

NOTICE

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2014 IL App (4th) 130140-U

NO. 4-13-0140

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

April 3, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
JEROLD OSBORNE,)	No. 09CF173
Defendant-Appellant.)	
)	Honorable
)	James R. Glenn,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Appleton and Justice Knecht 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 In April 2009, the State charged defendant, Jerold Osborne, by information with participation in methamphetamine manufacturing (720 ILCS 646/15(a)(1) (West 2008) (count I) and methamphetamine possession (720 ILCS 646/60(a)) (West 2008) (count II). In July 2009,

defendant entered into a partially negotiated guilty plea to count II, a Class X felony. 720 ILCS 646/60(b)(4) (West 2008). Defendant was eligible for extended-term sentencing of 6 to 60 years in prison due to a prior conviction. 730 ILCS 5/5-5-3.2(b)(1) (West 2008). As part of the plea agreement, the State agreed to dismiss count I and cap its sentencing recommendation at 30 years in prison.

¶ 5 The trial court admonished defendant pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997). Defendant waived his right to a jury trial and told the court he was knowingly and voluntarily relinquishing his rights.

¶ 6 The stipulated factual basis for the plea was contained in a "48 Hour Affidavit" prepared by arresting police officer Brett Compton. Therein, Compton stated he had assisted defendant's parole agent in conducting a parole check on defendant. Defendant's residence was located across the street from a Headstart preschool. After arriving at defendant's residence, the parole agent searched defendant and found on his person a matchbox in which three small Baggies containing methamphetamine were found, as well as a small digital scale. A search of defendant's residence uncovered two glass jars containing a blue liquid (later determined to contain 117.3 grams of methamphetamine), a filter with methamphetamine residue, a wooden "one-hitter" box with pipe, 14 syringes, a spoon with methamphetamine residue, another digital scale, a small Baggie containing two grams of methamphetamine, two caps attached to tubing for hydrogen chloride (HCL) generators, and two containers of salt. Just outside the door, they found a trash bag containing three coffee filters and 3.59 grams of methamphetamine. In a trash can just outside the door, they found a trash bag containing a filter with 0.1 grams of methamphetamine residue, two Coleman fuel cans, four HCL generators, two caps attached to

tubing for HCL generators, several glass jars, several battery tops, and several small pieces of foil. Additionally, burned Lithium strips and a bottle of Roto drain cleaner were located in a building on the northwest corner of the property to which defendant had access.

¶ 7 The report further stated Compton interviewed defendant at the police station after giving defendant his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Defendant told Compton approximately a month earlier he had started using methamphetamine again. Defendant stated two days prior to his arrest, an unknown individual had thrown a black garbage bag containing the methamphetamine-manufacturing materials into his yard. He microwaved the solution in the glass jars and made the methamphetamine discovered on his person.

¶ 8 The trial court found a factual basis for the plea. Defendant advised the court no force or threats had been used to make him plead guilty, no promises of any kind had been made that had not already been discussed, and his plea was voluntary. The court accepted the plea, ordered a presentence investigation, and set the matter for a sentencing hearing.

¶ 9 The presentence investigation report (PSI) revealed defendant had a 2001 conviction for possession of more than 900 grams of methamphetamine as well as possession of a firearm by a felon for which he had been sentenced to 15 years in the Department of Corrections (DOC). Defendant was on parole when he committed the current offense. Defendant admitted using and manufacturing methamphetamine but only for personal use and to share with his friends. He stated he had no control over his addiction and could not stay away from drugs or people who use drugs. Defendant stated a drug-using associate provided the drugs that got him started using again. Regarding the instant offense, defendant denied possessing the

methamphetamine lab. He said he found the items in the bag on his father's property and was simply trying to dispose of them when he was arrested.

¶ 10 At the January 2010 sentencing hearing, the State called Officer Compton, an inspector with the East Central Illinois Task Force. His testimony was substantially the same as in his 48-hour affidavit, which was the factual basis for the plea. Additionally, Compton testified all the items found during the search on the date of defendant's arrest were items regularly used in the production of methamphetamine. Defendant admitted to Compton he knew the items found outside the shed in which he had been living were used to manufacture methamphetamine. He admitted using those items to make methamphetamine because he had been "craving some meth." In Compton's opinion, the amount of methamphetamine and other items discovered on defendant and in or near his residence were indicative of someone dealing drugs rather than simply for personal use.

¶ 11 Defendant exercised his right of allocution at the sentencing hearing. He stated he had been released from DOC in July 2008 after serving seven years on a drug conviction, two years of which he was in the Gateway drug program. The first nine months of his release, defendant said he had his drug problem "under control." Then he ran into a few problems, and started using methamphetamine again. He acknowledged he had an addiction which had injured him and his family and their relationship. Defendant asked the trial court to give him another chance at drug court.

¶ 12 After having considered the evidence, the PSI report, the financial impact of incarceration, the information, arguments in mitigation and aggravation, and the sentencing alternatives, the trial court sentenced defendant to 22 years in DOC with 287 days of sentence

credit.

¶ 13 At the May 2012 hearing on the motion to withdraw guilty plea and/or reconsider his sentence, the trial court struck any reference to a motion to reconsider sentence since this case involved a negotiated plea. Following arguments of counsel, the court denied the motion to withdraw. Defendant appealed. In October 2012, this court allowed defendant's motion for summary remand and directed the anti-crime fine and street-value fine be vacated and a hearing be held to determine the proper amount of the street-value fine. In November 2012, per agreement of the parties, the trial court vacated the anti-crime fund fine and street-value fine.

¶ 14 In January 2013, defendant filed a *pro se* postconviction petition alleging he was denied effective assistance of counsel because his attorney (1) "failed to present an important witness, Jamie Miller, thus cause for ineffectiveness" and (2) had a conflict of interest since Miller was counsel's niece, causing him to refuse to call Miller to testify on defendant's behalf. Defendant further alleged he pleaded guilty on advice of counsel that it "would be best to take a plea bargain and not go to trial because of [defendant's] criminal history." Defendant maintained that amounted to "none representation." Defendant further maintained he requested counsel to "call an important defense witness 'Jamie Miller' who can and will testify for the [defendant], who was with [defendant] on the day of his arrest and also in the [defendant's] 'motion of discovery'." Defendant maintained had Miller been called, "the court could have had a different outlook on his decision[,] which was influenced by [defendant's] attorney." He further stated his attorney told Miller to stay away from defendant and cut all ties with him, thus showing ineffective counsel and counsel's conflict of interest. Defendant referred to matters outside the record "(i.e., affidavits)." The only affidavit attached to the postconviction petition was

defendant's wherein he swore upon his oath "that the facts stated in the foregoing Petition for Post-Conviction Relief *** are true and correct in substance and in fact."

¶ 15 In January 2013, the trial court dismissed the postconviction petition as frivolous and without merit. The court noted defendant's petition did not challenge the plea or sentence and noted further defendant had failed to attach any affidavit setting forth facts to support his claim that Miller could have testified about any relevant or admissible facts as to defendant's guilt or to any sentence consideration.

¶ 16 In February 2013, defendant filed a notice of appeal. In January 2014, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). On its own motion, this court granted defendant leave to file additional points and authorities by February 10, 2014. 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.

¶ 17 II. ANALYSIS

¶ 18 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief because defendant's allegations are conclusory and not supported by any documentation. We agree.

¶ 19 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) establishes a three-stage process for adjudicating a postconviction petition. *People v. Beaman*, 229 Ill. 2d 56, 71, 890 N.E.2d 500, 509 (2008). Here, defendant's petition was dismissed at the first stage. 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). "[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010).

¶ 20 Section 122-2 of the Act requires that the petition "clearly set forth the respects in which petitioner's constitutional rights were violated" and "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). Generally, "the failure to either attach the necessary affidavits, records, or other evidence or explain their absence is fatal to a post-conviction petition [citation] and by itself justifies the petition's summary dismissal." (Internal quotation marks omitted.) *People v. Delton*, 227 Ill. 2d 247, 255, 882 N.E.2d 516, 520 (2008). Here, defendant failed to attach an affidavit to his postconviction petition supporting his claim other than his sworn verification that the allegations in his petition were "true and correct in substance and fact." Moreover, defendant did not provide any specific information in his petition about what Miller could have testified about other than her testimony could have provided the court with a "different outlook on his decision." Absent any affidavit setting out some detail about Miller's potential testimony, we cannot determine what, if any, favorable information Miller could have provided to the court. Defendant's sworn verification his petition is true and correct is not enough to meet the requirements of section 122-2 of the Act. See *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2 195, 198 (2002) (holding the defendant's sworn verification stating his petition

was true and correct to the best of his knowledge did not satisfy section 122-2 of the Act, because a sworn verification is not a substitute for the "affidavits, records, or other evidence" mandated by the Act).

¶ 21 Moreover, in his petition, defendant did not challenge his guilty plea or sentence. The claims he made regarding his counsel's conflict of interest and ineffective assistance were unsupported by the record or any new documentation. The record shows the trial court thoroughly admonished defendant pursuant to Supreme Court Rule 402 and determined defendant understood the nature of the charges against him, the minimum and maximum sentences he was facing, the rights he was waiving, the conditions of the plea agreement, no threats or force had been made to get him to plead guilty, and no additional promises had been made beyond those in the plea agreement. The court determined defendant's plea was voluntary and a factual basis was shown for the plea. Additionally, defense counsel's advice to defendant that he should plead guilty in light of his prior criminal record was sound. Defendant was on parole for a prior drug conviction when he committed the current offense. He was facing extended-term Class X sentencing of up to 60 years in prison. Under the plea agreement, the State was willing to cap its sentencing recommendation at 30 years. Ultimately, defendant was sentenced to 22 years in DOC, below the State's recommendation and well below the maximum he could have faced without the plea agreement.

¶ 22 III. CONCLUSION

¶ 23 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD no meritorious issues can be raised on appeal, and we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

Affirmed.