

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) 100746-U

Filed 2/17/12

NO. 4-10-0746

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

| | | |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Vermilion County |
| MICHAEL J. MOORE, |) | No. 03CF205 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Michael D. Clary, |
| |) | Judge Presiding. |

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The court granted appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirmed the trial court's dismissal of defendant's section 2-1401 petition (735 ILCS 5/2-1401 (West 2010)).

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal because no meritorious issues can be raised in this case. For the following reasons, we grant OSAD's motion and affirm the trial court.

¶ 3 I. BACKGROUND

¶ 4 In April 2003, the State charged defendant, Michael J. Moore, in Vermilion County case No. 03-CF-205 with possession of a controlled substance (cocaine) (count I) (720 ILCS 570/402 (West 2002)). On January 28, 2004, the State filed an amended information adding a charge of possession of a controlled substance with intent to deliver (count II) (720

ILCS 570/401 (West 2002)). At the same time, defendant faced unrelated charges in federal court for possession of five grams or more of cocaine base with intent to distribute (21 U.S.C. § 841 (2000)). On August 12, 2004, the district court for the Central District of Illinois sentenced defendant to 140 months' imprisonment and later reduced that sentence to 120 months (defendant's sentence was reduced as a result of a subsequent lowering of the guideline sentencing range).

¶ 5 On August 16, 2004, defendant entered into a plea agreement with the State in case No. 03-CF-205, and the trial court accepted that agreement. Defendant pleaded guilty to count II in exchange for the dismissal of count I and a sentence of four years' imprisonment in the Illinois Department of Corrections (DOC), to be served concurrently with his federal sentence. DOC took defendant into custody and he served his sentence from August 23, 2004, to February 16, 2006 (18 months).

¶ 6 On February 16, 2006, the State released defendant into federal custody to serve his federal sentence. The Bureau of Prisons (Bureau) prepared a sentence computation and awarded defendant one day of prior-custody credit for his state arrest on May 30, 2003. Defendant requested credit toward his federal sentence for the 18 months he spent in state custody. The Bureau sent correspondence to the federal district judge who imposed defendant's sentence and inquired as to whether defendant's state and federal sentences were to run concurrently. The federal district judge replied, finding the state and federal sentences could not run concurrently because the state sentence was imposed *after* the federal sentence and defendant therefore did not meet the federal statutory requirements for concurrent sentencing. See 18 U.S.C. § 3585(b) (2006). The Bureau also reviewed defendant's file pursuant to title 18, section

3621(b), of the United States Code and found defendant was not eligible for concurrent sentencing (18 U.S.C. § 3621(b) (2006)).

¶ 7 Defendant challenged the decision of the Bureau and the federal district judge by filing a petition for writ of *habeas corpus* in federal district court. On March 1, 2010, the district court issued an order denying defendant's petition.

¶ 8 On June 8, 2010, defendant filed a "*pro se* petition for a writ of error *coram nobis*" in Vermilion County. At this time, defendant had already served his state sentence. Defendant asserted the Bureau refused to honor the concurrent sentence the trial court ordered in case No. 03-CF-205. Defendant further alleged his plea was the result of an "error of fact" because the state and federal sentences were incapable of satisfying the requirements of federal guidelines for concurrent sentencing, which therefore rendered his plea involuntary. Defendant requested the trial court impose a new sentence to allow him to receive credit against his federal sentence for the time spent in state prison.

¶ 9 On September 3, 2010, the trial court denied defendant's motion, finding neither the State nor the trial court acted wrongfully or in any way prevented the plea from being carried out. The trial court also found defendant provided no authoritative basis for the relief he requested and the trial court lacked jurisdiction to grant such relief. Defendant filed a notice of appeal and counsel was appointed to represent him on appeal.

¶ 10 Counsel filed a motion to withdraw accompanied by a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Our records show defendant was provided notice of the motion. On our own motion, we gave defendant leave to file additional points and authorities in his behalf on or before October 12, 2011, and he has failed to do so.

After examining the record in accordance with our duties under *Finley*, we grant OSAD's motion to withdraw as counsel on appeal and affirm the trial court's judgment.

¶ 11

II. ANALYSIS

¶ 12 OSAD suggests two potential issues for review in its motion to withdraw. The first issue is whether this court has jurisdiction to review dismissal of the petition for a writ of error *coram nobis*. Then, if jurisdiction is present, the question is whether defendant's sentence in case No. 03-CF-205 can be modified to achieve the original intent of the plea agreement—to have defendant serve his state sentence concurrently with his federal sentence.

¶ 13

A. Writ of error *Coram Nobis*

¶ 14 The writ of error *coram nobis* has been abolished and incorporated into section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). "Section 2-1401 is intended to correct errors of fact, unknown to the petitioner and the court at the time of the judgment, which would have prevented the rendition of the judgment had they been known." *People v. Muniz*, 386 Ill. App. 3d 890, 893, 899 N.E.2d 428, 431 (2008). To obtain relief under section 2-1401 a defendant must file a petition no later than two years after the entry of judgment or order. 735 ILCS 5/2-1401(c) (West 2010). Here, the State never raised the statute of limitations in the trial court and thus there is no bar based on timeliness. See *People v. Pinkonsly*, 207 Ill. 2d 555, 562-63, 802 N.E.2d 236, 241 (2003).

¶ 15

Defendant was released from state custody on February 16, 2006, into the custody of the Bureau. On December 16, 2008, in response to defendant's and the Bureau's request, the federal district judge who sentenced defendant informed defendant he would not receive credit toward his federal sentence for the 18 months he spent in state prison. The district court found

the sentences would not run concurrently because the state sentence was imposed *after* the federal sentence and defendant therefore did not meet the federal statutory requirements for concurrent sentencing. See 18 U.S.C. § 3585(b) (2006). The Bureau also reviewed defendant's file pursuant to federal law and found defendant was not eligible for concurrent sentencing. See 18 U.S.C. § 3621(b) (2006). At this time, defendant became aware he would not be serving concurrent sentences. Defendant then filed a petition for a writ of *habeas corpus* in the district court for the Central District of Illinois, which the district court denied. After exhausting these remedies, defendant filed his petition for writ of error *coram nobis*.

¶ 16 B. Defendant's Request for Credit Against Federal Sentence

¶ 17 Defendant asserts his plea was involuntary because it was an "error of fact" for the prosecution to present as an inducement and stipulation to the plea agreement that he could serve his state sentence concurrently with his federal sentence. From this, defendant concludes his involuntary plea renders his resulting state sentence void and such sentence should be vacated unless defendant is awarded credit toward his federal sentence. However, a sentence is only void when it violates the Constitution or statutory requirements. See *People v. Wilson*, 181 Ill. 2d 409, 414, 692 N.E.2d 1107, 1109 (1998). Defendant's sentence was lawfully imposed and not void.

¶ 18 The trial court entered an order providing for defendant to serve his state and federal sentences concurrently. Had defendant been remanded to serve his federal sentence first, the state sentence would have been served concurrently. See 730 ILCS 5/5-8-5 (West 2004). The record does not disclose why defendant, who was sentenced first on the federal charge, was initially remanded to state prison on the subsequently imposed state sentence. However, this

court is unable to provide any relief to defendant. The only request defendant has made in his petition is to have the time he spent in state prison credited toward his federal sentence. He suggests the four-year sentence could be vacated and reimposed as "time served of one day." However, such a sentence is not authorized by statute and this court is without authority to impose a sentence that does not conform with statutory guidelines. *People v. White*, 2011 IL 109616, ¶ 20, 953 N.E.2d 398, 403. Moreover, this court has no authority to order the Bureau to give defendant credit against his federal sentence.

¶ 19 When defendant was originally sentenced in federal court, the order was silent as to whether defendant would serve his federal sentence concurrently with any other sentence. See 18 U.S.C. § 3584(a) (2000) ("Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently."). Further, the Bureau addressed the district court by letter at defendant's request and inquired as to whether defendant was entitled to concurrent sentences. The district court found defendant did not qualify for concurrent sentencing pursuant to federal law because it lacked the authority to order a federal sentence to run concurrently with a state sentence not yet imposed, and further found his federal sentence commenced when he was turned over to federal authorities on February 16, 2006. See 18 U.S.C. § 3585(a) (2006). Just as the district court lacked authority, this court has no authority to amend the federal sentence imposed prior to the state sentence. Nor does it have the authority to direct the Bureau to disregard federal guidelines on concurrent sentencing. The trial court properly denied defendant's writ of error *coram nobis*. We find there are no meritorious issues for review and grant OSAD's motion to withdraw.

¶ 20

C. Mootness

¶ 21

We further note defendant's case is moot. The Illinois Supreme Court has held "[a] case is moot if the issues involved in the trial court have ceased to exist because intervening events have made it impossible for the reviewing court to grant effectual relief to the complaining party." *People v. Roberson*, 212 Ill. 2d 430, 435, 819 N.E.2d 761, 764 (2004). Further, a defendant's challenge to his sentence is moot "where defendant has completed serving his sentence." *People v. McNulty*, 383 Ill. App. 3d 553, 558, 892 N.E.2d 73, 77 (2008).

¶ 22

Defendant has completed his state sentence. Defendant is asking this court to vacate his sentence and impose a term of one day so he may receive credit toward his federal sentence for the 18 months he spent in state prison. However, as stated above, this court does not have authority to impose such a sentence. Further, granting defendant's request would not provide effectual relief, as he has already served his sentence, and the Bureau and the federal district court have denied defendant's request for his state and federal sentences to run concurrently. Accordingly, the case is moot.

¶ 23

III. CONCLUSION

¶ 24

After reviewing the record consistent with our responsibilities under *Finley*, we agree with OSAD no colorable argument can be made in this appeal, and we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 25

Affirmed.