

NOTICE
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2011 IL App (4th) 100284-U

Filed 7/25/11

NO. 4–10–0284

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Adams County
JOHNNY R. PRESLEY,)	No. 91CF158
Defendant-Appellant.)	
)	Honorable
)	William O. Mays,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990 (1987), and affirmed the trial court's judgment where counsel concluded that no meritorious issues could be raised on appeal as to the following: whether (1) defendant's sentence is unconstitutionally disparate to the sentence received by his codefendant; (2) the court erred when it failed to admonish defendant as to the term of mandatory supervised release that would accompany his sentence; or (3) defendant's appellate counsel was ineffective.

¶ 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. For the reasons that follow, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In 1991, a jury convicted defendant, Johnny R. Presley, of three counts of first degree murder (Ill. Rev. Stat. 1989, ch. 38, pars. 9–1(a)(1), (a)(2), (a)(3)), and the trial court

sentenced him to an extended term of 75 years in prison. Defendant appealed, arguing error in (1) the court's refusal of his involuntary manslaughter and second-degree murder jury instructions, (2) the admission of testimony concerning certain statements of his nontestifying codefendant, and (3) the court's decision to hold "in abeyance" judgments on two of the three murder counts. Defendant appealed, and this court affirmed his conviction on count I and vacated the judgments on the convictions on counts II and III. *People v. Presley*, 230 Ill. App. 3d 77, 94, 595 N.E.2d 606, 617 (1992), *appeal denied*, No. 74013 (Oct. 7, 1992).

¶ 5 In November 1992, defendant filed a petition for relief from judgment under section 2–1401 of the Code of Civil Procedure (Code) (Ill. Rev. Stat. 1991, ch. 110, par. 2–1401), arguing that the trial court erred by failing to determine his mental status at the time of the offense. In March 1993, the trial court dismissed defendant's petition. This court affirmed that dismissal. *People v. Presley*, No. 4–92–0962 (Aug. 12, 1993) (unpublished order under Supreme Court Rule 23), *appeal denied*, No. 76021 (Dec. 1, 1993).

¶ 6 In April 1994, defendant filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 through 122–8 (West 1994)), alleging that the trial court erred by not (1) holding a fitness hearing and (2) considering that defendant was acting in defense of a dwelling when he committed the underlying crime. In June 1994, the trial court dismissed defendant's petition. This court affirmed on appeal. *People v. Presley*, No. 4–94–0632 (Aug. 21, 1995) (unpublished summary order under Supreme Court Rule 23(c)(2)), *appeal denied*, No. 79888 (Dec. 6, 1995).

¶ 7 In August 2000, defendant filed a second section 2–1401 petition, asserting that his extended-term sentence was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466

(2000). In March 2001, the trial court dismissed defendant's petition, and this court affirmed (*People v. Presley*, No. 4–01–0183 (Jan. 31, 2002) (unpublished order under Supreme Court Rule 23), *appeal denied*, No. 93393 (Oct. 7, 2003)).

¶ 8 In August 2004, defendant *pro se* filed a third section 2–1401 petition, again asserting that his extended-term sentence was void under *Apprendi*. In June 2005, the trial court dismissed, and defendant appealed. OSAD was appointed, and later moved to withdraw. We granted OSAD's motion and affirmed the court's decision. *People v. Presley*, No. 4–05–0536 (Feb. 28, 2006) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 9 In September 2009, defendant filed the instant petition under both section 2–1401 and the Act, arguing that (1) his 75-year sentence was unconstitutionally disparate to the 45-year sentence his codefendant received and violated the equal-protection clause, (2) the trial court erred by failing to admonish him as to the term of mandatory supervised release (MSR) that would accompany his sentence, and (3) his appellate counsel was ineffective. In April 2010, the trial court dismissed defendant's petition. Defendant appealed, and OSAD was appointed.

¶ 10 In May 2011, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990 (1987). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by June 3, 2011. 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.

¶ 11

II. ANALYSIS

¶ 12 Defendant filed petitions for relief under both the Act and section 2–1401 of the Code. OSAD argues that this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief. We agree.

¶ 13 A. Defendant's Postconviction Petition

¶ 14 Defendant first argues that his sentence is unconstitutional under the Act. However, 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 that "[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).

However, the supreme court noted the following exception:

"A narrow exception to the rule prohibiting successive post[.]conviction 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.

¶ 15 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).

¶ 16 Defendant claims that his sentence was unconstitutionally disparate to the sentence his codefendant received. However, defendant made this same argument in his August 2000 petition, which was dismissed by the trial court. This court then affirmed that dismissal in *Presley*, No. 4–01–0183. Defendant's equal-protection claim is thus barred by the doctrine of *res judicata*. In the alternative, defendant's claim was not filed in a timely fashion, and he has made no argument that he was impeded in bringing the claim; thus, he does not meet the narrow exception provided by the cause-and-prejudice test. Therefore, defendant's claim has been forfeited, and the trial court's dismissal was proper.

¶ 17 B. Defendant's Section 2–1401 Claim

¶ 18 Defendant also filed petitions for relief from his allegedly unconstitutional sentence under section 2–1401 of the Code (735 ILCS 5/2–1401 (West 2008)). However, section 2–1401(c) clearly states "the petition must be filed not later than 2 years after the entry of the order or judgment." 735 ILCS 5/2–1401(c) (West 2008). That same section allows the moving party to exclude from the two-year period "[t]ime during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed." 735 ILCS 5/2–1401(c) (West 2008). Here, defendant is clearly beyond the two-year period contemplated by the statute, given that he was convicted in 1991 and filed the instant petition in 2009. Nor does

defendant allege duress, disability, or fraudulent concealment such that the exception to the two-year period would apply. Defendant's petition under 2-1401 is not timely and the trial court properly dismissed it.

¶ 19

C. Defendant's MSR Claim

¶ 20

Defendant next alleges that he was not admonished on the term of MSR he would be required to serve upon his release from prison; thus, he claims his sentence must be adjusted pursuant to *People v. Whitfield*, 217 Ill. 2d 177, 840 N.E.2d 658 (2005). However, defendant's reliance on *Whitfield* is misplaced, in light of the fact that, unlike the defendant in *Whitfield*, defendant did not plead guilty.

¶ 21

D. Defendant's Claim of Ineffective Assistance of Counsel

¶ 22

Finally, defendant claims that his right to effective assistance of appellate counsel was violated, though his petition does not specifically allege when or how his appellate counsel was ineffective. To sustain a claim of ineffective assistance of counsel, defendant must show that "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defense in that absent counsel's deficient performance there is a reasonable probability that the result of the proceeding would have been different." *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004). Under the first prong, defendant failed to allege how appointed counsel's performance was objectively deficient. Further, under the second prong, he cannot allege ineffective assistance of counsel for counsel's failure to raise nonmeritorious arguments, as there was no reasonable probability that the results of any of his appeals would have been different had those issues been raised. Therefore, defendant has failed to meet his burden under both prongs of his ineffective-assistance-of-counsel claim.

¶ 23

III. CONCLUSION

¶ 24 After review of the record consistent with our responsibilities under *Finley*, we agree with OSAD that 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.

¶ 25 Affirmed.