

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 111029-U  
NO. 4-11-1029  
IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

FILED  
November 30, 2012  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
WILLIAM BAILEY,	)	No. 10CF1612
Defendant-Appellant.	)	
	)	Honorable
	)	John R. Kennedy,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.  
Presiding Justice Turner and Justice Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* We grant the office of the State Appellate Defender's motion to withdraw as appellate counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

¶ 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 ground no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 21, 2010, in a two-count information defendant was charged with aggravated driving under the influence of alcohol, a Class 2 felony (625 ILCS 5/11-501(d)(2)(B) (West 2010)), and driving while license revoked, a Class 4 felony (625 ILCS 5/6-303(d) (West 2010)).

¶ 5 On November 23, 2010, defendant pled guilty to aggravated driving under the

influence of alcohol. The trial court informed defendant of the nature of the charge, the minimum and maximum sentences, and the right to plead guilty or not guilty. The court also informed defendant that if he pled guilty he would waive his right to trial. Defendant testified that no one had forced or threatened him to plead guilty, and no other promises had been made, other than the dismissal of the charge of driving while license revoked. The court accepted defendant's guilty plea, finding that it was made knowingly and voluntarily.

¶ 6 On January 13, 2011, the trial court held a sentencing hearing. During the hearing, a copy of the presentence investigation report (PSI) was admitted. The PSI was file stamped three days earlier. According to defendant, three minutes into the hearing, defense counsel told him to look over some papers and sign them without informing him that the papers were his PSI. Defendant claims that he did not realize that the papers were his PSI because he was focused on his sister, who was about to testify. Subsequently, the State and defendant told the court that no additions or corrections needed to be made to the PSI. The PSI indicated that, from 1975 to 2004, defendant was convicted of numerous criminal offenses, including burglary, attempted robbery, resisting arrest, assault, battery, and criminal trespass. The PSI also showed that defendant had four convictions for driving on a suspended license and committed 18 traffic violations between 1979 and 2006. Additionally, in 2006, defendant had two convictions for driving under the influence of alcohol (DUI). In the "additional information" portion of the PSI, the probation officer compiling the report noted that defendant was arrested for DUI on March 21, 1987. However, the probation officer also noted that due to the offense's age, the outcome of the arrest is unknown.

¶ 7 At the conclusion of the sentencing hearing, the trial court sentenced defendant to

five years in the Illinois Department of Corrections and imposed various assessments, including a \$500 fine and a \$200 deoxyribonucleic acid (DNA) analysis fee. The court also ordered defendant to submit a DNA sample for analysis.

¶ 8 On January 26, 2011, defendant filed a motion to reconsider sentence.

¶ 9 On February 4, 2011, after a hearing, the trial court denied defendant's motion to reconsider sentence.

¶ 10 On February 9, 2011, defendant filed a notice of appeal with the trial court and the court appointed OSAD to represent him. On appeal, defendant argued that the trial court erred in ordering him to submit a DNA sample because he had previously submitted a sample. He also argued that he was entitled to a \$40 credit against his fine for the eight days he served in the county jail prior to sentencing. Subsequently, in a summary order, this court granted the requested relief.

¶ 11 On October 3, 2011, defendant filed a *pro se* petition for postconviction relief. In the petition, defendant argued that he was (1) denied effective assistance of counsel; (2) denied his right to read the PSI; and (3) denied his right to withdraw his guilty plea because of errors in the PSI. More specifically, in terms of the PSI, defendant alleged that he could not have committed the traffic offenses listed in the PSI from 1977 through 1979 because he was incarcerated during that time period. Defendant also claimed that the PSI inaccurately reflected that his probation was terminated unsuccessfully in 2006 and 2008. Last, defendant asserted that the PSI contained information concerning DUIs that he never committed.

¶ 12 In support of his argument, defendant attached two documents to his petition. The first document consists of a memorandum from Julia Rodriguez, who appears to be a correctional

officer, reporting that defendant was incarcerated from November 13, 1980, through February 20, 1981. The memorandum also indicated that defendant was "received at Sheridan" on August 11, 1977, and paroled out on August 16, 1978. The second document is a memorandum from Philip Daley, who appears to be a records office employee at the Vienna Correctional Center, informing defendant that the sentences for his two burglary convictions and attempted robbery conviction in 1975 should reflect that he received five years' probation rather than five years' imprisonment. However, the memorandum does not appear to refer to inaccuracies in the PSI. Moreover, the information in the PSI is consistent with the memorandum.

¶ 13 On October 28, 2011, the trial court dismissed the petition as frivolous and without merit, finding as follows:

"The only constitutional issue raised by defendant is an allegation of ineffective assistance of counsel. The defendant essentially argues that his attorney should have disputed certain portions of the presentence report. The defendant does not dispute his criminal record, but instead, the defendant disputes some of the sentencing and probation details of some of those convictions. In an ineffective assistance of counsel analysis, the defendant cannot demonstrate prejudice."

¶ 14 On November 14, 2011, defendant filed a notice of appeal and OSAD was appointed to represent him.

¶ 15 On September 26, 2012, OSAD moved to withdraw as appellate counsel, 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. On its own motion, this court granted defendant leave to file additional points and authorities by October 29, 2012. 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 court's judgment.

¶ 16

## II. ANALYSIS

¶ 17 OSAD argues defendant's petition presents no meritorious issues.

¶ 18 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2010)) provides a defendant with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). In noncapital cases, the adjudication of a postconviction petition follows a three-stage process. *Jones*, 211 Ill. 2d at 144, 809 N.E.2d at 1236. At the first stage, the trial court must independently determine if the defendant's petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). "To survive dismissal at [the first] stage, a petition need only present the gist of a constitutional claim." *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). The failure to either attach to a petition the necessary affidavits, records, or other evidence or explain their absence is fatal to the petition and by itself justifies summary dismissal. *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002). The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998).

¶ 19

### A. Statutory Right To Review PSI

¶ 20 Defendant argues that he was denied his statutory right to review his PSI prior to the sentencing hearing. Section 5-3-4(b)(2) of the Unified Code of Corrections (Unified Code)

requires that: "Presentence reports be open for inspection\*\*\* to the state's attorney and the defendant's attorney at least 3 days prior to the imposition of sentence, unless such 3 day requirement is waived." 730 ILCS 5/5-3-4(b)(2) (West 2010). In this case, defendant's sentencing hearing was on January 13, 2011, three days after the PSI was file stamped. The record does not support defendant's contention that the PSI was unavailable for his examination prior to trial in violation of section 5-3-4(b)(2) of the Unified Code.

¶ 21

#### B. PSI

¶ 22 Defendant argues that there were material errors in the PSI that raise the gist of a claim of constitutional deprivation. "It is well settled that defendant has a right to review and comment on matters contained in a presentence investigation report." *People v. Eddmonds*, 101 Ill. 2d 44, 64, 461 N.E.2d 347, 356-57 (1984).

¶ 23 First, defendant claims that because he was incarcerated between 1977 and 1979, he could not have committed the traffic offenses listed in the PSI during that time period. The PSI shows the disposition date of eight traffic offenses between 1977 and 1981. Seven of those offenses occurred between defendant's release from prison in 1978 and his subsequent incarceration in November 1980 for resisting police. The remaining traffic offense, driving under suspension, has a disposition date of December 1981, which is 10 months after defendant's release from prison. Moreover, the memoranda attached to defendant's petition do not support his assertions regarding the timing of the traffic offenses. Thus, we find that defendant failed to state the gist of a claim of constitutional error.

¶ 24 Second, defendant argues that the PSI inaccurately shows that he failed to complete his probation for multiple offenses in 2006 and 2007. The PSI shows that defendant's

probation was “unsuccessfully terminated” five times between August 2006 and June 2007.

Defendant did not submit an affidavit or other documentation to support his allegation that the probation information in the PSI was erroneous. A petition that contains bare allegations does not present the gist of a claim of constitutional deprivation. “[T]he petition, together with affidavits and the record, where attached, must show facts which indicate the denial of constitutional rights.” *People v. Durley*, 53 Ill. 2d 156, 160, 290 N.E.2d 244, 246 (1972).

Accordingly, we find that defendant did not state the gist of a claim of constitutional deprivation.

¶ 25 Third, defendant claims that the PSI contains information concerning DUIs that “he never committed and would have vehemently denied.” The PSI shows that defendant had two convictions in 2006 for DUI. The “additional information” section of the PSI also provides that, in March 1987, defendant was arrested in Houston, Texas, for DUI. However, the probation officer who prepared the PSI noted that he was not aware of the outcome of the arrest because of the age of offense. In his petition, defendant failed to identify which of the reported DUI convictions were in error. He also failed to attach to the petition an affidavit or other form of documentation to support his claims. See *Durley*, 53 Ill. 2d at 160, 290 N.E.2d at 246. Thus, based on the record, we find that defendant failed to adequately support his allegation that he did not commit the DUIs listed in the PSI.

¶ 26 C. Ineffective Assistance of Counsel

¶ 27 Last, defendant argues that he was deprived of effective assistance of counsel because his defense counsel failed to provide him with the opportunity to review the PSI before the sentencing hearing. Claims of ineffective assistance of counsel are governed by the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In a petition alleging

ineffective assistance of counsel, a defendant "must show counsel's performance was deficient and that prejudice resulted from the deficient performance." *People v. Brown*, 236 Ill. 2d 175, 185, 923 N.E.2d 748, 754 (2010). A petition alleging ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198, 1203 (2010).

¶ 28 Even assuming that defense counsel erred in failing to review the PSI with defendant, defendant cannot show prejudice. Aggravated DUI is a Class 2 felony, punishable by a term of imprisonment of three to seven years. 625 ILCS 5/11-501(d)(2)(B), 730 ILCS 5/5-4.5-35(a) (West 2010). The trial court sentenced defendant to a midrange sentence of five years' imprisonment. In sentencing defendant, the court noted his lengthy criminal record and the fact that his probation was revoked in both of his DUI cases. Moreover, the PSI indicates that defendant has an extensive criminal history, including multiple felony convictions, dating back to 1975. Based on the record, we find that defendant did not state the gist of a claim for ineffective assistance of counsel.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 31 Affirmed.