

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).

FILED

December 14, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 160364-U

No. 4-16-0364

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
LYNN A. FATHAUER,)	No. 10CF340
Defendant-Appellant.)	
)	Honorable
)	Rudolph M. Braud, Jr.,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court dismissed the appeal for lack of jurisdiction where the order appealed was not final for purposes of appeal.

¶ 2 Defendant, Lynn A. Fathauer, appeals from the trial court’s order allowing his postconviction counsel to withdraw as appointed counsel. On appeal, defendant contends the trial court erred by (1) allowing counsel to withdraw when his *pro se* postconviction petition presented a meritorious claim of ineffective assistance of counsel, and (2) not adjudicating the merits of the State’s pending motion to dismiss his postconviction petition. Defendant also requests we vacate fines improperly imposed against him by the circuit clerk. Because we are without jurisdiction to address defendant’s arguments, we dismiss this appeal.

¶ 3 I. BACKGROUND

¶ 4 In January 2012, a jury found defendant guilty of participation in methamphetamine manufacturing (720 ILCS 646/15(a)(2)(A) (West 2010)) and obstruction of justice (720 ILCS 5/31-4(a) (West 2010)). In March 2012, the trial court sentenced defendant to concurrent prison terms of 20 years for the methamphetamine offense and 3 years for obstructing justice. Defendant appealed his convictions and sentences, and this court affirmed. *People v. Fathauer*, 2013 IL App (4th) 120424-U, ¶ 2.

¶ 5 In February 2014, defendant filed a *pro se* postconviction petition, alleging he was denied (1) a fair trial, (2) due process, (3) the effective assistance of trial counsel, and (4) the effective assistance of appellate counsel.

¶ 6 In April 2014, the trial court appointed counsel to represent defendant. That same month, the State filed a motion to dismiss defendant's postconviction petition.

¶ 7 In August 2015, defendant's postconviction counsel filed a motion to withdraw as counsel purporting to be pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). In his motion, counsel acknowledged, citing *People v. Kuehner*, 2015 IL 117695, ¶ 21, 32 N.E.3d 655, he was required to show why the trial court's initial assessment finding defendant's postconviction petition was not frivolous or patently without merit was incorrect. Counsel provided a detailed summary of defendant's case and addressed each of defendant's *pro se* claims. Based on his evaluation, counsel concluded no meritorious issues could be argued and requested he be granted leave to withdraw as counsel.

¶ 8 In May 2016, the trial court held a hearing in chambers on postconviction counsel's motion to withdraw. Postconviction counsel and the State were present in person, and defendant was present by telephone. Postconviction counsel presented argument on his motion.

The State indicated it had no objection to counsel's motion. Defendant responded to counsel's argument. After considering the arguments, the court granted counsel's motion to withdraw.

¶ 9 After granting postconviction counsel's motion to withdraw, the trial court inquired: "Where does that leave us?" The State informed the court: "I believe that leaves us with the State's motion to dismiss this petition." The court directed the State to "[g]o right ahead" with its motion. It then inquired as to whether defendant had a copy of the State's motion, to which defendant explained he did not have it in front of him because he was informed he only had a "call from the judge." Defendant also noted his now-former postconviction counsel "strongly advised" him to appeal the "the motion to withdraw," which defendant indicated he wanted to do. Defendant's former postconviction counsel then stated:

"I believe that once counsel files a *** *Finley* brief and moves to withdraw because there is no viable constitutional issue, and that motion is granted, it renders the State's motion to dismiss moot. So I don't believe the [c]ourt even needs to rule on the State's motion. The [c]ourt has already made a finding that pursuant to *** *Finley*, there are no meritorious issues and dismissed the *pro se* petition. So I believe that's all we need to do at this point, which triggers [defendant's] right *** to file a [n]otice of [a]ppeal ***."

Following counsel's statement, the court inquired into whether defendant desired to appeal, to which defendant indicated he did. The court concluded: "That will be [the] docket entry order of the [c]ourt." The docket entry provides, in part, as follows:

"Cause called on hearing for *** motion to withdraw. Arguments

heard and considered. Motion granted. Clerk directed to file notice of appeal.”

¶ 10 On defendant’s behalf, the circuit clerk filed a notice of appeal. The notice of appeal provided the nature of the order appealed from was the “[a]ttorney’s [m]otion to [w]ithdraw.”

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues this court should remand for further second-stage postconviction proceedings because the trial court improperly allowed his counsel to withdraw when his *pro se* postconviction petition presented a meritorious claim of ineffective assistance of counsel. Alternatively, defendant asserts, even if the trial court did not err in allowing his counsel to withdraw, this court should remand for further second-stage proceedings because the trial court failed to adjudicate the merits of the State’s motion to dismiss his postconviction petition. Defendant also requests we vacate fines improperly imposed by the circuit clerk because they are void.

¶ 14 In response, the State asserts this court should dismiss defendant’s appeal because we lack jurisdiction to address defendant’s contentions of error. Specifically, the State asserts (1) the trial court’s order allowing defendant’s postconviction counsel to withdraw is not a final order for purposes of appeal, and (2) no order rendering an adverse final judgment on defendant’s postconviction petition has been entered.

¶ 15 A defendant has a right to appeal “from a final judgment of the [trial] court in any post-conviction proceeding.” Ill. S. Ct. R. 651(a) (eff. Feb. 6, 2013). “The procedure for an

appeal in a post[conviction proceeding shall be in accordance with the rules governing criminal appeals, as near as may be.” Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013). Our jurisdiction is therefore limited to the review of appeals from final judgments, unless otherwise provided by supreme court rule. See, e.g., Ill. S. Ct. Rs. 604(e) through (g) (eff. July 1 2017).

¶ 16 Both defendant and the State agree allowing a motion to withdraw as counsel does not dispose of a defendant’s postconviction petition. See *People v. Jackson*, 2015 IL App (3d) 130575, ¶ 17, 58 N.E.3d 10 (“When the trial court grants a motion to withdraw, the court may appoint new counsel or allow the defendant to proceed *pro se*.”). Defendant asserts, however, the trial court believed it had “constructively” dismissed his postconviction petition and rendered a final judgment when it granted counsel’s motion to withdraw. Defendant suggests the situation presented is similar to the situation discussed in *People v. Greer*, 341 Ill. App. 3d 906, 793 N.E.2d 217 (2003), which he notes did not dismiss an appeal for a lack of jurisdiction after finding a postconviction petition was improperly dismissed *sua sponte*.

¶ 17 We find *Greer* to be distinguishable. In that case, the defendant appealed the trial court’s order “grant[ing] appointed counsel’s motion to withdraw *** and dismiss[ing] [the] defendant’s [postconviction] petition *sua sponte*.” (Emphasis added.) *Id.* at 908, 793 N.E.2d at 219. Conversely, here no order dismissed defendant’s postconviction petition. The trial court orally granted counsel’s motion to withdraw. The docket entry provides the court granted counsel’s motion to withdraw. Defendant’s notice of appeal was from the court’s order granting counsel’s motion to withdraw. While it appears the parties and the court operated under the mistaken impression the petition was dismissed, that misunderstanding does not transform the court’s order allowing counsel to withdraw into a final judgment for the purposes of appeal.

¶ 18 Because defendant has failed to appeal from a final order, we are without jurisdiction to review defendant's contentions of error regarding the trial court's (1) decision to allow his postconviction counsel to withdraw as appointed counsel, or (2) failure to review the merits of the State's pending motion to dismiss. Additionally, while "a void order may be attacked at any time, the issue of voidness must be raised in the context of a proceeding that is properly pending in the courts." *People v. Flowers*, 208 Ill. 2d 291, 308, 802 N.E.2d 1174, 1184 (2003). Because defendant has failed to appeal from a final order, any order directed at the purported void assessments in this case would itself be void and of no effect. Defendant may raise the void assessments argument in the trial court.

¶ 19 III. CONCLUSION

¶ 20 We dismiss this appeal and return the matter to the trial court.

¶ 21 Appeal dismissed.