

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).

2013 IL App (4th) 120611-U
NO. 4-12-0611
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
September 23, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
JAMES L. ROGERS,)	No. 10CF2145
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Because the allegation in defendant's petition for postconviction relief was frivolous and patently without merit, the circuit court was correct to summarily dismiss the petition.

¶ 2 Defendant, James L. Rogers, appeals from the first-stage dismissal of his *pro se* petition for postconviction relief. The office of the State Appellate Defender (OSAD) moves to withdraw from representing defendant because OSAD does not believe that any reasonable argument could be made in support of this appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987). We notified defendant of his right to respond, by a certain date, with additional points and authorities, but he did not do so.

¶ 3 In our *de novo* review, we agree with OSAD that an appeal in this case would be frivolous. Therefore, we grant OSAD's motion to withdraw, and we affirm the circuit court's

judgment.

¶ 4

I. BACKGROUND

¶ 5 In December 2011, defendant and the State entered into a fully negotiated plea agreement in which defendant pleaded guilty to theft with a prior theft conviction, a Class 4 felony (720 ILCS 5/16-1(b)(2) (West 2010)), in exchange for the State's recommendation of a five-year prison sentence. At the plea hearing, the trial court properly admonished defendant of the potential sentencing range of up to six years in prison. Defendant indicated he understood the court's admonishments. Defendant said he had not been promised or threatened in any way related to the entry of his plea. The court accepted the following factual basis: On December 25, 2010, police were called to an apartment in Champaign for a burglary in progress, where the occupant caught a suspect stealing his X-box game console. A canine officer arrived and tracked the scent of the suspect from the victim's apartment to a nearby apartment, where the game console, nine Rolling Rock beers, and defendant were found. During a show up, the victim identified the defendant as the intruder he saw in his home. He also identified the found X-box console and the beers as his own. *People v. Rogers*, No. 4-12-0131 (April 24, 2012 (dismissing appeal on appellant's motion)).

¶ 6

Defendant filed a direct appeal, but his appeal was dismissed in April 2012. In May 2012, defendant filed a *pro se* petition for postconviction relief, alleging his trial counsel rendered ineffective assistance by coercing him into pleading guilty and allowing him to agree to an extended-term sentence when he was not eligible for the same. Defendant claimed his prior 1988 theft conviction (the conviction used to enhance the severity of the offense from a misdemeanor to a Class 4 felony) in Champaign County case No. 88-CF-1566 occurred more than 10 years prior and could not be used as an enhancement offense. Two weeks after defendant's petition was filed, the circuit

court summarily dismissed the petition as frivolous and patently without merit. This appeal followed.

¶ 7

II. ANALYSIS

¶ 8 In a memorandum in support of its motion to withdraw, OSAD presented potential issues for appeal based upon a review of the record and defendant's stated allegations in his postconviction petition. After our review of counsel's motion, memorandum, and the record in this case, we agree with OSAD that no meritorious issues can be raised in this appeal.

¶ 9 OSAD considered whether defendant's sentence was authorized under the applicable statutory sentencing scheme. Defendant agreed to plead guilty to theft with a prior theft conviction. At the plea hearing, the trial court asked defendant if he understood the nature of the charge and whether he understood that his prior theft conviction in Champaign County case No. 88-CF-1566 was to be used to enhance his offense from a misdemeanor to a Class 4 felony. See 720 ILCS 5/16-1(b)(2) (West 2010). Defendant said he understood. The court continued with the admonishments regarding the potential range of punishment for this offense. Defendant again stated he understood that a Class 4 felony was punishable by a prison sentence of between one to three years in prison. See 730 ILCS 5/5-4.5-45(a) (West 2010). Defendant also said he understood an extended term would "take [him] out to six years." 730 ILCS 5/5-4.5-45(a) (West 2010).

¶ 10 Prior to the trial court's imposition of defendant's sentence, the parties agreed to waive the preparation of a presentence investigation report. However, the prosecutor listed defendant's prior convictions on the record in open court. This criminal history included a 1999 Class X armed robbery in Champaign County case No. 99-CF-170, for which defendant was sentenced to 15 years in prison. (We note OSAD refers to this conviction as a 1998 armed robbery in McLean County.)

The Illinois Department of Correction's official website indicates defendant's 15-year sentence was discharged. However, we are unable to discern how long defendant served or his release date, it is reasonable to assume he would have been required to serve at least 50% of his sentence.

¶ 11 Section 5-5-3.2(b)(1) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(b)(1) (West 2010)) provides that a defendant is subject to an extended-term sentence as follows:

"When a defendant is convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, *excluding time spent in custody*, and such charges are separately brought and tried and arise out of different series of acts[.]"

(Emphasis added.) 730 ILCS 5/5-5-3.2(b)(1) (West 2010).

¶ 12 We conclude that defendant's 1999 armed robbery conviction in Champaign County case No. 99-CF-170 was a qualifying offense (after excluding the time he spent in custody) pursuant to the enhanced-sentencing provisions set forth above. Due to this qualifying offense, defendant was indeed subject to an enhanced sentence upon entry of guilty plea in this case. Thus, defendant's five-year sentence was authorized under the applicable sentencing scheme. Since two different and separate convictions were relied upon to enhance the classification of the defendant's offense and to increase the length of his prison term, the trial court did not err in imposing the extended-term sentence and defendant's sentence is not void. See *People v. Hicks*, 164 Ill. 2d 218, 228 (1995).

¶ 13 Because we find defendant's sentence was not void and he was subject to an extended-term sentence, any claim of ineffective assistance of counsel would be without merit. We

agree with OSAD and find no indication that trial counsel's performance was deficient or resulted in prejudice to defendant. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We agree with OSAD's assessment of this case.

¶ 14

III. CONCLUSION

¶ 15 For the foregoing reasons, we grant OSAD's motion to withdraw, and we affirm the circuit court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 16 Affirmed.