

**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).

2014 IL App (4th) 130016-U

NO. 4-13-0016

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**  
June 13, 2014  
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.	)	Sangamon County
ROBERT B. COLLINGWOOD,	)	No. 96CF847
Defendant-Appellant.	)	
	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.  
Presiding Justice Appleton and Justice Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court granted the motion of the office of the State Appellate Defender to withdraw as 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 for defendant, Robert B. Collingwood, pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). For the reasons that follow, we grant OSAD's motion and affirm the trial court's judgment, which dismissed defendant's petition for relief from judgment.

¶ 3 I. BACKGROUND

¶ 4 In April 1997, defendant entered an open plea of guilty to first degree murder (720 ILCS 5/9-1(a)(1) (West 1996)). Following a June 1997 hearing, the trial court sentenced defendant to 45 years in prison.

¶ 5 In August 1997, defendant—through newly appointed counsel—filed a motion to withdraw his guilty plea, alleging that his pre-guilty-plea counsel gave him erroneous advice and coerced him into pleading guilty. In June 1998, following a hearing, the trial court denied defendant's motion to withdraw his guilty plea.

¶ 6 In June 1999, this court affirmed defendant's conviction on direct appeal, concluding that defendant's post-guilty-plea counsel was not ineffective for failing to allege ineffective assistance of counsel as to pre-guilty-plea counsel's handling of a motion to suppress defendant's statements. *People v. Collingwood*, No. 4-98-0474 (June 22, 1999) (unpublished order under Illinois Supreme Court Rule 23).

¶ 7 In April 2000, defendant *pro se* filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2000)), alleging that (1) he was not properly admonished of his possible prison sentence prior to tendering his guilty plea, (2) his pre-guilty-plea counsel was ineffective for failing to (a) adequately investigate his case and (b) advise him to proceed to trial, and (3) his post-guilty-plea counsel's assistance at the hearing on the motion to withdraw guilty plea was ineffective for various reasons. The trial court appointed counsel, who amended defendant's postconviction petition to include additional claims of ineffective assistance of pre-guilty-plea and appellate counsel. In January 2001, following a hearing, the court granted the State's motion to dismiss defendant's petition. In September 2002, this court affirmed the court's dismissal. *People v. Collingwood*, No. 4-01-0051 (Sept. 5, 2002) (unpublished order under Illinois Supreme Court Rule 23).

¶ 8 In January 2010, defendant filed the instant petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)). In May 2010, the State filed a motion to dismiss defendant's petition. (We note that be-

tween January 2010 and September 2012, two different attorneys represented defendant and made amendments to his petition. Defendant was displeased with both attorneys and the amended petitions they filed on his behalf. In September 2012, the court granted defendant's motion to proceed *pro se*. In October 2012, the court granted defendant's motion to consolidate all of the claims in his original and amended petitions into a single amended petition.)

¶ 9 Defendant alleged in his final amended petition that (1) his first degree murder conviction was void under the (a) single-subject clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. IV, § 8(d)) and (b) *ex post facto* clauses of the United States Constitution (U.S. Const., art. I, §§ 9, 10) and Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 16); and (2) his pre-guilty-plea counsel, Adam Giganti, operated under a *per se* conflict of interest. Defendant attached to his petition affidavits completed by him and a fellow Department of Corrections inmate, Barry Sanders.

¶ 10 According to defendant's affidavit, in the first week of June 1997, while defendant was in custody at the Sangamon county jail, Sanders—another inmate whom defendant had never met—informed defendant that Giganti had also represented Sanders in 1997. Giganti allegedly told Sanders during the course of representation that after he "gets rid" of defendant "to the State," Giganti would be "able to do something" for Sanders. Defendant interpreted that alleged statement as Giganti's suggestion to Sanders that defendant's conviction would result in a "decent plea deal" for Sanders. Sanders's affidavit stated, as follows:

"In the year of 97[,] Mr. Adam Giganti[,] attorney at law, explained that once he gets rid of [defendant] to the state he would be able to help me better in my plea deal with the state. I received 10 yrs at 85% of the yr 97. Everything I've explained is true and

correct."

Neither defendant's nor Sanders's affidavits were notarized.

¶ 11 In October 2012, following a hearing at which defendant appeared, the trial court granted the State's motion to dismiss defendant's petition. In a written order, the court stated its findings:

"The court finds that defendant's allegations do not warrant the grant of post-judgment relief. The court does not find that the Public Acts in question are unconstitutional and that their application violated Defendant's constitutional right to due process. Furthermore, the Court cannot find that Mr. Giganti's representation of Defendant and Barry Sanders represented a *per se* conflict of interest and that Defendant's constitutional right to counsel was violated."

¶ 12 Defendant appealed, and the trial court appointed OSAD as counsel.

¶ 13 In March 2013, OSAD filed a motion to withdraw as counsel pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), along with a brief in support, asserting that defendant's appeal presented no meritorious issues. On our own motion, we granted defendant leave to file additional points and authorities, which he did. The State filed a brief in response.

¶ 14 For the reasons that follow, we grant OSAD's motion to withdraw, and affirm the trial court's dismissal of defendant's petition.

¶ 15 II. DEFENDANT'S APPEAL IS WITHOUT MERIT

¶ 16 OSAD asserts that defendant's appeal presents no meritorious issues because all the claims in his petition are frivolous. We agree.

¶ 17

A. Defendant's Single-Subject Clause Claims

¶ 18 Defendant argues in his section 2-1401 petition that his conviction for first degree murder is void because Public Act 83-1067 (eff. July 1, 1984) and Public Act 84-1450 (eff. July 1, 1987) violated the single-subject clause of the Illinois Constitution.

¶ 19 The single subject clause of the Illinois Constitution provides, in pertinent part, that "[b]ills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject." Ill. Const. 1970, art. IV, § 8(d). "In determining whether a particular enactment violates the single subject requirement, the term 'subject' is to be liberally construed in favor of upholding the legislation, and the subject may be as comprehensive as the legislature chooses." *People v. Cervantes*, 189 Ill. 2d 80, 84, 723 N.E.2d 265, 267 (1999).

"Therefore, in order to satisfy the single subject requirement, the matters included within the enactment must have a 'natural and logical connection' to a single subject." *Id.* (quoting *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 352, 718 N.E.2d 191, 197 (1999)).

¶ 20

1. *Public Act 83-1067*

¶ 21 Public Act 83-1067 (eff. July 1, 1984), commonly known as the Criminal Sexual Assault Act, "repealed eight statutes which had defined sex offenses in sections 11-1 through 11-11.1 of the Criminal Code of 1961, including the offense of rape." *In re Detention of Lieberman*, 201 Ill. 2d 300, 313, 776 N.E.2d 218, 226 (2002). Defendant seems to argue that (1) Public Act 83-1067 violated the single subject clause and (2) because Public Act 83-1067 amended a section of the Criminal Code relating to murders occurring during certain sexual offenses (720 ILCS 5/9-1(b) (West 1996)), its violation of the single-subject clause rendered all of section 9-1 of the Criminal Code void. In other words, defendant argues that since Public Act 83-1067 went into

effect 30 years ago, the Criminal Code's prohibition on first degree murder has been void. We agree with OSAD that this claim is frivolous.

¶ 22 Public Act 83-1067 did not violate the single subject clause because the matters included within the enactment had a natural and logical connection to the subject of sexual offenses. Even if Public Act 83-1067 had violated the single subject clause—which it did not—the constitutional violation would have only implicated the provisions of the first degree murder statute that were amended by the Act. Section 9-1(a) of the Criminal Code (720 ILCS 5/9-1(a) (West 1996))—the statute under which defendant was convicted—was not amended by Public Act 83-1067.

¶ 23 *2. Public Act 84-1450*

¶ 24 Defendant also argues in his section 2-1401 petition that Public Act 84-1450 (eff. July 1, 1987) violated the single subject clause. Public Act 84-1450 renamed the offense of murder to first degree murder and abolished the offense of voluntary manslaughter, substituting it with the offense of second degree murder. *People v. Jeffries*, 164 Ill. 2d 104, 111, 646 N.E.2d 587, 590 (1995). This Act necessarily amended all provisions of the compiled statutes that referred to "murder" or "voluntary manslaughter." "The intent of the legislature in enacting Public Act 84-1450 was to remedy the confusion and inconsistency that had developed in regard to the murder and voluntary manslaughter statutes." *Id.*

¶ 25 Defendant seems to argue that because Public Act 84-1450 amended the definition of murder and voluntary manslaughter in a large number of statutory provisions, it must have violated the single subject clause. Similar to his previous argument, defendant essentially contends that since the Act went into effect in 1987, every first degree murder conviction in this

state has been void. We agree with OSAD that the claim is frivolous because Public Act 84-1450 did not violate the single subject clause.

¶ 26 B. Defendant's *Ex Post Facto* Claim

¶ 27 Defendant further argues in his section 2-1401 petition that his first degree murder conviction violated the *ex post facto* clauses of the United States Constitution (U.S. Const., art. I, §§ 9, 10) and Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 16).

¶ 28 Like OSAD, we are unable to follow defendant's reasoning. In his petition, defendant cites general *ex post facto* case law from the United States and Illinois Supreme Courts, but he makes no coherent attempt to link that case law to his conviction. In defendant's points and authorities, filed in response to OSAD's motion to withdraw, defendant cites *People v. Shumpert*, 126 Ill. 2d 344, 355, 533 N.E.2d 1106, 1111 (1989). In that case, to avoid an *ex post facto* violation, the supreme court construed the effective date of Public Act 84-1450 to be July 1, 1987. The *ex post facto* issue in *Shumpert* only involved offenses committed within a six-month period of 1987. Defendant apparently interprets *Shumpert* to hold that the first degree murder statute has been void since 1987, rendering his 1997 first degree murder conviction a nullity. Because *Shumpert* plainly does not stand for that proposition, we agree with OSAD that this claim is frivolous.

¶ 29 C. Defendant's *Per Se* Conflict of Interest Claim

¶ 30 Last, defendant argues in his section 2-1401 petition that his guilty plea was not knowing and voluntary because Giganti operated under a *per se* conflict of interest. We agree with OSAD that this claim is frivolous for four separate reasons.

¶ 31 First, because the claim is not a voidness challenge, it is untimely. *In re Haley D.*, 2011 IL 110886, ¶ 58, 959 N.E.2d 1108; see also 735 ILCS 5/2-1401(c) (West 2010) ("[T]he pe-

tition must be filed not later than 2 years after the entry of the order or judgment.") As this court has previously held, "[t]he grounds available to a court for dismissing for lack of due diligence include the mere failure to offer a reasonable excuse for undue delay in filing the petition." *People v. Bramlett*, 347 Ill. App. 3d 468, 473, 806 N.E.2d 1251, 1255 (2004). According to defendant's affidavit, defendant learned of the alleged conflict of interest from Sanders in the first week of June 1997. Defendant claims that he could not have filed his petition earlier because he could not obtain Sanders's affidavit until 2012, when he and Sanders were placed in the same penitentiary. We agree with OSAD that this is not a reasonable excuse. Defendant did not need Sanders's affidavit to present his claim of a *per se* conflict of interest.

¶ 32 Second, defendant has forfeited his conflict-of-interest claim by failing to raise it in a postplea motion. See Ill. Sup. Ct. R. 604(d) (eff. Aug. 1, 1992). As stated, defendant alleged that he first learned of this claim when he spoke with Sanders in the first week of June 1997. Defendant was sentenced on June 9, 1997, giving him until July 9, 1997, to raise his claim in a postplea motion. Because defendant failed to do so, his claim is forfeited.

¶ 33 Third, neither defendant's nor Sanders's affidavits are notarized. "If based on matters outside the trial record, a section 2-1401 petition must be supported by sworn allegations of the party or parties having personal knowledge of the relevant facts, set forth either by verified petition or by attached affidavit in order to be legally sufficient." *In re Estate of Barth*, 339 Ill. App. 3d 651, 662, 792 N.E.2d 315, 324 (2003). "[A]n affidavit must be sworn to, and statements in a writing not sworn to before an authorized person cannot be considered affidavits." *Roth v. Illinois Farmers Insurance Co.*, 202 Ill. 2d 490, 494, 782 N.E.2d 212, 214 (2002). Because defendant did not support his conflict-of-interest claim with a sworn affidavit, and because the

claim is based entirely upon matters outside of the record, defendant has failed to adequately present his claim.

¶ 34 Finally, Sanders's vague statement to defendant about what Giganti told Sanders hardly supports defendant's *per se* conflict of interest claim. The supreme court has identified three situations in which a *per se* conflict of interest exists: "(1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved in the prosecution of defendant." *People v. Taylor*, 237 Ill. 2d 356, 374, 930 N.E.2d 959, 971 (2010). None of these situations is shown to exist in this case.

¶ 35 Further, even if defendant had couched his claim in terms of a standard ineffective-assistance-of-counsel claim—as opposed to a *per se* conflict-of-interest claim—he has not identified how Giganti's alleged statement to Sanders demonstrates that his guilty plea was not knowing and voluntary. During the trial court's admonishments at the guilty-plea hearing, defendant stated, in pertinent part, that (1) he was satisfied with Giganti's representation of him, (2) he understood all the rights he was giving up by pleading guilty, (3) he knew of the possible penalties he faced, and (4) he had not been made any promises or threatened in any way. Even if Giganti had made the alleged statement to Sanders, such a fact would not support defendant's claim.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we grant OSAD's motion to withdraw as counsel and affirm the trial court's dismissal of defendant's section 2-1401 petition. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 38

Affirmed.