

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) 130525-U

NO. 4-13-0525

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 5, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
RODREKUS WILLIAMS,)	No. 10CF577
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Harris 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 where no meritorious issues could be raised on appeal.

¶ 2 This case 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 grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 We recently addressed the factual background of defendant's criminal case in *People v. Williams*, 2012 IL App (4th) 110045-U. Only those facts necessary for this appeal are set forth.

¶ 5 In April 2010, a grand jury indicted defendant for the Class 1 felony of residential burglary, alleging defendant knowingly and without authority entered into the dwelling place of Elizabeth Anderson with the intent to commit therein a theft (count I) (720 ILCS 5/19-3 (West 2010)), and the Class 3 felony of unlawful possession of a weapon by a felon, alleging defendant, a person who had been convicted of a felony under the law of Illinois, knowingly possessed a shotgun on or about his person (count II) (720 ILCS 5/24-1.1(a) (West 2010)). In June 2010, a grand jury indicted defendant for the Class 2 felony of unlawful possession of a weapon by a felon, as an extendible and nonprobationable offense (count III) (720 ILCS 5/24-1.1(a) (West 2010)). The State dismissed count II prior to trial.

¶ 6 In August 2010, a jury convicted defendant of counts I and III. On January 3, 2011, the trial court sentenced defendant to concurrent 14-year prison terms for the two convictions. Later that month, defendant filed a motion to reconsider sentence, which was denied.

¶ 7 On direct appeal, defendant argued insufficient foundation was presented regarding the expert witness' testimony concerning fingerprint evidence. In August 2012, this court affirmed the trial court's judgment. *People v. Williams*, 2012 IL App (4th) 110045-U.

¶ 8 In April 2013, defendant filed a postconviction petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In his petition, defendant argued the indictment should have been dismissed because the defense was never provided with a transcript of the grand jury proceedings. He argued his trial counsel was ineffective for failing to move to dismiss the indictment and his appellate counsel was ineffective for failing to raise the ineffectiveness issue on direct appeal.

¶ 9 The trial court summarily dismissed the petition in June 2013. The court found defendant's claims were "devoid of any factual basis or merit" as he did not "set forth any specifics or facts to support his claim."

¶ 10 In June 2013, defendant filed a notice of appeal. In June 2014, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). On its own motion, this court granted defendant leave to file additional points and authorities by July 28, 2014. 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 OSAD moves to withdraw pursuant to *Finley*, arguing no meritorious arguments can be raised on appeal.

¶ 13 The Act provides a means for a defendant to challenge a conviction or sentence based on an alleged violation of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). At the first stage of postconviction review, the circuit court independently reviews the petition to determine whether it is "frivolous or is patently without merit" and dismisses the petition if it finds that to be the case. 725 ILCS 5/122-2.1(a)(2) (West 2012). To avoid dismissal at this stage, the petitioner need only present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). Additionally, at this point in the proceedings, all well-pleaded allegations in the petition are taken as true and liberally construed in favor of the petitioner. *People v. Brooks*, 233 Ill. 2d 146, 153, 908 N.E.2d 32, 36 (2009). The summary dismissal of a postconviction petition at the first

stage is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). To establish the ineffectiveness of trial counsel at the first stage of postconviction proceedings, defendant must show it is arguable counsel's performance fell below an objective standard of reasonableness and also it is arguable defendant was prejudiced by counsel's deficient representation. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶ 14 In the case *sub judice*, defendant argued in his postconviction petition his (1) trial counsel was ineffective for failing to move to dismiss the indictment and (2) appellate counsel was ineffective for failing to raise the issue on direct appeal. Defendant maintained, had his trial attorney moved to dismiss the indictment on the grounds it was not " 'valid' " and was "without jurisdiction," the indictment could have been dismissed because the State never provided the defense with transcripts of the April 15, 2010, and June 24, 2010, grand jury proceedings. Defendant further maintained the fact no transcripts were made of the grand jury proceedings proves the grand jury was not impaneled and could not have been sworn, "the grand jury indictment wasn't constitutionally convened," and, therefore, it had no jurisdiction to return an indictment, making his conviction on the indictment void.

¶ 15 An indictment is presumed valid, in the absence of evidence to the contrary, when returned by a legally constituted jury. *People v. Whitlow*, 89 Ill. 2d 322, 330-31, 433 N.E.2d 629, 632 (1982). Here, the indictment appears valid on its face, having been returned in open court, signed by the foreperson of each grand jury as a true bill, and also signed by the State's Attorney. Defendant has provided no evidence the grand jury was not legally constituted.

¶ 16 Section 112-2 of the Code of Criminal Procedure of 1963 (Code) mandates the grand jury be impaneled and sworn by the court. 725 ILCS 5/112-2 (West 2010). The

indictment, however, is not required to show compliance with this provision of the statute. See 725 ILCS 5/111-3 (West 2010) (the form of a charge is sufficient when it is in writing, states the name of the offense and statutory provision, sets forth the nature and elements of the offense, the date and county in which it occurred, and names the accused); *People v. Cleveland*, 104 Ill. App. 2d 415, 417-18, 244 N.E.2d 212, 213 (1969) (the face of the indictment need not recite compliance with sections 112-1 to 112-4 of the Code); *People v. Smith*, 66 Ill. App. 2d 257, 260-61, 213 N.E.2d 135, 137 (1966) (in 1964, the prior version of the Code was supplanted by section 111-3, which contains no requirement that the commencement of an indictment be in any particular form or contain any particular language).

¶ 17 Section 112-7 of the Code requires only, "A transcript shall be made of all questions asked of and answers given by witnesses before the grand jury." 725 ILCS 5/112-7 (West 2010). There is no separate requirement a transcript show the grand jury was sworn. *People v. Haag*, 80 Ill. App. 3d 135, 138, 399 N.E.2d 284, 286-87 (1979).

¶ 18 In support of his argument, defendant cites *People v. Gray*, 261 Ill. 140, 103 N.E. 552 (1913), where the record of the grand jury proceedings did not demonstrate the grand jury was sworn as required by law. The court reversed the defendant's conviction, finding a grand jury that was not sworn was without jurisdiction to act. *Id.* at 142, 103 N.E. at 552. Defendant's reliance on *Gray* is misplaced. *Gray* was decided prior to the effective date of our current Code, which no longer requires an indictment to contain any language showing the grand jury was sworn. *Smith*, 66 Ill. App. 2d at 260-61, 213 N.E.2d at 137.

¶ 19 As a general rule, trial counsel's failure to file a motion that would be futile does not establish incompetent representation. See *People v. Givens*, 237 Ill. 2d 311, 331, 934 N.E.2d

470, 482 (2010) (counsel's failure to file a motion to quash arrest and suppress evidence does not constitute ineffective assistance when the motion would have been futile). Therefore defense counsel's failure to move to dismiss defendant's indictment, which would have been futile, did not constitute ineffective assistance of counsel.

¶ 20 Further, "[a] petitioner who contends that appellate counsel rendered ineffective assistance of counsel must show that the failure to raise an issue on direct appeal was objectively unreasonable and that the decision prejudiced petitioner." *People v. Childress*, 191 Ill. 2d 168, 175, 730 N.E.2d 32, 36 (2000). Appellate counsel is not ineffective for failing to raise frivolous or otherwise nonmeritorious issues on appeal because the defendant suffers no prejudice. *Id.* Appellate counsel did not provide ineffective assistance by failing to raise defendant's frivolous argument on appeal.

¶ 21 III. CONCLUSION

¶ 22 After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD no meritorious issues can be raised on appeal, grant OSAD's motion to withdraw as counsel for defendant, and affirm the trial court's judgment.

¶ 23 Affirmed.