

NOTICE
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2012 IL App (4th) 100464-U

Filed 3/2/12

NO. 4-10-0464

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
DUWAYNE M. TAYLOR,)	No. 06CF406
Defendant-Appellant.)	
)	Honorable
)	Scott B. Diamond,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* The office of the State Appellate Defender's motion to withdraw as counsel on appeal is granted and the trial court's judgment is affirmed as defendant can raise no meritorious issues in this appeal.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 11, 2006, defendant, Duwayne Taylor, pleaded guilty to criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2008)) and aggravated battery (720 ILCS 5/12-4(b)(10) (West 2008)) (This section was renumbered by Pub. Act 96-1551, § 5 (eff. July 1, 2011) (2010 Ill. Laws 7818, 7829-30), and aggravated battery may now be found at 720 ILCS 5/12-

3.05). In exchange for his guilty plea, defendant was sentenced to 30 months' probation. He did not file a direct appeal. He was discharged from probation on March 5, 2009.

¶ 5 On October 7, 2008, defendant was charged with possession of a firearm by a convicted felon in violation of section 922(g)(1) of title 18 of the United States Code (18 U.S.C. § 922(g)(1) (2006)). He was sentenced to 15 years in federal prison. Defendant's sentence was enhanced based on his prior convictions in the instant case.

¶ 6 On March 17, 2010, defendant filed a *pro se* petition entitled "PETITION FOR POST-CONVICTION RELIEF CORAM NOBIS—NUNC PRO TUNC UNDER 28 U.S.C. § 1651 THE ALL WRITS ACT." However, in the body of the petition, he asserted that the petition was pursuant to the "Illinois Compiled Statutes governing post-conviction relief." Defendant alleged that the trial court erred by failing to properly admonish him regarding his guilty plea. Specifically, defendant argued that the court should have admonished him of the collateral consequence that his conviction in the instant case could be used to enhance future sentences.

¶ 7 On May 25, 2010, the trial court dismissed defendant's postconviction petition as frivolous and without merit. The court further determined that the petition was not properly brought, because at the time the petition was filed defendant was not in prison or on a term of mandatory supervised release.

¶ 8 On June 18, 2010, defendant filed a notice of appeal. In the notice, defendant argued that the petition "was a true writ of error coram nobis under 28 U.S.C. § 1651" and the appeal should be held in abeyance pending a ruling on the merits of the petition. The trial court denied defendant's motion to hold the appeal in abeyance and stated that the writ of *coram nobis* had been superceded by section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401

(West 2008)).

¶ 9 This appeal followed. OSAD was appointed to serve as defendant's attorney on appeal.

¶ 10 In May 2011, OSAD moved to withdraw, attaching to its motion a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by June 23, 2011. Defendant has done so, and the State has responded. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 11 II. ANALYSIS

¶ 12 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief, because, at the time defendant's petition was filed, defendant was not "imprisoned in the penitentiary" as required under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(a) (West 2008)). We agree.

¶ 13 As "the General Assembly abolished the common law writ system and replaced it with the statutory postjudgment petition" established in section 2-1401, we consider defendant's petition as a petition under that statute. *People v. Vincent*, 226 Ill. 2d 1, 7, 871 N.E.2d 17, 22 (2007). "A section 2-1401 petition for relief from a final judgment is the forum in a criminal case in which to correct all errors of fact occurring in the prosecution of a cause, unknown to petitioner and the court at the time judgment was entered, which, if then known, would have prevented its rendition." *People v. Mahaffey*, 194 Ill. 2d 154, 181, 742 N.E.2d 251, 266 (2000).

¶ 14 To invoke postconviction relief, the Act requires that a defendant be "imprisoned

in the penitentiary." *People v. West*, 145 Ill. 2d 517, 519, 584 N.E.2d 124, 125 (1991); 725 ILCS 5/122-1 (West 2008). However, actual incarceration is not a strict prerequisite. The Act has been held to include defendants who have been released from incarceration after the timely filing of their petition, released on appeal bond following conviction, released under mandatory supervision, and sentenced to probation. *West*, 145 Ill. 2d at 519, 584 N.E.2d at 125.

¶ 15 The instant case is analogous to *West*. In *West*, the defendant was convicted of voluntary manslaughter in Illinois and completed his sentence for that offense. *West*, 145 Ill. 2d at 518, 584 N.E.2d at 124. An Arizona court later used the defendant's Illinois conviction as an aggravating factor to sentence him to death for murder. *West*, 145 Ill. 2d at 518, 584 N.E.2d at 124. The defendant sought to attack his Illinois conviction under the Act in order to challenge his Arizona sentence. *West*, 145 Ill. 2d at 518, 584 N.E.2d at 124. The Illinois Supreme Court held that the defendant's incarceration in Arizona for a separate conviction was not imprisonment within the meaning of the Act. "The person must be in prison for the offense he is purporting to challenge." *West*, 145 Ill. 2d at 519, 584 N.E.2d at 125.

¶ 16 At the time defendant's postconviction petition was filed, he was not in prison or released on bond for the offense he was purporting to challenge. Defendant was not on mandatory supervised release, having never been sentenced to prison in the instant case. Last, defendant was not serving a term of probation. Defendant's sentence of 30 months' probation was discharged more than a year before his postconviction petition was filed. As a result, postconviction relief is unavailable to defendant.

¶ 17 Our determination that defendant is not entitled to postconviction relief under the Act precludes any consideration of the merits of defendant's petition. " 'A conviction's possible

enhancing effect on subsequent sentences has been held to be merely a collateral consequence of a guilty plea, about which a defendant need not be advised***.' " *In re E.V.*, 298 Ill. App. 3d 951, 960, 700 N.E.2d 175, 181 (1998) (quoting *King v. Dutton*, 17 F.3d 151, 153-54 (6th Cir. 1994)).

¶ 18

III. CONCLUSION

¶ 19

For the foregoing reasons, we conclude no meritorious issues can be raised on appeal in this case and, accordingly, we grant OSAD's motion to withdraw and affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 20

Affirmed.