

**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).

2016 IL App (4th) 140411-U

NO. 4-14-0411

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
RICHARD L. HOOD,	)	No. 89CF142
Defendant-Appellant.	)	
	)	Honorable
	)	William O. Mays,
	)	Judge Presiding.

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JUSTICE STEIGMANN delivered the judgment of the court.  
Presiding Justice Knecht and Justice Pope concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed the trial court's dismissal of defendant's motion for leave to file a successive petition for postconviction relief because defendant was not "imprisoned in the penitentiary," as required by the Post-Conviction Hearing Act (725 ILCS 5/122-1(a) (West 2014)).

¶ 2 In May 1989, defendant, Richard L. Hood, pleaded guilty to aggravated battery and was sentenced to 30 months of probation. In January 1990, the trial court granted the State's motion to revoke defendant's probation and sentenced him to three years in prison. In April 2014, defendant *pro se* filed a motion for leave to file a successive postconviction petition, arguing that he was not admonished that his sentence of probation might include jail time. The trial court denied defendant's motion. Defendant appeals.

¶ 3 On appeal, appointed counsel has filed a motion to withdraw as counsel for defendant because no colorable argument of error exists on appeal. We agree. We grant counsel's motion to withdraw and affirm the judgment of the trial court.

¶ 4

## I. BACKGROUND

¶ 5 In May 1989, defendant, pleaded guilty to aggravated battery (Ill. Rev. Stat. 1989, ch. 38, ¶ 12-4(a)). The trial court sentenced him to 30 months of probation, which included conditions that defendant serve 6 months in jail and 12 months of periodic imprisonment. In June 1989, defendant *pro se* filed a postsentencing motion seeking to reduce his sentence. In July 1989, before the court addressed his postsentencing motion, defendant filed a notice of appeal and, later that month, an amended notice of appeal. In August 1989, this court dismissed that appeal (case No. 4-89-0608) and remanded with directions for the trial court to rule on any pending postsentencing motions. *People v. Hood*, No. 4-89-0608 (Aug. 14, 1989) (discussed on defendant's motion and remanded for ruling on all pending sentencing motions).

¶ 6 On remand, in October 1989, the trial court denied defendant's amended postsentencing motion (which he filed in July 1989 while his appeal was pending). After denying the motion, the court admonished defendant that he had 30 days in which to appeal that decision, and if he could not afford an attorney on appeal, one would be appointed for him. Defendant stated his intent to appeal. The court directed the clerk to file a notice of appeal and appointed the appellate defender to represent defendant on appeal (case No. 4-89-0814).

¶ 7 In January 1990, while defendant's appeal (case No. 4-89-0814) was pending, the State filed a motion to revoke defendant's probation. Later that month, the trial court granted the State's motion to revoke and resentenced defendant to three years in prison. Defendant appealed, (No. 4-90-0118).

¶ 8 In April 1990, this court granted, over defendant's objection, the State's motion to dismiss defendant's pending appeal (case No. 4-89-0814). *People v. Hood*, No. 4-89-0814 (Apr. 4, 1990) (appeal dismissed over objection on State's motion).

¶ 9 On October 31, 1990, this court affirmed the trial court's revocation of defendant's probation and resentenced him to three years in prison but remanded for a determination of sentence credit to which he was due. *People v. Hood*, 204 Ill. App. 3d 895, 562 N.E.2d 394 (1990).

¶ 10 In November 1993, defendant *pro se* filed a petition for postconviction relief (ILCS 5/122-1 (West 1992)), arguing that, after defendant pleaded guilty, the trial court failed to admonish him of his appeal rights pursuant to Illinois Supreme Court Rule 605(b) (eff. July 1, 1975). Later that month, the court *sua sponte* "denied" that petition, finding that it was not timely filed. (The record does not contain any documentation establishing that defendant appealed the court's decision.)

¶ 11 In January 1994, defendant *pro se* filed a motion to vacate guilty plea, which the trial court denied the following day. Defendant appealed but later dismissed his appeal. *People v. Hood*, No. 4-94-0085 (Dec. 21, 1994) (appeal dismissed on defendant's motion).

¶ 12 In September 1994, defendant *pro se* filed another "petition for post conviction relief," arguing, in pertinent part, that the trial court "failed to inform [defendant] of [his] appeal rights." The court found that "this cause is now on appeal from prior court proceedings." The court therefore ordered defendant's petition "denied for lack of jurisdiction." (The record does not contain documentation establishing the pending appeal referenced by the court.)

¶ 13 Examination of our records show on November 28, 1994, defendant *pro se* filed a postconviction petition in an unrelated case: Adams County case No. 91-CF-387, which the trial court summarily dismissed in January 1995. Defendant appealed and this court affirmed, noting that defendant's *pro se* postconviction petition "raised a number of issues concerning his conviction in Adams County case No. 89-CF-142, not the present case, which we need not consider." *People v. Hood*, No. 4-95-0084, slip order at 2 (May 16, 1996) (unpublished order under Su-

preme Court Rule 23). (Defendant appealed several judgments in No. 91-CF-387 as well as in Adams County case No. 91-CF-286.)

¶ 14 In April 2014, defendant filed a motion for leave to file a successive petition for postconviction relief. 725 ILCS 5/122-1(f) (West 2014). In it, defendant argued that he was not admonished, prior to pleading guilty, that the trial court had discretion to include jail time as part of his sentence of probation. Defendant argued further that as a result of the lack of admonishments, his guilty plea was not knowing and voluntary. (Although defendant cites Rule 605(b), the substance of his argument appears to rely on Illinois Supreme Court Rule 604(d) (eff. July 1, 1975).) Defendant also argued that the term of periodic imprisonment the court imposed violated section 5-7-1 of the Unified Code of Corrections (Ill. Rev. Stat. 1989, ch. 38, ¶ 1005-7-1) and was therefore void. As a result, defendant argued that the court should either (1) vacate his original guilty plea or (2) allow him to file a motion to withdraw that plea.

¶ 15 In May 2014, the trial court denied defendant's motion for leave to file a successive petition. The court found that defendant's motion failed to state any grounds for relief that had not been raised in previous collateral filings or appeals. In addition, the court found that the issues raised in defendant's motion were "frivolous and patently without merit."

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant's appointed counsel filed a motion requesting leave to withdraw because no colorable argument of error exists on appeal. On our own motion, we granted defendant leave to file additional points and authorities by March 3, 2016. He filed none. We agree with defense counsel. We therefore grant counsel's motion to withdraw and affirm the trial court's denial of defendant's motion for leave to file a successive postconviction petition.

¶ 19 Only a person "imprisoned in the penitentiary" may institute a proceeding under the Post-Conviction Hearing Act (725 ILCS 5/122-1(a) (West 2014)). The person must be in prison "for the offense he is purporting to challenge," not for a different offense. *People v. West*, 145 Ill. 2d 517, 519, 584 N.E.2d 124, 125 (1991).

¶ 20 In this case, defendant filed his motion for leave to file a successive petition in April 2014, seeking to challenge his 1989 conviction and sentence for aggravated battery. In May 1989, he pleaded guilty to that offense and received 30 months of probation, which included 6 months in jail and 12 months of periodic imprisonment. In January 1990, the trial court granted the State's motion to revoke his probation and resented him to three years in prison. When defendant filed his motion for leave to file a successive postconviction petition, he was no longer imprisoned in the penitentiary for the aggravated battery conviction he sought to challenge. Instead, he was imprisoned for other offenses committed after his release from his aggravated battery sentence. As a result, the trial court was correct to deny defendant's motion.

¶ 21 Further, a motion for leave to file a successive petition under the Act will be granted "only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2014). Defendant's motion for leave does not argue that cause and prejudice exist. As a result, the trial court properly denied defendant's motion for leave to file a successive postconviction petition.

¶ 22 Because no colorable claim of error exists on appeal, we grant counsel's motion to withdraw and affirm the trial court's judgment.

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, the trial court's judgment is affirmed.

¶ 25

Affirmed.