

NOTICE
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2011 Ill. App. (4th) 090720-U

Filed 09/23/11

NO. 4-09-0720

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Coles County
JOHN W. RINEHART,)	No. 04CF611
Defendant-Appellant.)	
)	Honorable
)	Teresa K. Richter,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The trial court did not err in dismissing defendant's postconviction petition and supplemental postconviction petition as frivolous and patently without merit.

¶ 2 In July 2009, defendant, John W. Rinehart, filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)). In August 2009, defendant filed a *pro se* supplemental petition for postconviction relief. In September 2009, the trial court summarily dismissed defendant's postconviction petition and supplemental postconviction petition as frivolous and patently without merit.

¶ 3 Defendant appeals, arguing the trial court erred by dismissing his postconviction petition and supplemental postconviction petition at the first stage of the postconviction proceedings. We disagree and affirm.

¶ 4

I. BACKGROUND

¶ 5 In April 2005, the trial court found defendant guilty of predatory criminal sexual assault of a child. 720 ILCS 5/12–14.1(a)(1) (West 2004). In July 2005, the court sentenced him to 24 years' imprisonment. Defendant subsequently filed several posttrial motions, including a second and third amended motion for a new trial and sentence reduction. In June 2007, the court denied defendant's motion for new a trial but reduced his sentence to 20 years' imprisonment.

¶ 6 On direct appeal, the office of the State Appellate Defender (OSAD) moved to withdraw as counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), on the ground that no meritorious issues could be raised. In April 2009, defendant filed a response to OSAD's motion to withdraw, requesting the motion be denied and he be appointed new counsel to present his issues on appeal. In the response, defendant argued he should be allowed to proceed with his alleged attempts to get a "bystander's report concerning what took place in the courtroom during the testimony of the three minor witnesses when [his] immediate family members were ordered from the courtroom." Defendant argued this resulted in a denial of his constitutional rights to a fair trial and due process of law.

¶ 7 This court affirmed defendant's conviction and sentence. *People v. Rinehart*, No. 4–07–0593 (Jan. 25, 2010) (unpublished order under Supreme Court Rule 23), *appeal denied*, No. 110026 (May 26, 2010). In particular, this court determined defendant was estopped from challenging the removal of his family from the courtroom during the minors' testimony under the rule of invited error or acquiescence. This court noted the issue was raised for the first time on appeal, and defendant's trial counsel acquiesced in the exclusion of defendant's family members when the State made its oral motion. Further, this court determined defendant forfeited this issue

by his failure to raise it in his posttrial motions.

¶ 8 In August 2008, defendant filed a *pro se* verified petition for relief from judgment under section 2–1401 of the Code of Civil Procedure (Civil Procedure Code) (735 ILCS 5/2–1401 (West 2008)) on the basis of newly discovered evidence. In October 2008, the trial court denied defendant's *pro se* petition for relief from judgment.

¶ 9 Defendant appealed the denial of his *pro se* petition for relief from judgment, and the trial court appointed OSAD to represent him on appeal. OSAD subsequently moved to withdraw as counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), on the ground that no meritorious issues could be raised. This court agreed with OSAD and affirmed the trial court's denial of defendant's *pro se* petition for relief from judgment. *People v. Rinehart*, No. 4–08–0822 (Nov. 1, 2010) (unpublished order under Supreme Court Rule 23).

¶ 10 In July 2009, defendant filed a *pro se* petition for postconviction relief, requesting the trial court grant him a new trial based on newly discovered evidence and raising numerous claims involving ineffective assistance of counsel. In August 2009, defendant filed a *pro se* supplemental petition for postconviction relief, raising claims of ineffective assistance of trial and appellate counsel. In particular to this appeal, defendant argues ineffective assistance of counsel for appellate counsel's failure to argue the trial court violated section 115–11 of the Code of Criminal Procedure of 1963 (Criminal Procedure Code) (725 ILCS 5/115–11 (West 2004)) when it excluded defendant's family members from the courtroom.

¶ 11 In September 2009, the trial court dismissed defendant's *pro se* petition as frivolous and patently without merit. Specifically regarding the exclusion issue, the court noted that prior to trial, the State made an oral motion to close the courtroom, except for persons

having a direct interest in the case, when the minors testified. At the time the motion was made, Thomas Rinehart, defendant's brother, and Ashley Rinehart, later identified as defendant's niece, were present in the courtroom. Defendant's counsel made no objection, and the court granted the motion. Therefore, Thomas and Ashley were asked to leave the courtroom prior to the minors' testimony. Consequently, the court determined (1) defendant's failure to object to the State's oral motion resulted in waiver of this issue, and (2) the absence of two family members for only part of the trial did not deprive defendant of a fair trial.

¶ 12 This appeal followed.

13 II. ANALYSIS

¶ 14 On appeal, defendant argues the trial court erred by dismissing his postconviction petition and supplemental postconviction petition at the first stage of the postconviction proceedings. Specifically, defendant argues ineffective assistance of counsel for appellate counsel's failure to argue (1) the trial court violated section 115–11 of the Criminal Procedure Code (725 ILCS 5/115–11 (West 2004)) when it excluded defendant's family members from the courtroom, and (2) trial counsel was ineffective for failing to understand the correct application of section 115–11 and object to the court's error.

¶ 15 In contrast, the State argues (1) this issue is barred by *res judicata* because defendant previously argued the trial court erred by excluding his family members from the courtroom in his April 2009 response to OSAD's first motion to withdraw, and (2) defendant attempts to evade the application of *res judicata* by arguing ineffective assistance of appellate counsel for counsel's failure to raise this issue on appeal.

¶ 16 A postconviction proceeding is a "collateral attack on a prior conviction and

sentence, and the scope of such a proceeding is generally limited to constitutional matters that have not been, or could not have been, previously adjudicated." *People v. Cummings*, 375 Ill. App. 3d 513, 518, 873 N.E.2d 996, 1001 (2007). Consequently, *res judicata* may bar relief under the Act. *People v. Blair*, 215 Ill. 2d 427, 442, 831 N.E.2d 604, 614–15 (2005).

¶ 17 In the present case, defendant previously raised the issue regarding the exclusion of his family members from the courtroom in his April 2009 response to OSAD's motion to withdraw. On direct appeal, this court determined defendant was estopped from challenging the trial court's ruling on the State's oral motion to close the courtroom under the rule of invited error or acquiescence. Additionally, this court determined defendant forfeited this issue by his failure to raise it in his posttrial motion. Because this issue was previously considered and decided on direct appeal, it is barred by the doctrine of *res judicata*.

¶ 18 Next, defendant argues ineffective assistance of appellate counsel for counsel's failure to argue the trial court erred in excluding defendant's family from the courtroom under section 115–11 of the Criminal Procedure Code.

¶ 19 Initially, we note defendant appears to have recast his direct appeal challenge to the trial court's exclusion of his family members from the courtroom into a postconviction claim for ineffective assistance of appellate counsel for counsel's failure to raise this issue on direct appeal. "A post-conviction petitioner may not avoid the bar of *res judicata* simply by rephrasing issues previously addressed on direct appeal." *People v. Williams*, 186 Ill. 2d 55, 62, 708 N.E.2d 1152, 1155 (1999). "However, where the reviewing court's failure to address a constitutional issue is alleged to be the fault of appellate counsel in failing to raise a meritorious claim, such a claim may be examined to prevent a fundamental miscarriage of justice." *People v. Cabrera*,

402 Ill. App. 3d 440, 445, 932 N.E.2d 528, 535 (2010).

¶ 20 Here, on direct appeal, defendant's counsel moved to withdraw as counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). Defendant filed a response to OSAD's motion, raising the exclusion issue. This court determined defendant's response to OSAD's motion to withdraw provided no basis for the court to deny OSAD's motion. *People v. Rinehart*, No. 4–07–0593 (Jan. 25, 2010) (unpublished order under Supreme Court Rule 23), *appeal denied*, No. 110026 (May 26, 2010). Specifically, this court determined defendant forfeited this issue by his failure to raise it in a posttrial motion, and defendant was estopped from raising the argument under the rule of invited error or acquiescence.

¶ 21 Although defendant's appellate counsel did not raise the exclusion issue on direct appeal, this issue was considered and decided after defendant raised it in his April 2009 response to OSAD's motion to withdraw. Because the underlying claim was addressed and rejected on direct appeal, defendant's present ineffective-assistance-of-appellate-counsel argument is without merit. Accordingly, the trial court did not err in dismissing defendant's postconviction petition and supplemental petition as frivolous and patently without merit.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we 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.

¶ 24 Affirmed.