2011 IL App (4th) 100072-U

Filed 12/30/11

NO. 4-10-0072

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
CAMERON N. BELK, SR.,	)	No. 06CF1573
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and McCullough 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 denying his section 2-1401 motion for failure to state a claim on which relief could be granted, agreeing with counsel's conclusion no meritorious issues could be raised on appeal.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2006, the State charged defendant, Cameron N. Belk Sr., by information with two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)). The charges alleged defendant committed two separate acts of sexual penetration with D.W., who was at least 13 years old, but less than 17 years old, when the acts were committed,

and defendant was at least 5 years older than D.W. The record shows the following.

¶ 5 Defendant was originally represented by private counsel but, prior to commencement of trial, his counsel withdrew. Defendant requested a continuance to secure new private counsel, which the trial court granted. Three months later, defendant had failed to secure private counsel. The court attempted to appoint a public defender, but defendant refused. Defendant requested another continuance to attempt to secure private counsel, which the court denied. Defendant elected to represent himself *pro se*.

¶ 6 On the first day of trial, defendant filed a motion to dismiss, alleging the police (1) violated his civil rights by conducting an illegal search and seizure, (2) tampered with evidence by erasing the surveillance tape from his business which he claimed recorded the illegal search and seizure, (3) changed witness statements, and (4) conducted a biased investigation. The trial count denied the motion and informed defendant he could question the State's witnesses regarding the allegations. During his opening argument, defendant stated the following:

> "Now in this case you're going to find, this case is dealing with DNA [(deoxyribonucleic acid)] evidence, but the DNA evidence never had to be taken. You're going to find out that in this case I was up front and honest all along. You're going to find that this case deals more with the age *** that the alleged victim said they were. That's what you're going to find out in this case. *** You're going to find in this case, as well as not only did I believe this young lady was 17 [years] of age in Illinois, but she told several other people that were around her the same thing. And I want you,

the jury, to take a good, hard look at this case and find out for yourself if she's telling the truth."

¶ 7 Testimony showed D.W., the alleged victim, had worked for defendant in the summer of 2006 at a clothing store he owned. In September 2006, D.W. informed police she had engaged in sexual acts with defendant on four separate occasions, all of which occurred at defendant's store. D.W. was 16 years old when she engaged in the sexual acts with defendant. D.W. testified she had informed defendant of her age and he had seen her driving permit, which had her age printed on it. Defendant was 36 years old at the time. Eventually, D.W. told her sister what had happened and then contacted the police.

¶ 8 The police asked D.W. to take part in a phone conversation with defendant which would be recorded for evidence. D.W. agreed, and the conversation was recorded. The recorded conversation was later played for the jury during defendant's trial. The tape contained statements by defendant wherein he indicated he had sexual relations with D.W. A few days after recording the conversation between D.W. and defendant, police executed a search warrant for defendant's business. D.W. showed officers where in the store she and defendant had engaged in sexual acts, and samples were taken from the carpet. A forensic scientist later testified the carpet samples contained blood from D.W. and semen from defendant.

¶ 9 D.W. testified she worked for defendant at his store in the summer of 2006. She knew him from a church they attended. She was 16 that summer, born October 12, 1989. She told defendant she was going to be a junior in high school and showed him her driver's permit, which had her age printed on it. She testified about four sexual contacts, the first two weeks after she started her employment and the last on August 23, 2006.

¶ 10 On cross-examination, defendant questioned D.W. regarding her alleged provocation and attempted to show she initiated the sexual contact or at least consented. D.W. admitted sending defendant pictures of her breasts and vagina via cellphone while defendant was out of town. However, D.W. stated she only did so in an attempt to keep defendant away from her, as she hoped the pictures would satisfy him. Defendant also questioned D.W. about several other incidents in which she allegedly made statements of a sexual nature to him, but D.W. denied making any such statements. D.W. testified it was defendant who made sexual comments to her.

¶ 11 Defendant introduced testimony from several witnesses. Beverly Brown testified defendant was the godfather of her daughter, D.B., who was 16 years old and knew D.W. from school. Brown stated she believed D.W. was 17 or 18 at the time in question, but she had never actually spoken to D.W. about her age. D.B. testified and told the court D.W. had told her she was 17 but later admitted she was only 16. D.B. also stated police had questioned her about whether she had ever had sexual relations with defendant, which she denied. Vincent Gloder testified D.W. had told him she was 17. Gloder also testified he had found poetry written by D.W. in defendant's store, which indicated D.W.'s desire to have sex with defendant. Finally, Dwight Kindle testified he heard D.W. tell someone else she was 18, though D.W. later told Kindle she was actually only 17. Defendant did not testify.

¶ 12 Following closing arguments and jury instructions, the jury found defendant guilty of both counts of aggravated criminal sexual abuse. In September 2008, the trial court sentenced defendant to concurrent 42-month sentences on each count. In October 2008, defendant filed a motion to revise his sentence, but before the court could consider his motion,

defendant filed an appeal with this court. This court remanded the matter to the trial court to consider defendant's pending motion. *People v. Belk*, 4-09-0090 (August 27, 2009) (dismissed on motion of appellant). After we remanded the matter, the court reduced his sentences to concurrent three-year terms.

¶ 13 On direct appeal, defendant argued his convictions should be reversed and his sentences vacated because he did not waive his right to counsel but was forced to represent himself at trial when the trial court denied his motion for a continuance to secure new counsel. In September 2010, this court affirmed the trial court's judgment. *People v. Belk*, 403 Ill. App. 3d 1056, 936 N.E.2d 721 (2010), *appeal denied*, 238 Ill. 2d 655, 942 N.E.2d 455 (2010).

¶ 14 On November 5, 2009, while his direct appeal was pending before this court, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2008)) claiming multiple grounds supported relief.

¶ 15 On December 3, 2009, defendant placed a *pro se* letter in the mail to the Champaign County Circuit Clerk's office, which indicated he "would like for this to serve as [his] official Notice of Appeal" for the section 2-1401 ruling.

¶ 16 On December 8, 2009, the trial court denied defendant's November 2009 section 2-1401 petition for failing to state a claim upon which relief could be granted.

¶ 17 On December 9, 2009, the circuit clerk's office received and filed defendant's December 3, 2009, *pro se* letter indicating his desire to appeal the December 8, 2009, ruling and forwarded it to the trial judge. On December 15, 2009, the circuit clerk made the following docket entry: "Appeal prepared for appellate court this date." On January 7 and 8, 2010, the

circuit clerk made the following docket entries: "to Appellate Court," "Record of exhibits received on file indicating exhibits sent," and "Certificate of mailing prepared." As far as we can tell by examining our records and the record on appeal, the circuit clerk sent this court nothing at that time.

¶ 18 On January 8, 2010, 31 days after entry of judgment by the trial court, defendant mailed another *pro se* document indicating his desire to appeal the denial of his section 2-1401 petition to the circuit clerk by placing it in prison mail. The proof of service, certified by a notary public, specifies defendant sent the original to the appellate court and copy to the circuit clerk. On January 12, 2010, the circuit clerk received defendant's notice of appeal and forwarded it to the trial judge.

¶ 19 Also on January 12, 2010, this court received a sheath of *pro se* documents from defendant titled "Appeal of 735 ILCS 5/2-1401 Motion for Relief of Judgment." These documents were filed in defendant's direct appeal in No. 4-09-0829, and treated as a motion, which was denied on January 20, 2010.

¶ 20 On January 19, 2010, the trial judge directed the circuit clerk to prepare and file a notice of appeal and appointed the office of the State Appellate Defender (OSAD) to represent defendant on his appeal. On January 21, 2010, the circuit clerk prepared and forwarded a notice of appeal, which we docketed herein as No. 4-10-0072, along with a copy of OSAD's appointment. On April 22, 2010, OSAD filed a motion to allow late notice of appeal to be filed, claiming defendant's failure to file a timely notice of appeal was not his fault, and under Illinois Supreme Court Rule 606(c) (eff. March 20, 2009), defendant was still within the six-month window for filing a late notice of appeal with the court's permission. On April 23, 2010, this

court granted OSAD's motion.

¶ 21 In March 2011, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant, who is currently in prison. On its own motion, this court granted defendant leave to file additional points and authorities by April 18, 2011. Defendant has done so, and the State has filed a responding brief. After reviewing the record consistent with our responsibility under *Finley*, we agree with OSAD.

¶ 22 II. ANALYSIS

¶ 23 OSAD moves to withdraw pursuant to *Finley*, arguing no meritorious arguments can be raised on defendant's appeal. The State initially argues this court lacks jurisdiction over defendant's appeal. As jurisdiction is a threshold matter, we address it first.

¶ 24 A. Jurisdiction

¶ 25 The State argues defendant's notice of appeal sent January 8, 2010, was not filed in a timely manner and OSAD's motion to file late notice of appeal was erroneously granted. OSAD filed no reply brief so it has not addressed the State's argument on this issue. We disagree with the State and find we have jurisdiction over defendant's appeal.

¶ 26 OSAD's motion alleged defendant filed two separate *pro se* documents indicating his desire to appeal the denial of his section 2-1401 petition, the first of which was filed with the circuit clerk on December 9, 2009. The State makes no mention of defendant's December 9, 2009, request for appeal, addressing only defendant's notice of appeal mailed to the clerk on January 8, 2010, *i.e.* his second request to appeal. OSAD's motion, which this court granted, outlines both defendant's December 9, 2009, request to appeal and his January 8, 2010, request

to appeal. We will initially focus our attention on the "second" notice of appeal, as it is at the center of the State's jurisdictional argument.

¶ 27 The original notice of appeal from the trial court's denial of defendant's motion was required to be filed within 30 days. The 30-day period for timely filing a notice of appeal is governed by section 1.11 of the Statute on Statutes (5 ILCS 70/1.11 (West 2010)). Under section 1.11 "[t]he time within which any act provided by law is to be done shall be computed by excluding the first day and including the last day." 5 ILCS 70/1.11 (West 2010). This means the 30-day period applicable to defendant's appeal started on December 9, 2009, and ended on January 7, 2010. The State argues because defendant did not file his notice of appeal until January 8, 2010, it was not timely filed. See *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213, 902 N.E.2d 662, 664 (2009) ("The timely filing of a notice of appeal is both jurisdictional and mandatory.").

¶ 28 In its motion for leave to file late notice of appeal, OSAD acknowledged defendant's January 8, 2010, notice of appeal was filed late but argued defendant's late notice of appeal fell within the six-month exception for late appeals under Illinois Supreme Court Rule 606(c) (eff. March 20, 2009). The State points out Rule 606(c) applies to criminal appeals only. Defendant's petition for relief from judgment under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2008)) is a civil remedy that extends to criminal matters as well. *People v. Vincent*, 226 Ill. 2d 1, 8, 871 N.E.2d 17, 22-23 (2007). Proceedings on a section 2-1401 motion are subject to the usual rules of civil practice. *Vincent*, 226 at 8, 871 N.E.2d at 23. As a section 2-1401 petition is civil in nature, the six-month exception to late appeals under Rule 606(c) is inapplicable to defendant's appeal. Instead, Illinois Supreme Court Rules 303 and 304(b)(3) (Ill.

S. Ct. Rs. 303 (eff. May 30, 2008), 304(b)(3) (eff. Feb. 26, 2010)) govern appeals from the trial court's dismissal of a section 2-1401 petition. *Holloway v. Kroger Co.*, 253 Ill. App. 3d 944, 948, 625 N.E.2d 894, 897 (1993).

¶ 29 Illinois Supreme Court Rule 303(a)(1) (eff. May 30, 2008) allows for an appeal to be filed within 30 days of entry of the final judgment being appealed. Illinois Supreme Court Rule 303(d) (eff. May 30, 2008) allows for a 30-day extension from the original 30-day period (*i.e.*, 60 days) on motion of the appealing party, if good cause can be shown why the appeal was not filed in a timely manner. Illinois Supreme Court Rule 304(b)(3) (eff. Feb. 26, 2010) states an order becomes appealable whenever any of the relief prayed for under a section 2-1401 motion is granted or denied. Because OSAD's motion to file late notice of appeal was not filed within 60 days of the trial court's dismissal of defendant's motion, if limited to the January 8, 2010, notice of appeal, the State would be correct.

¶ 30 Our inquiry into jurisdiction does not end there, however. Defendant sent a *pro se* letter to the circuit clerk file-stamped December 9, 2009, indicating on page three of its text his desire to appeal the ruling on his section 2-1401 petition. This letter was clearly filed by the circuit clerk within the 30-day window allowed under Rule 303(a)(1), as the trial court's decision on defendant's motion was filed on December 8, 2009. Supreme Court Rule 373 (Ill. S. Ct. R. 373 (eff. Dec. 29, 2009)) states "[u]nless received after the due date, the time of filing records, briefs or other papers required to be filed within a specified time will be the date on which they are actually received by the clerk of the reviewing court." The letter was considered received and filed on December 9, 2009. Under the language of Rule 303(a)(1), a notice of appeal is considered filed on the date it is received, unless it is received late; thus, the fact the letter was

sent on December 3, 2009, is of no importance in determining when it was received by the circuit clerk as it was not received late.

¶ 31 The record shows the letter was forwarded to the trial judge upon receipt by the circuit clerk on December 9, 2009. Less than a week later, on December 15, 2009, a docket entry was made stating, "Appeal prepared for appellate court this date." We find no such notice of appeal in our records. Further entries were made on January 7 and 8, 2010, which indicate the record was being prepared for appeal. All of these entries were made prior to receipt of defendant's subsequently filed late notice of appeal, which was placed in the prison mail on January 8, 2010, and stamped, received, and filed by the clerk on January 12, 2010. The circuit clerk forwarded defendant's *pro se* January 8, 2010, letter to the trial judge. On January 19, 2010, Judge Difanis directed the office of the circuit clerk to prepare a notice of appeal, appointed OSAD, and directed the circuit clerk to notify OSAD of its appointment.

¶ 32 In the meantime, on January 12, 2010, while defendant's direct appeal was pending with this court as No. 4-09-0829, this court received from defendant an original *pro se* sheath of papers seeking to appeal the section 2-1401 "Motion for Relief of Judgment" and containing, among other things, a copy of defendant's December 2009 *pro se* letter requesting an appeal. This court treated these papers as a motion in defendant's direct appeal and denied it on January 20, 2010. On January 25, 2010, this court received a notice of appeal from the circuit clerk of defendant's appeal of the December 8, 2009, denial of his section 2-1401 motion.

¶ 33 Because the circuit court clerk received a timely filed request to appeal from defendant, which it filed on December 9, 2009, and it filed its January 21, 2010, notice of appeal late with this court, we conclude this court has jurisdiction arising from defendant's request to

appeal filed with the circuit clerk on December 9, 2009, notwithstanding the fact the circuit court clerk was late in preparing the notice of appeal. *Cf. People v. Miner*, 4 Ill. App. 3d 409, 280 N.E.2d 469 (1972).

¶ 34 B. OSAD's Motion To Withdraw

¶ 35 Defendant contends his section 2-1401 petition was improperly denied by the trial court. On appeal, defendant claims he has newly discovered evidence relevant to the following claims: (1) the search and sweep, which resulted in the discovery of DNA evidence, were defective and the DNA evidence was not properly preserved or tested; (2) officers who testified at trial perjured themselves; (3) the application for the eavesdropping device contained information "fraudulently concocted" by the officers; (4) the prosecutor withheld disclosable phone records showing much of the contact between defendant and D.W. via telephone was initiated by D.W.; (5) the prosecutor was guilty of unethical behavior in not calling two witnesses from the list of witnesses the State submitted, who would have testified to the consensual nature of the sexual contact between defendant and D.W.; (6) defendant's original trial counsel was ineffective for his failure to provide defendant with copies of D.W.'s poems, which showed her desire to have sex with defendant; and (7) defendant was improperly denied his right to counsel of choice at trial.

¶ 36 OSAD moves to withdraw as defendant's counsel and claims no meritorious argument can be made defendant's section 2-1401 petition was improperly denied. We agree and grant OSAD's motion to withdraw.

¶ 37 "Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original

action and diligence in both discovering the defense or claim and presenting the petition." *Vincent*, 226 Ill. 2d at 7-8, 871 N.E.2d at 22. In other words, to obtain relief under section 2-1401, a defendant must show "a cause, unknown to petitioner and the court at the time judgment was entered, which, if then known, would have prevented its rendition." *People v. Mahaffey*, 194 Ill. 2d 154, 181, 742 N.E.2d 251, 266 (2000). Section 2-1401 further requires the petition be supported by affidavit or other appropriate showing as to matters not of the record. 735 ILCS 5/2-1401(b) (West 2010); *Vincent*, 226 Ill. 2d at 7, 871 N.E.2d at 22. The burden is on the petitioner to show they are entitled to relief by a preponderance of evidence. *People v. Hallom*, 265 Ill. App. 3d 896, 906, 638 N.E.2d 765, 772 (1994). A section 2-1401 petition is subject to dismissal for failing to state a claim upon which relief can be granted. *Vincent*, 226 Ill. 2d at 8, 871 N.E.2d at 23. We review *de novo* a trial court's dismissal of a section 2-1401 petition. *Vincent*, 226 Ill. 2d at 14, 871 N.E.2d at 26.

¶ 38 1. *The Search of Defendant's Business*

¶ 39 Defendant raises several issues in connection with the search of his business and the seizure of DNA evidence in the search. Defendant first claims the search warrant was defective because it listed the wrong address for his store, so it failed to adequately describe the premises to be searched. Defendant claims to have new evidence in the form of photographs taken by officers, showing the address on his business was different from the address on the search warrant. Defendant claims the photographs were purposely suppressed by the State because they would have rendered the evidence obtained through the search inadmissible. Initially, we note defendant raised the address issue in a motion to suppress, and the trial court denied it. However, because defendant alleges he has uncovered new evidence to support his

claim, we address it.

¶ 40 A search warrant must "identify the premises in such manner as to leave the officer no doubt and no discretion as to the premises to be searched." *People v. Smith*, 20 Ill. 2d 345, 349, 169 N.E.2d 777, 780 (1961). However, an error in the description of the premises to be searched is not fatal if, with reasonable effort, the police are able to identify the place intended to be searched. *People v. Mabry*, 304 Ill. App. 3d 61, 64-65 710 N.E.2d 454, 456-57 (1999). In the case *sub judice*, defendant attempted to have evidence suppressed, arguing the search warrant was invalid because it listed the wrong suite number in the address. The trial court rejected this argument. At trial, defendant cross-examined the officers involved in the search regarding the alleged defect in the address. The officers testified they had no trouble deducing which property was subject to the search warrant. Additional evidence was introduced at trial showing defendant's business received mail at the address listed on the search warrant, bringing into doubt whether the address listed was erroneous. Given the testimony of the officers involved in the search and the nature of defendant's allegations, the trial court could reasonably conclude the photographs would not have changed its decision regarding defendant's motion to suppress.

¶ 41 Defendant also claims the police lied about the sequence of events of the search and purposely turned off the store's surveillance camera so there would be no video of the illegal search and seizure. These issues were also presented to the trial court in defendant's motion to suppress. Defendant does not offer new evidence to support these claims; therefore, they are barred from being adjudicated in a section 2-1401 petition.

¶ 42 As the trial court pointed out, even assuming the motion to suppress was

improperly denied and the DNA evidence should not have been admitted, the verdict would not have been impacted. The only element the DNA evidence was relevant toward was whether defendant had sexual contact with D.W., but defendant admitted having sex with D.W. during his opening argument. Thus, the DNA evidence was not needed to prove defendant had sexual contact with D.W. Defendant failed to state a claim upon which relief could have been granted regarding this issue.

¶ 43 2. *Police Perjury Regarding the Interview of D.B.*

¶ 44 Defendant next argues police officers perjured themselves as to the circumstances of an interview they conducted with D.B., defendant's goddaughter. At trial, conflicting testimony as to the circumstances of the interview with D.B. was offered.

¶ 45 The officers testified no one else was present when they questioned D.B., and at no time did D.B. request her mother's presence. The officers further testified they contacted D.B. after being informed by D.W. that D.B. might have also been having sex with defendant, and police did not discuss defendant's case with D.B. D.B. testified she asked the officers to call her mother before questioning her, and the dean of students was a witness to her request. Defendant offered no evidence of perjury other than his assertions, and the dean of students was not called to bolster D.B.'s testimony. Moreover, the mere presence of conflicting testimony does not amount to perjury. Even assuming his allegations are true, the alleged perjury in this case did not influence the verdict in any way. The police interview with D.B. focused on defendant's alleged contact with her, not on the issues before the trial court.

¶ 46 3. *The Application for the Eavesdropping Device*

¶ 47 Defendant next claims to have newly discovered evidence showing the

application for an eavesdropping device submitted by police contained a previously unknown falsity. Defendant alleges the false information was purposely concocted by the police. Section U of the eavesdropping application contained statements made to police regarding another individual, Bryan Dyson, who had previously been convicted of having sexual contact with minors. Section U stated one of Dyson's victims claimed defendant had sexual contact with a minor as well, but defendant denied the allegation. Defendant was never formally investigated in connection with the Dyson case.

¶ 48 We note the eavesdropping application was not newly discovered evidence in the context of a section 2-1401 petition. However, assuming it was newly discovered by defendant, the eavesdropping application would not likely have been denied had defendant's objection to it been raised prior to trial. Defendant does not attack any of the other sections contained in the application. Nor does defendant offer any evidence to further his claim section U was fabricated by police officers. Further, the tape only served to corroborate defendant's statements made during opening arguments. The burden is on defendant to show through affirmative evidence he is entitled to relief under section 2-1401. Defendant has not met the burden of proof on this issue.

¶ 49 4. *The Prosecution's Failure To Disclose Phone Records*

¶ 50 Defendant next argues the prosecution failed to disclose exculpatory phone records. This claim is based on the fact the prosecution only disclosed 10 of the 30 pages of phone records it received from defendant's prior defense counsel. According to defendant, the remaining 20 pages of phone records would have demonstrated D.W. initiated much of the contact between defendant and herself. Defendant argues this goes to show the consensual

nature of the sexual contact between him and D.W. However, consent was not at issue in defendant's trial and is not a defense to criminal sexual abuse. Defendant admitted sexual contact with D.W. The only relevant issue was whether defendant reasonably believed D.W. was 17 or older at the time of the contact. Defendant was able to question D.W. at trial regarding phone calls she had placed to him. The phone records were not exculpatory in nature and do not tend to show the jury would have reached a different verdict had it received the phone records as evidence.

¶ 51 5. *The Prosecution Acted Unethically*

¶ 52 Defendant next argues the prosecution acted unethically in not calling D.W.'s parents, who were listed as witnesses for the State, whose statements revealed D.W. said she consented to the sex, contrary to her trial testimony that sex was forced. As previously discussed, whether the sexual contact between defendant and D.W. was consensual or not was not a matter before the court. Further, defendant could have called the witnesses as part of his case in chief but did not do so. The trial court specifically stated it would allow defendant to call any witness he deemed necessary to his case, regardless of whether they had been disclosed or not, because he was representing himself. Defendant knew of the testimony at the time trial commenced but failed to call either of the witnesses to testify. Defendant cannot claim the evidence was unavailable at trial or would have affected the outcome had it been presented to the jury.

¶ 53 6. *Issues Regarding Counsel*

¶ 54 Defendant makes two claims regarding counsel: (1) original trial counsel was ineffective in failing to provide defendant with certain evidence after withdrawing as defendant's

counsel, and (2) he was improperly denied counsel by the trial court, forcing him to represent himself.

¶ 55 Defendant's claims regarding counsel have each been raised in previous posttrial proceedings. Defendant's claim regarding his original trial counsel was raised in a posttrial motion and rejected; thus the claim is barred by *res judicata*. Further, the claim centers around poems written by D.W., which defendant claims his trial counsel failed to provide him with after withdrawing from his case. Defendant contends the poems show D.W.'s intent to have sex with him and would have impeached her previous testimony the initial contact between defendant and D.W. was not consensual. In a section 2-1401 motion, defendant must adduce new evidence of a defense or claim which, had it been known to the court at trial, would have resulted in a different verdict. Consent is not a defense and the evidence is not newly discovered. In fact, defendant cross-examined D.W. at trial regarding the poetry. Defendant's claim regarding trial counsel is not meritorious.

¶ 56 Defendant's claim regarding the trial court's alleged failure to allow him to obtain counsel of his choice also fails. Defendant raised this exact claim in a posttrial motion, and the trial court denied the motion. This court affirmed the trial court's judgment on appeal in a published opinion. *People v. Belk*, 403 Ill. App. 3d 1056, 936 N.E.2d 721 (2010), *appeal denied* 238 Ill. 2d 655, 942 N.E.2d 455 (2010). The issue is barred by *res judicata*.

¶ 57 III. CONCLUSION

¶ 58 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD defendant failed to raise any meritorious issues in his appeal, and we grant OSAD's motion to withdraw as counsel for defendant 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.

¶ 59 Affirmed.