One of the ways the defendant can be found accountable for Craighead's actions is if "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." 720 ILCS 5/5-2(c) (West 1996). The evidence that the defendant was aware of Craighead's plan and advised Craighead to quit telling the plan to other people to prevent them from telling anyone shows that he was aiding Craighead. The defendant also failed to go to the police with information regarding the shooting, showing that he was complicit in the murders. Therefore, the defendant's murder conviction is supported on a theory other than felony murder, so it is

inconsequential if the State's arguments regarding felony murder at the defendant's and Craighead's trial were different.

¶ 18 Even if the defendant was convicted on a theory of felony murder, the differences between the State's arguments at the two trials is not a constitutional violation. In *People v. Caballero*, 206 Ill. 2d 65 (2002), the Illinois Supreme Court implied that a due process violation could occur were the State to argue irreconcilably different facts in different prosecutions. *Id.* at 82. After reviewing a number of cases that addressed the issue of whether the State violated due process by offering differing versions of crimes in different trials, the Illinois Supreme Court stated: "[t]hese cases stand for the proposition that a party is not as bound by his prior arguments as he is by prior assertions of fact." *Id.* at 83-84. We note that the defendant cited to the Supreme Court case of *Bradshaw v. Stumpf*, 545 U.S. 175 (2005), as support for his argument. In *Bradshaw*, the Supreme Court held that as regarded Stumpf's guilty plea, the inconsistent theories did not require voiding Stumpf's guilty plea. *Id.* at 186-87. The Supreme Court remanded the issue of whether or not the inconsistent theories violated Stumpf's due process rights at sentencing. *Id.* at 187-88. On remand, the Sixth Circuit, *en banc*, found that the allegedly "inconsistent arguments [did] not violate the Due Process Clause." *Stumpf v. Robinson*, 722 F.3d 739, 751 (6th Cir. 2013) (*en banc*). Relative to this case, the Sixth Circuit stated: "The mere fact that the State argued for different inferences in different cases does not make either argument so unfair that it violates the Due Process Clause." *Id.* at 750.

¶ 19 We find persuasive the conclusion reached by the Iowa Supreme Court:

"We are convinced that these two decisions only stand for the proposition that a selective use of evidence by the prosecution in order to establish inconsistent factual contentions in separate criminal prosecutions for the same crime may be so egregious and lacking in good faith as to constitute a denial of due process. We view those situations as a narrow exception to the right of the prosecution to rely on alternative theories in criminal prosecutions albeit that they may be inconsistent. [Citation.] This right is particularly obvious in cases in which the evidence is not clear concerning which of two persons is the active perpetrator of the crime and which of them is an aider and abettor of the active perpetrator. [Citation.] There is, after all, a safeguard against abuse as a result of the prosecution's burden to prove any theory it asserts by evidence beyond a reasonable doubt." *State v. Watkins*, 659 N.W.2d 526, 532 (Iowa 2003).

¶ 20 In this case, there is no assertion by the defendant that the State offered any evidence in Craighead's trial that was contrary to the evidence offered in his own trial. The sum total of his argument is that the State argued, in Craighead's trial, that the facts supported attempted armed robbery instead of the armed robbery, as the State asserted in the defendant's trial. This is not a sufficient change in theory to be a denial of due process.

¶ 21 Filing Fee

¶ 22 The circuit court imposed a filing fee of \$90 on the defendant. The circuit court is allowed to impose a filing fee if it finds a defendant's filing to be frivolous. 735 ILCS 5/22-105 (West 2012); *People v. Smith*, 383 Ill. App. 3d 1078, 1093 (2008). A filing fee can be imposed on a motion for leave to file a successive postconviction petition. *People v. Conick*,

232 Ill. 2d 132, 138-41 (2008). A filing is frivolous if, among other things, "it lacks an arguable basis either in law or in fact." 735 ILCS 5/22-105(b)(1) (West 2012). As discussed above, we determine that the filing is frivolous and patently without merit. Therefore, the circuit court was allowed to impose a \$90 filing fee on the defendant.

¶ 23 CONCLUSION

¶ 24 The defendant failed to show cause and prejudice as required by the Act to be allowed to file a successive postconviction petition. OSAD's motion for leave to withdraw is granted, and the circuit court of St. Clair County's order is affirmed.

¶ 25 Motion granted; affirmed.