

NOTICE

Decision filed 03/15/16. 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.

2016 IL App (5th) 150213-U

NO. 5-15-0213

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,	)	Madison County.
	)	
v.	)	No. 77-CF-174
	)	
LARRY PAUL MOORE,	)	Honorable
	)	Clarence W. Harrison II,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Justices Chapman and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court did not err in summarily dismissing the defendant's postconviction petition, for the defendant clearly lacked standing to seek postconviction relief, and any argument to the contrary would lack merit, and therefore defendant's court-appointed counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 2 The defendant, Larry Paul Moore, appeals from the circuit court's summary dismissal of his petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). The defendant's court-appointed attorney has concluded that no meritorious issue can be raised in this appeal. On that ground, he has filed with this court a motion for leave to withdraw as counsel, along with a supporting brief. See

*Pennsylvania v. Finley*, 481 U.S. 551 (1987). (In his motion to withdraw, counsel mistakenly cited to *Anders v. California*, 386 U.S. 738 (1967), which concerns motions to withdraw as counsel in direct appeals, but this mistake was harmless because counsel met his obligations under *Finley*.) The defendant has filed a response to counsel's motion to withdraw. This court has examined counsel's motion, the defendant's response, and the entire record on appeal. This court has concluded that the defendant lacked standing to seek relief under the Post-Conviction Hearing Act, his postconviction petition was properly dismissed, and any argument to the contrary would lack merit. Accordingly, appellate counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 3

#### BACKGROUND

¶ 4 In June 1977, a jury found the defendant guilty of rape (Ill. Rev. Stat. 1975, ch. 38, ¶ 11-1(a)), armed robbery (Ill. Rev. Stat. 1975, ch. 38, ¶ 18-2(a)), and theft over \$150 (Ill. Rev. Stat. 1975, ch. 38, ¶ 16-1(a)). In July 1977, after a hearing in aggravation and mitigation, the circuit court sentenced the defendant to concurrent prison terms of 40 to 80 years for rape, 40 to 80 years for armed robbery, and 3 to 9 years for theft over \$150. This court affirmed the judgment of conviction. *People v. Moore*, 73 Ill. App. 3d 510 (1979).

¶ 5 On May 31, 2011, the State filed in the circuit court a petition to have the defendant committed under the Sexually Violent Persons Commitment Act (725 ILCS 207/1 *et seq.* (West 2010)). The petition alleged that the defendant was still serving his prison sentence but was scheduled to be discharged on June 10, 2011. Also on May 31,

2011, the circuit court ordered the Department of Corrections (DOC) to detain the defendant and to transfer him to a facility approved by the Department of Human Services (DHS) upon completion of his prison sentence. See 725 ILCS 207/30(a) (West 2010).

¶ 6 On June 2, 2011, the court found probable cause to believe that the defendant was sexually violent. The court ordered that custody of the defendant be transferred to DHS upon completion of the defendant's prison sentence and that the defendant be detained and evaluated in a DHS-approved facility. See 725 ILCS 207/30 (West 2010).

¶ 7 In March 2013, the defendant filed a *pro se* motion to dismiss the commitment petition. The merits of that motion to dismiss are not pertinent to this appeal. In April 2013, the court held a hearing on the motion to dismiss. The defendant represented to the court that he had been discharged from DOC on June 10, 2011. After considering the merits of the defendant's motion, the court denied the motion.

¶ 8 The DOC's website corroborates the defendant's representation that he was discharged from the DOC on June 10, 2011; the website indicates that the defendant was "release[d] to DHS supervision" on that date. The website also indicates that the defendant's "projected discharge date" is "to be determined." This court may take judicial notice of information on the DOC's website. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 8. This court presumes that the to-be-determined "projected discharge date" is the date that the DOC will eventually calculate as the date it expects the defendant to complete his term of parole.

¶ 9 On March 9, 2015, the defendant filed a *pro se* petition for relief under the Post-Coviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). This postconviction petition is the subject of the instant appeal. Relying on the decision in *People v. Whitfield*, 217 Ill. 2d 177 (2005), the defendant claimed that he suffered a constitutional deprivation when a term of parole was added to his prison sentences despite the circuit court's failure to admonish him, at the 1977 sentencing hearing, that he would be obliged to serve a parole term after completing his prison term. For relief, the defendant prayed that the court order an immediate end to his parole.

¶ 10 On March 19, 2015, in a written order, the circuit court "denied as moot" the defendant's postconviction petition. The court stated that the defendant had been discharged to the DHS, was being detained as a sexually violent person, and was no longer on parole. The court reasoned that because Moore was no longer on parole, his postconviction petition was "moot as untimely."

¶ 11 Subsequently, the defendant filed a *pro se* motion to reconsider the denial of his postconviction petition. The circuit court denied the motion to reconsider. The defendant perfected this appeal.

¶ 12 The record on appeal includes the record of the case brought against the defendant under the Sexually Violent Persons Commitment Act, which is Madison County case No. 11-MR-246. This record shows that as of August 11, 2015 (the date of the last docket entry), the circuit court had not yet held a trial to determine whether the defendant is in fact a sexually violent person. See 725 ILCS 207/35(a) (West 2012). In other words, the commitment petition remained pending in the circuit court as of August 11, 2015.

¶ 14 The circuit court characterized its order in this case as a "denial" of the defendant's postconviction petition. Actually, it was a summary dismissal of the petition. Appellate review of the summary dismissal of a postconviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). This court reviews the circuit court's judgment, not its reasoning. *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010). The key question on appeal is whether the postconviction petition "had no arguable basis either in law or in fact, *i.e.*, whether it was based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 15 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a method by which a criminal defendant may collaterally attack his conviction or sentence. *People v. Jones*, 211 Ill. 2d 140, 143 (2004). In order to secure postconviction relief, a defendant must demonstrate a substantial constitutional deprivation in the proceedings that resulted in the conviction or sentence. *Id.* at 143-44. A defendant institutes a postconviction proceeding by filing a petition in the circuit court. 725 ILCS 5/122-1(b) (West 2012). Once the petition has been filed, the circuit court has 90 days in which to review the petition and to enter an order thereon. 725 ILCS 5/122-2.1(a) (West 2012). If the court determines that the petition is frivolous or patently without merit, it must summarily dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 16 Section 122-1(a)(1) of the Post-Conviction Hearing Act specifies who has standing to file a petition for relief under the Act: "Any person imprisoned in the

penitentiary may institute a proceeding \*\*\*." 725 ILCS 5/122-1(a)(1) (West 2010). For purposes of section 122-1(a)(1), a person is "imprisoned in the penitentiary" if he is currently incarcerated in a correctional facility, or if he was released from the correctional facility while his timely filed petition was pending, or if he was released on appeal bond, or if he was on mandatory supervised release, or if he was sentenced to probation. *People v. West*, 145 Ill. 2d 517, 519 (1991).

¶ 17 For decades after his sentencing in July 1977, the defendant was incarcerated in one or another correctional facility operated by the DOC, and during those decades he was doubtlessly a person "imprisoned in the penitentiary" within the meaning of section 122-1(a)(1). Then, on June 10, 2011, the defendant was released from prison. If the State had not filed a petition to have the defendant committed as a sexually violent person, the defendant would have begun his parole term immediately upon his release from prison, and as a parolee he would have remained a person "imprisoned in the penitentiary" with standing to seek postconviction relief.

¶ 18 However, the State did in fact file a petition to have the defendant committed as sexually violent. The commitment petition was filed on May 31, 2011, just 10 days before the defendant was released from prison. The filing of the commitment petition tolled the running of the defendant's parole term. See 725 ILCS 207/15(e) (West 2012) (the filing of a commitment petition "shall toll the running" of any term of parole or mandatory supervised release). The running of a parole term remains tolled until such time as (1) the commitment petition is dismissed, (2) a judge or jury finds that the defendant is not a sexually violent person, or (3) a judge or jury has determined that the

defendant is a sexually violent person, and the defendant has been committed to the custody of the DHS for control, care, and treatment, but then the defendant is discharged from the custody or supervision of the DHS, unless he successfully completed a period of court-ordered conditional release. 725 ILCS 207/15(e) (West 2012). See also 725 ILCS 207/60, 65 (West 2012). None of these three tolling-ending events occurred prior to the defendant's filing his postconviction petition on March 9, 2015, and therefore the defendant's parole term remained tolled as of that date. (Indeed, the record on appeal does not contain any indication that any of these three tolling-ending events has occurred since the filing of the postconviction petition.) Because the running of the defendant's parole term remained tolled on the date the defendant filed his postconviction petition, the defendant was not on parole on the filing date. Instead, he continued to be detained by the DHS in connection with the commitment petition. A tolling of MSR does not satisfy the "imprisoned in the penitentiary" requirement of section 122-1(a)(1) of the Post-Conviction Hearing Act. "Defendant needs to be currently on MSR, not tolled, to be within the realm of the [Post-Conviction Hearing] Act." *People v. Steward*, 406 Ill. App. 3d 82, 94 (2010).

¶ 19 A postconviction petition filed by a person who is not imprisoned within the meaning of the Post-Conviction Hearing Act, and who therefore lacks standing to seek postconviction relief, is necessarily a petition that is frivolous and patently without merit. As our Illinois Supreme Court noted in *People v. Bocclair*, 202 Ill. 2d 89, 101 (2002), Webster's Third New International Dictionary 1414 (1993) defines the word "merit" as "legal significance, standing, or importance." Without standing for the postconviction

petitioner, there can be no merit in his postconviction petition. "A petition filed pursuant to the [Post-Conviction Hearing] Act has no merit if filed by an individual who is not imprisoned." *Steward*, 406 Ill. App. 3d at 90. Therefore, summary dismissal of the defendant's postconviction petition was appropriate.

¶ 20 Even if the defendant had standing to seek postconviction relief, summary dismissal would have been appropriate, for his postconviction petition lacked substantive merit. The defendant's reliance on *Whitfield* was wholly misplaced. *Whitfield* may only be applied prospectively to cases in which the defendant's conviction was finalized after December 20, 2005, the date *Whitfield* was announced. *People v. Morris*, 236 Ill. 2d 345, 366 (2010). The defendant's conviction was finalized decades before *Whitfield* was announced, making the *Whitfield* decision inapplicable to the defendant's case.

¶ 21 Furthermore, *Whitfield* is a case applicable only to a criminal defendant who allegedly has been deprived of the benefit of his bargain, *i.e.*, his plea agreement with the State, in a particular way. See *Whitfield*, 217 Ill. 2d at 195 (due process is violated when a statutorily-mandated term of mandatory supervised release (MSR) is added to a specific prison sentence that was imposed pursuant to a plea agreement between the parties and the court had failed to advise the defendant, prior to accepting his guilty plea, that the MSR term would be added to the agreed-upon prison sentence). *Whitfield* is inapposite here. The defendant was found guilty by a jury and sentenced by the circuit court after a hearing in aggravation and mitigation. There was no bargain between the parties here, and therefore the defendant could not possibly have been deprived of any benefit of any bargain.



¶ 22 Because the defendant lacked standing to seek postconviction relief, his postconviction petition was frivolous and patently without merit. The circuit court properly dismissed it. Any argument to the contrary would lack merit. Therefore, the defendant's appointed appellate attorney is allowed to withdraw as counsel, and the judgment of the circuit court of Madison County is affirmed.

¶ 23 Motion granted; judgment affirmed.