

**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).

2014 IL App (4th) 120844-U

NO. 4-12-0844

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

May 5, 2014  
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.	)	Champaign County
WILLIAM E. MOTTON,	)	No. 05CF1815
Defendant-Appellant.	)	
	)	Honorable
	)	Harry E. Clem,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.  
Justices Knecht and Holder White 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 January 2009, a jury found defendant, William E. Motton, guilty of unlawful delivery of a controlled substance, unlawful possession with intent to deliver a controlled substance, and criminal drug conspiracy. In October 2009, the trial court sentenced defendant to prison. On direct appeal, this court affirmed. In October 2011, defendant filed a postconviction petition. Following a September 2012 evidentiary hearing, the trial court denied defendant's amended petition for postconviction relief.

¶ 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 frivolous and without merit. We grant

OSAD's motion and affirm the trial court's judgment.

¶ 4

#### I. BACKGROUND

¶ 5 In September 2005, a grand jury indicted defendant in case No. 05-CF-1815 with the offense of unlawful calculated criminal drug conspiracy (count I) (720 ILCS 570/405(a) (West 2004)). In March 2007, the State charged defendant by information with unlawful criminal drug conspiracy (count II) (720 ILCS 570/405.1(a) (West 2004)), unlawful delivery of a controlled substance (count III) (720 ILCS 570/401(d) (West 2004)), and unlawful possession with intent to deliver a controlled substance (count IV) (720 ILCS 570/401(d) (West 2004)). Counts I and II alleged that between November 1, 2004, and September 27, 2005, defendant conspired with his brother, Mark Motton; Paul Dozier; and Ricky Exum to deliver heroin.

¶ 6 In case No. 05-CF-1814, the State charged Mark Motton with unlawful calculated criminal drug conspiracy, unlawful criminal drug conspiracy, armed violence, unlawful possession of a weapon by a felon, unlawful possession with intent to deliver a controlled substance (heroin), and unlawful possession with intent to deliver a controlled substance (methadone).

¶ 7 Edwin Piraino was substituted as defendant's attorney in November 2005. Piraino had appeared as counsel for Mark the previous month. In August 2006, the State moved to join defendant's case with those of Mark and Dozier. At the hearing on the motion in October 2006, Piraino objected to the joinder on grounds that all of the defendants had made statements incriminating each other. Piraino answered in the negative when the trial court asked if there was any reason why defendant and Mark could not be tried together. The court allowed defendant's case and Mark's case to be joined but denied the State's motion with respect to Dozier's case.

¶ 8 In May 2007, defendant moved to substitute attorney G. Ronald Kesinger in place of Piraino. Kesinger represented both defendants for five months before withdrawing and being replaced by Michael J. Goggin and Michael M. Goggin. Michael M. is Michael J.'s son and law partner. Both Michael J. and Michael M. filed appearances in both cases and appeared on behalf of defendant and Mark at various pretrial hearings.

¶ 9 In January 2009, defendants' joint jury trial commenced and both attorneys appeared. The State moved to dismiss count I against both defendants, which the trial court allowed. Michael J. proposed to offer one combined opening statement, with closing arguments to be separate for defendant and Mark. The State's witnesses were cross-examined once by either Michael J. or Michael M. and the attorneys covered issues related to both defendant and Mark.

¶ 10 Champaign police officer Jack Turner testified he was assigned to the narcotics unit, which uses confidential sources to conduct controlled drug buys. In November 2004, Jerry Thomas, a confidential source, notified the narcotics unit he had been purchasing heroin from Ricky Exum. Officer Turner conducted a controlled drug buy between Thomas and Exum on November 1, 2004. Thomas agreed to purchase three bags of heroin for \$60, and the transaction took place in the parking lot of the American Legion. Thomas later turned over three bags of a brown, powdery substance (exhibit No. 1) that field-tested positive for heroin.

¶ 11 On February 18, 2005, the narcotics unit utilized Thomas to conduct a second buy from Exum. The buy resulted in three bags of a substance that field-tested positive for heroin (exhibit No. 2). A third controlled drug buy was conducted between Thomas and Exum on April 20, 2005, which resulted in the purchase of three individual bags containing a substance that field-tested positive for heroin (exhibit No. 3).

¶ 12 On April 27, 2005, Turner conducted a fourth controlled buy with Jerry Thomas. The man who met with Thomas was later identified as defendant. Thomas turned over three plastic bags that field-tested positive for heroin (exhibit No. 4).

¶ 13 Officer Turner testified he used a second confidential source, Leslie Bauchamp, to conduct a controlled drug buy on September 12, 2005. Bauchamp indicated she called a particular telephone number to purchase heroin, and Turner recognized the number as the one used by Thomas in the previous four drug buys. Bauchamp met with Exum and purchased three plastic bags, the contents of which field-tested positive for heroin (exhibit No. 6). On September 22, 2005, Bauchamp met with Exum and purchased three plastic bags containing heroin (exhibit No. 8). On September 23, 2005, Bauchamp met with Exum and purchased three plastic bags of suspected heroin (exhibit No. 9).

¶ 14 On September 26, 2005, Bauchamp participated in two separate controlled drug buys. On the first buy, she met with Exum and purchased six plastic bags of suspected heroin (exhibit No. 10). Later in the day, Bauchamp met with Exum and again purchased six bags of suspected heroin (exhibit No. 11). On this second buy, Officer Turner recorded the serial numbers on the money provided to Bauchamp. Those bills were recovered on September 27, 2005, during the execution of two search warrants.

¶ 15 Officer Turner testified he participated in the execution of a search warrant at 111 East Church Street. Turner encountered Mark Motton inside the residence. Mark told the officers he had a small bag of heroin in his pocket. He also told them they would find a pistol in an upstairs closet. Turner stated the money from Bauchamp's second drug buy on September 26, 2005, was found on the headboard in Mark's bedroom.

¶ 16 Officer Turner explained to Mark that officers were also executing a search

warrant at 801 West Hill Street as a result of their investigation regarding Exum's heroin sales. Mark stated he himself used approximately half a gram of heroin per day. He also stated he traveled to Chicago "about once a week" to purchase heroin for sale in Champaign. Mark used his own money, as well as money from Exum and defendant, to make the purchases. Mark told Officer Turner that he would go to 801 West Hill Street to package the heroin for redistribution with the assistance of defendant and Exum. The latter two also assisted in the sale of the heroin. Defense counsel did not object to this testimony or request a limiting instruction.

¶ 17 Michael J. cross-examined Officer Turner about the identification of defendant's involvement in the April 27, 2005, heroin delivery. He also elicited testimony regarding Turner's failure to record the interview with Mark and his failure to have a stenographer or a prosecutor present during the statement. Turner testified defendant was arrested at 801 West Hill Street as the police were inside searching. Defendant did not appear to have a key to 801 West Hill Street.

¶ 18 Champaign police officer Matt Henson testified he conducted a controlled drug buy with Leslie Bauchamp on September 21, 2005. She met with Exum and returned with three bags of suspected heroin (exhibit No. 7). Henson stated Bauchamp is now deceased.

¶ 19 Champaign police detective Mark Vogelzang testified he assisted in the collection of evidence at 111 East Church Street. He stated a plastic bag of heroin weighing 1.1 grams (exhibit No. 25) was recovered from Mark Motton's shorts. A 9-millimeter handgun (exhibit No. 26) was recovered from the closet of Mark's bedroom. Although the gun was unloaded, it was found in a box with two loaded magazines. Exhibit No. 29 consisted of \$315 in United States currency that was recovered from Mark's bed stand. An additional \$90 (exhibit No. 13) was identified as funds advanced for narcotics transactions. Vogelzang stated exhibit No. 30 consisted of a plastic bottle containing suspected methadone that was found in the basement

stairway of Mark's house.

¶ 20 Champaign police officer Jason Yandell testified he assisted in the controlled drug buy on April 27, 2005. The confidential informant met with a black male, later identified as defendant. On September 12, 22, and 26, 2005, the informant met with Exum, who was driving a black Chevrolet pickup truck. The truck was registered to Mark Motton. After the buys, Yandell followed Exum and noticed he went to an apartment at 801 West Hill Street and a house at 111 East Church Street.

¶ 21 On September 27, 2005, Officer Yandell participated in the execution of the search warrant at 801 West Hill Street. Yandell interviewed Paul Dozier, who was inside the apartment. Yandell stated Dozier had delivered heroin to a confidential informant the day before. Officers recovered a plastic bag containing suspected heroin (exhibit No. 14). A digital scale was also recovered in the same room as empty bottles of a cutting agent.

¶ 22 During the search, Officer Yandell stated defendant came to the door. He was taken into custody. A search of his person revealed two cell phones, one of which matched the number used by the confidential informants to arrange drug buys. Defendant also had a set of keys to the black truck used by Exum in several of the drug transactions.

¶ 23 Officer Yandell interviewed defendant, who stated Mark supplied heroin to him and Exum to sell. Defendant stated his brother would give him 10 bags of heroin per day. Defendant would bring the bags to 801 West Hill Street, and then he or Exum would distribute it. Defendant indicated he received free heroin in exchange for selling it.

¶ 24 Michael J. successfully objected to an inquiry into Dozier's statements about the heroin operation. He also cross-examined Yandell about his identification of defendant from one of the controlled purchases and elicited testimony that defendant did not have a key to the

apartment at 801 West Hill Street. Further, Yandell stated he did not have a stenographer or prosecutor present for defendant's statement and did not ask him to give a written or recorded statement.

¶ 25 Champaign police sergeant Brian Gallagher testified he assisted in the service of the search warrant at 111 East Church Street. In Mark Motton's bedroom, Gallagher located \$405 in cash on the headboard of the bed. He also observed a handgun in the closet.

¶ 26 Kristen Stiefvater, a forensic scientist with the Illinois State Police (ISP), testified the three plastic bags in exhibit No. 1 contained 0.2 grams of a tan powder containing heroin. John Martin, an ISP forensic scientist, testified the powder in exhibit No. 2 weighed 0.2 grams and contained heroin. Michael Cravens, an ISP forensic scientist, testified exhibit Nos. 3, 4, 6, 7, 8, 9, 10, 11, 14, and 25 all contained heroin. Exhibit No. 14 also contained a blue capsule that contained diphenhydramine, which could have been Dormin or Sleepinal. Exhibit No. 30 was a liquid containing methadone.

¶ 27 Jerry Thomas testified he served as a confidential source in the fall of 2004. He had prior convictions for manufacture and delivery of a controlled substance, felony theft, misdemeanor theft, and burglary. Exum had supplied heroin to Thomas, and Thomas would call him to arrange a buy. On April 27, 2005, Thomas met a man named Willie, who was related to Mo. He identified defendant as Willie and Mark Motton as Mo. Thomas gave defendant \$60 in exchange for the heroin.

¶ 28 After the close of the State's case, both defendants exercised their constitutional right not to testify. On behalf of Mark Motton, Michael J. made a motion for a directed finding on the charges of unlawful possession of a weapon by a felon and armed violence. Counsel argued Mark never had direct access to the gun because it was unloaded and on another floor of

the residence. On behalf of defendant, Michael M. made a motion for a directed finding on the charge of unlawful possession with intent to deliver a controlled substance. The trial court denied the motions.

¶ 29 Michael J. delivered a closing argument on behalf of Mark Motton, and Michael M. delivered a closing argument on behalf of defendant. Thereafter, the jury found defendant guilty of unlawful delivery of a controlled substance, unlawful possession with intent to deliver a controlled substance, and criminal drug conspiracy. The jury also found Mark guilty of armed violence (methadone), armed violence (heroin), unlawful possession of a weapon by a felon, calculated criminal drug conspiracy, possession with intent to deliver a controlled substance (heroin), and possession of a controlled substance (methadone).

¶ 30 In February 2009, Michael J. filed a motion for a new trial. Therein, counsel set forth various claims of error, including the claim that the State failed to disclose an undetermined amount of money paid to Thomas by Officer Turner. At a hearing on the motion, Turner testified Officer Henson gave Thomas \$40 for information and services pertaining to an unrelated case. Turner denied that Thomas was given money relating to defendant's case. In its written order denying the motion, the trial court ruled that no reasonable probability existed that the outcome of defendant's trial would have been different had the prosecution disclosed the payment to Thomas.

¶ 31 In October 2009, the trial court sentenced defendant to 20 years on count II, 15 years on count III, and 15 years on count IV. The court ordered all sentences to be served concurrently. The court also sentenced Mark to prison. In November 2009, Michael J. filed a motion to reduce sentence, which the court denied.

¶ 32 On direct appeal, in which this court consolidated defendant's and Mark's cases,

defendant argued (1) he was denied his right to a fair trial and the effective assistance of counsel when the jury heard the confession from Mark, a nontestifying codefendant, without a limiting instruction; and (2) his convictions for unlawful delivery of heroin and unlawful possession with intent to deliver must be vacated under the one-act, one-crime rule. *People v. Motton*, No. 4-09-0856 (Apr. 14, 2011) (unpublished order under Supreme Court Rule 23). This court ruled defendant forfeited the issue of Mark's confession and declined to find either plain error or ineffective assistance of counsel given the overwhelming evidence of defendant's guilt. This court also refused to vacate defendant's convictions for unlawful delivery and unlawful possession in light of his criminal-drug-conspiracy conviction.

¶ 33 In October 2011, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)). Defendant alleged he was deprived of his right to confront witnesses when evidence concerning Mark's statement was admitted at trial. Defendant alleged his trial counsel was ineffective for failing to object to the admission of the evidence. Defendant also requested his convictions for unlawful delivery and unlawful possession be vacated as included in his conviction for criminal drug conspiracy.

¶ 34 In November 2011, the trial court docketed the petition and appointed counsel to represent defendant. Postconviction counsel later filed an amended petition. Therein, counsel alleged Piraino had a conflict of interest from the joint representation of defendant and Mark. Also, defendant complained about being represented jointly at trial by both Michael J. and Michael M. Goggin. He claimed he was prejudiced by being tried alongside Mark, whose statements implicating defendant were introduced without a limiting instruction or the opportunity to cross-examine. Defendant alleged it was unclear during trial which attorney was

representing which defendant.

¶ 35 In April 2012, the State filed a motion to dismiss pursuant to section 122-5 of the Act (725 ILCS 5/122-5 (West 2010)). In May 2012, the trial court denied the motion to dismiss. In September 2012, the court conducted an evidentiary hearing.

¶ 36 Delores Motton, defendant's mother, testified she helped hire Michael J. to represent defendant and Mark. She expected Michael J. to personally represent both defendants.

¶ 37 Defendant testified Mark hired Piraino to represent them both. He met with Piraino approximately 10 times in Piraino's office. Defendant asked Piraino about severing the cases, but Piraino told him not to worry because his charges were less serious than Mark's. Defendant stated Mark fired Piraino, hired and fired Kesinger, and then the family hired Michael J. Defendant claimed he asked Michael J. to move to sever his case. Defendant believed Michael J., "the father," would be his trial lawyer, but defendant believed Michael M. represented him during the trial. Had he known Michael M. would be his attorney, defendant stated he would have accepted the State's offer of eight years in prison.

¶ 38 On cross-examination, defendant testified he was aware he could have obtained the services of the public defender but felt being represented by a private attorney was the better alternative.

¶ 39 Edwin Piraino testified both defendant and Mark hired him. Piraino advised the men that he would not represent them if they were going to blame each other. Both defendants claimed they did not make the statements attributed to them and both were "adamant" that they be tried together.

¶ 40 Michael J. testified he met with both defendants numerous times during his representation. He stated defendant never asked him to move to sever the cases and it was

defendants' preference to try the cases together. Michael J. discussed the incriminating statements with defendants and decided to attack the reliability of the officers' testimony based on the statements not being recorded. Michael J. testified he and his son, along with defendants, decided on splitting the defense between himself and Michael M. as a way to give both defendants "two bites at the apple." Michael J. stated both defendants indicated they wanted to go to trial.

¶ 41 Michael M. testified defendant never expressed any concerns about being tried with his brother and never asked for a severance. Michael M. discussed with defendant the statements made by Mark to the police, and they devised a strategy to address it at trial. Michael M. stated he felt defendant would benefit from having two attorneys at trial handling the questioning and argument.

¶ 42 Following closing arguments, the trial court noted this court had already considered defendant's claim that the admission of Mark's statement constituted a violation of *Bruton v. United States*, 391 U.S. 123 (1968), and held any error was harmless due to the overwhelming evidence of defendant's guilt. The court found defendant had been represented by both Michael J. and Michael M. at trial and found no deficiencies. The court also found incredible defendant's claim that he would have pleaded guilty had he known Michael M. would be his attorney. The court denied defendant's amended petition for postconviction relief. This appeal followed.

¶ 43 II. ANALYSIS

¶ 44 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 January

13, 2014. He has done so, and the State has also filed a brief. OSAD contends any appeal in this cause would be frivolous and without merit.

¶ 45 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

"Because this is a collateral proceeding, rather than an appeal of the underlying judgment, a post-conviction proceeding allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal. [Citation.] Thus, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived." *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56, 793 N.E.2d 609, 619 (2002).

¶ 46 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 47 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2010). A petition may be dismissed at the second stage "only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005).

¶ 48 If a constitutional violation is established, "the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the trial court denied postconviction relief following an evidentiary hearing. "Following an evidentiary hearing where fact-finding and credibility determinations are involved, the trial court's decision will not be reversed unless it is manifestly erroneous." *People v. Beaman*, 229 Ill. 2d 56, 72, 890 N.E.2d 500, 509 (2008).

¶ 49 In his amended postconviction petition, defendant essentially raised two claims of ineffective assistance of counsel. First, defendant alleged his previous attorneys failed to sever his trial from Mark's, despite the fact Mark made out-of-court statements incriminating defendant. As this issue could have been raised on direct appeal, it is forfeited. Moreover, defendant did raise the issue of Mark's confession being admitted without a limiting instruction, and this court found defendant could not establish prejudice given the overwhelming evidence of his guilt. Thus, this issue is barred by the doctrine of *res judicata*.

¶ 50 Defendant also alleged the joint representation by Michael J. and Michael M. Goggin deprived him of counsel with whom he could consult and thereby denied him the right to the effective assistance of counsel. Defendant claimed he hired Michael J. to represent him but

was actually represented by Michael M. The trial court found defendant's allegations were not credible, and we find that determination was not manifestly erroneous.

¶ 51 The transcripts show both Michael J. and Michael M. represented both defendants. Michael J. gave the defense opening statement, which covered both defendants' cases. Michael J. also performed the cross-examination of most of the witnesses, including the witnesses who testified regarding the April 27, 2005, transaction concerning their ability to identify defendant. Thus, the allegations that defendant was deprived of Michael J.'s advocacy and the opportunity to cross-examine witnesses are refuted by the record.

¶ 52 The record also indicates defendant waived any objection to the structure of the representation by the Goggins. Michael J. and Michael M. were retained attorneys. Defendant testified he did not have sufficient funds to hire another attorney but admitted he knew he could have asked for the services of the public defender. The trial court found it remarkable that defendant never expressed any dissatisfaction with his attorneys to the court during the "many proceedings that came and went in this particular case."

¶ 53 In its brief, the State argues defendant's appellate counsel could have argued the joint representation of defendant and his brother resulted in an actual conflict of interest that manifested itself at trial when Mark's statements were admitted and that conflict resolved to defendant's detriment when Mark declined to testify. However, and as the State points out, this issue could have been raised on direct appeal but was not. Thus, any attempt to raise this issue now on appeal would result in a finding of forfeiture. Moreover, defendant did not raise a claim of ineffective assistance of appellate counsel to overcome the procedural bar of forfeiture. See *People v. Harris*, 206 Ill. 2d 1, 33, 794 N.E.2d 314, 335 (2002) (stating the waiver doctrine is relaxed when "the alleged waiver stems from the incompetence of appellate counsel").

¶ 54 The State also points out that defendant's *pro se* responses to OSAD's motion are without merit. Therein, defendant claimed (1) the State failed to disclose favorable evidence to the defense, (2) the trial court allowed hearsay identification testimony, and (3) his convictions for unlawful delivery of heroin and unlawful possession with intent to deliver heroin must be vacated under the one-act, one-crime rule. The first two issues are forfeited because defendant did not include them in his original or amended postconviction petition. Also, the issue concerning defendant's multiple convictions is barred by the doctrine of *res judicata*, as that issue was addressed on direct appeal.

¶ 55 OSAD contends no argument can be made (1) that defendant is entitled to relief on his postconviction petition or (2) to warrant remand for new proceedings. Our review of the record reveals OSAD is correct. Accordingly, we conclude an appeal from the trial court's denial of defendant's amended petition for postconviction relief following an evidentiary hearing would not result in a finding of manifest error.

¶ 56 III. CONCLUSION

¶ 57 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.

¶ 58 Affirmed.