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2011 IL App (4th) 100195-U

Filed 10/25/11

NO. 4-10-0195

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
STEVEN D. SUMMERS,	)	No. 95CF312
Defendant-Appellant.	)	
	)	Honorable
	)	Jeffrey B. Ford,
	)	Judge Presiding.

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PRESIDING JUSTICE KNECHT delivered the judgment of the court.  
Justices Turner and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* The court granted appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the trial court's judgment agreeing with counsel's conclusion no meritorious issues could be raised on appeal as to whether the State's Attorney's office (1) violated the terms of the negotiated plea by running defendant's sentences in Champaign County consecutive to his sentence in a Clinton County case or (2) breached the plea agreement by taking defendant to trial and requesting a longer prison sentence than was offered in a plea proposal.

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

¶ 3 I. BACKGROUND

¶ 4 In January 1996, a jury convicted defendant, Steven D. Summers, in Champaign County case No. 95-CF-312 of armed robbery, a Class X felony (720 ILCS 5/18-2 (West 1994)),

and aggravated vehicular hijacking, a Class X felony (720 ILCS 5/18-4(a)(3), (b) (West 1994)).

In February 1996, the trial court sentenced defendant to two concurrent terms of 30 years' imprisonment, which were to be served consecutive to two concurrent 60-year prison sentences defendant received for unrelated offenses in Clinton County. He appealed (docketed No. 4-96-0136), arguing the sentence for aggravated vehicular hijacking should be vacated because it is an included offense of armed robbery. In May 1997, this court affirmed defendant's conviction on his direct appeal. *People v. Summers*, No. 4-96-0136 (May 30, 1997) (unpublished order under Supreme Court Rule 23). Defendant did not appeal this court's decision.

¶ 5 In April 1996, defendant filed his first motion for postconviction hearing pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 1996)). In May 1996, the trial court summarily dismissed this motion for failure to state a cause of action.

¶ 6 In June 1996, defendant filed his second postconviction petition, alleging the following: (1) his confession was coerced; (2) he was denied the effective assistance of counsel; (3) the State failed to disclose evidence favorable to defendant; (4) his conviction violated double jeopardy; and (5) the jury was unconstitutionally selected and impaneled. Later in June 1996, the trial court denied defendant's petition as conclusory, unsupported by affidavits, records, or other evidence, and frivolous and patently without merit. Defendant did not appeal the dismissal of his second postconviction petition.

¶ 7 In October 1997, defendant filed his third postconviction petition, alleging the following: (1) defendant was tried using evidence from another conviction; (2) the trial court denied defendant's motions *in limine*; (3) the State introduced new evidence after the trial had started without informing defense counsel; (4) the court allowed the State to continually ask

leading questions over defendant's objections; (5) the court allowed the State to make "prejudicial, inflammatory, and erroneous statements" during its closing argument; (6) the court erred by denying defendant's motion for a mistrial; and (7) defendant received ineffective assistance of appellate counsel because appellate counsel failed to (a) mention defendant's posttrial motion in defendant's appellant brief, (b) argue the State failed to prove defendant's guilt beyond a reasonable doubt, and (c) argue the court erred in denying defendant's motion for a directed verdict.

¶ 8 In November 1997, the trial court denied defendant's third postconviction petition. According to the court, the first six arguments raised by defendant could have been raised on direct appeal and were not the proper subject for postconviction relief. As for defendant's allegations of ineffective assistance of appellate counsel, the court found defendant's allegations did not meet the two-pronged test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As a result, the court dismissed defendant's petition as frivolous and patently without merit. Defendant did not appeal the denial of this third postconviction petition.

¶ 9 In August 2003, defendant filed his fourth postconviction petition, alleging the following: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) the trial court erred in denying defendant's motion for a directed verdict; (3) the court erred in giving three jury instructions over defendant's objections; (4) the court erred in overruling objections made by defendant to State questions; (5) the court erred in sustaining objections by the State to questions asked by defendant; (6) the court erred in allowing the State to ask leading questions over defendant's objections; (7) the State made "prejudicial, inflammatory and erroneous statements" during its closing argument; (8) the court erred in denying defendant's motion to suppress

statements; (9) the court erred in denying defendant's motion *in limine*; (10) the court erred in denying defendant's motion for mistrial; and (11) defendant's appellate counsel was ineffective for raising only one issue in defendant's appellant brief.

¶ 10 In September 2003, the trial court summarily dismissed defendant's fourth petition. The court found defendant's claims frivolous and patently without merit. On appeal, this court affirmed the trial court's judgment. *People v. Summers*, No. 4-03-0896 (May 9, 2005) (unpublished order under Supreme Court Rule 23).

¶ 11 In September 2009, defendant filed a section 2-1401 petition for relief from judgment pursuant to the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2008)). This petition alleged the following: (1) defendant was denied the benefit of his Clinton County plea agreement because the State breached the terms; (2) trial counsel for defendant was ineffective in proceeding to trial, even though the plea agreement required defendant to plead guilty; and (3) defendant's 30-year sentence was void. In October 2009, the trial court denied defendant's petition. The court concluded defendant presented no newly discovered evidence; therefore, the arguments should have been raised either in defendant's direct appeal filed several years before or in any of his numerous postconviction petitions. As part of the written order, the court specifically stated defendant could not file any further postconviction petitions without first obtaining permission from the court. See 725 ILCS 5/122-1(f) (West 2008).

¶ 12 In February 2010, defendant filed the instant postconviction petition, claiming the Champaign County State's Attorney's office breached the terms of the negotiated plea in Clinton County by (1) running his sentence in Champaign County case No. 95-CF-312 consecutive to his sentence in Clinton County (case No. 95-CF-42) and (2) requesting a longer prison sentence

after his conviction at trial than it offered in a proposed plea agreement. Later in February 2010, the trial court denied defendant's petition. The court noted defendant failed to request the court's permission prior to filing his latest petition; however, it went on to analyze the arguments raised therein. The court found defendant raised no new evidence. His new petition just revisited arguments defendant had made in previous petitions. The court also found defendant was fully aware the plea agreement required a guilty plea in the Champaign County case and he elected to plead not guilty and proceed to trial. Defendant rejected the plea agreement and could not "get the benefit of a bargain he decided not to take."

¶ 13 Defendant appeals, arguing his postconviction motion was improperly denied. The trial court appointed OSAD to serve as defendant's counsel on appeal. In March 2011, OSAD moved to withdraw as counsel for defendant, 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. This court granted defendant leave to file additional points and authorities by April 29, 2011. Defendant failed to do 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.

¶ 14 II. ANALYSIS

¶ 15 Defendant appeals, arguing the State breached the terms of the plea bargain it entered into with him. We disagree.

The Supreme Court of Illinois has stated:

"[A] postconviction proceeding allows inquiry only into constitutional issues that were not, and could not have been, adju-

licated 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).

¶ 16 All of the allegations in defendant's fifth postconviction petition (sixth postjudgment petition) could have been raised on direct appeal. As a result, those claims are forfeited. See *Pitsonbarger*, 205 Ill. 2d at 456, 793 N.E.2d at 619. In addition, the Act generally prohibits the filing of successive postconviction petitions. *People v. Britt-El*, 206 Ill. 2d 331, 336, 794 N.E.2d 204, 208 (2002). Section 122-3 of the Act provides "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2008). Further, our supreme court has stated a court's decision on an initial postconviction petition has *res judicata* effect not only on the issues raised in the initial petition but also on any issues that could have been raised in the initial petition. *People v. Caballero*, 179 Ill. 2d 205, 211, 688 N.E.2d 658, 661 (1997).

¶ 17 According to our supreme court:

"A narrow exception to the rule prohibiting successive postconviction petitions holds that a claim presented in a successive petition may be given consideration when the proceedings on the initial petition were 'deficient in some fundamental way.' "

*Britt-El*, 206 Ill. 2d at 339, 794 N.E.2d at 209 (quoting *People v. Flores*, 153 Ill. 2d 264, 273-74, 606 N.E.2d 1078, 1083 (1992)).

A defendant must establish a fundamental deficiency by demonstrating both cause and prejudice with regard to each claim he raised in the successive petition. *Britt-El*, 206 Ill. 2d at 339, 794 N.E.2d at 209.

¶ 18 Under the cause-and-prejudice test:  
" '[C]ause' is \*\*\* defined as some objective factor external to the defense that impeded counsel's efforts to raise the claim in an earlier proceeding, and 'prejudice' is defined as an error which so infected the entire trial that the resulting conviction violates due process." *People v. Jones*, 191 Ill. 2d 194, 199, 730 N.E.2d 26, 29 (2000).

Defendant's claims in the instant postconviction petition could have been raised in any of his previous petitions. Defendant did not include anything in his current petition showing why he could not have raised these arguments in his previous petitions. As a result, defendant has failed to establish some objective factor external to the defense that rendered him unable to raise these arguments in his previous postconviction petitions. Defendant's claims in his most recent postconviction petition fail to raise any meritorious issues upon which relief can be granted.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 21 Affirmed.