

NOTICE

Decision filed 06/24/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-10-0003

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 04-CF-157
	)	
MONTE SHAWN GEARHART,	)	Honorable
	)	E. Dan Kimmel,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Justices Welch and Goldenhersh concurred in the judgment.

**R U L E 2 3 O R D E R**

*Held:* The order of the circuit court dismissing the defendant's postconviction petition is affirmed because the defendant was not eligible to seek relief under the Post-Conviction Hearing Act where he was not in custody or restrained in his liberty pursuant to the conviction he challenged.

On August 17, 2004, the defendant, Monte Shawn Gearhart, entered into a negotiated plea of guilty to the offenses of unlawful possession of a controlled substance and unlawful use of a weapon. In exchange for his plea of guilty, he was sentenced to a term of 24 months of probation. The defendant did not file a motion to vacate his guilty plea and did not file a direct appeal.

On October 15, 2009, the defendant filed a "Uniform Application for Post-Conviction Relief" (postconviction petition) pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)). The defendant attached a memorandum of law and his affidavit to his postconviction petition. In the postconviction petition and attachments, the defendant alleged that he was denied the effective assistance of counsel, that he had not

knowingly, intelligently, or voluntarily entered into the guilty plea, and that he was actually innocent of the charges supporting his criminal convictions. In his memorandum of law, the defendant stated that he was serving a federal prison sentence of life without parole at a United States Penitentiary in Kentucky. He sought to challenge the constitutional validity of the state conviction on the basis that it "was used by the Federal District Court to enhance" his sentence in federal court. He stated, "Courts have held that prisoners could collaterally attack prior criminal judgments used to enhance subsequent sentences." He alleged that he was challenging the validity of the Illinois conviction in order to seek a sentence modification in the federal district court.

The defendant argued that he was denied the effective assistance of counsel because his trial attorney had failed to adequately investigate and research his case before advising him to plead guilty. He claimed that even though he told his attorney that the methamphetamine found in his truck did not belong to him, his attorney continued to advise him to plead guilty in exchange for the negotiated sentence offer. The defendant asserted that the only reason he pled guilty was because his attorney "coerced" him to do so. He argued that, if his attorney had conducted a proper investigation, the outcome of the case would have been different. He also claimed that his attorney did not adequately explain that future sentences in other courts might be enhanced on the basis of this guilty plea.

The defendant argued that he did not knowingly, intelligently, or voluntarily enter his guilty plea because his attorney was ineffective. He claimed that he was actually innocent of the charges against him: "Assuming [the defendant] was in possession of a small amount of meth as stated in police reports—which [he] denies—that conduct, although in violation of Illinois laws, should not have precipitated a felony drug conviction." He claimed that the court knew he was a drug addict when it accepted his guilty plea and that there was no indication that he intended to distribute "meth." He argued that, instead of setting him up to

get life without parole, "the criminal justice system should have brought about treatment and rehabilitation."

The defendant did not allege in any of his postconviction pleadings or attachments that he continued to be subject to the sentence of 24 months of probation entered by the court on August 17, 2004. Additionally, there is nothing in the record to indicate that his sentence of probation was extended beyond August 17, 2006. There are no pleadings or orders in the trial court record between the defendant's 2004 sentence of probation and his 2009 postconviction petition.

On November 18, 2009, the trial court entered an order summarily dismissing the defendant's postconviction petition without granting him an evidentiary hearing. The trial court dismissed the postconviction petition "as failing to clearly set forth the respects in which [his] constitutional rights were violated." This appeal followed.

#### ANALYSIS

The defendant argues that he stated the gist of a claim of a constitutional violation that entitled him to second-stage postconviction proceedings. The State responds that the defendant cannot pursue postconviction action because he has completed his sentence and is no longer in custody or restrained in his liberty pursuant to the conviction he challenges in this postconviction petition. We agree with the State.

After a defendant initially files a petition pursuant to the Act, the trial court reviews the allegations in the petition to determine if the defendant has presented the gist of a constitutional claim. *People v. Frison*, 365 Ill. App. 3d 932, 933 (2006).

"Proceedings under the \*\*\* Act are a collateral attack on the judgment rather than a direct appeal. [Citation.] During postconviction proceedings, the burden is on the defendant to make a substantial showing of a deprivation of a constitutional right. [Citation.] Defendant is entitled to an evidentiary hearing only if [he] meets this

burden; the circuit court accepts as true all well-pleaded facts in the petition and supporting affidavits. [Citation.] We review *de novo* the circuit court's dismissal of a postconviction petition without an evidentiary hearing." *People v. Shum*, 207 Ill. 2d 47, 56-57 (2003).

In *People v. Mrugalla*, the defendant filed a petition for postconviction relief five years after his discharge from probation, alleging ineffective assistance of counsel and an involuntary guilty plea as grounds for the petition. *People v. Mrugalla*, 371 Ill. App. 3d 544, 545 (2007). The trial court in *Mrugalla* dismissed the postconviction petition as "patently without merit because the defendant had served his sentence and was not imprisoned as a result of his conviction." *Mrugalla*, 371 Ill. App. 3d at 545. The appellate court affirmed, stating that the Act is not available to persons who have served their sentences but who wish to purge their records of past convictions. *Id.*

In *People v. Carrera*, the Illinois Supreme Court held that a defendant who had fully served his sentence of probation was not imprisoned in the penitentiary as required in order to institute a proceeding for postconviction relief under section 122-1 of the Act, even though he was subject to deportation proceedings by the Immigration and Naturalization Service (INS). *People v. Carrera*, 239 Ill. 2d 241, 258 (2010). In *Carrera*, the supreme court found the reasoning of the *Mrugalla* court valid. *Carrera*, 239 Ill. 2d at 257. The court noted that the current constraints on the defendant's liberty were imposed by the INS but that the former constraints on his liberty due to his criminal conviction had expired upon the successful completion of his probation, and as a result, he was "no longer eligible to seek relief under the Act." *Id.*

The same is true in the case at bar. The defendant was sentenced to 24 months of probation, which expired in 2006. The defendant has not alleged that his term of probation was extended or that it was revoked, nor has he cited to anything in the record to show that

his sentence of probation was in effect when he filed his petition for postconviction relief. Accordingly, the defendant has failed to satisfy his burden to show that he is entitled to relief under the Act. *Shum*, 207 Ill. 2d at 57. The trial court properly dismissed the defendant's postconviction petition because the defendant was no longer eligible to seek relief under the Act. Even accepting as true all of the defendant's factual allegations, his postconviction petition was patently without merit.

#### CONCLUSION

For all the reasons stated, we affirm the trial court's dismissal of the defendant's postconviction petition.

Affirmed.