

**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).

2019 IL App (4th) 170343-U

NO. 4-17-0343

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

August 9, 2019

Carla Bender

4<sup>th</sup> District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Greene County
DAVID A. McGEE,	)	No. 10CF113
Defendant-Appellant.	)	
	)	Honorable
	)	James W. Day,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.  
Justices Cavanagh and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court granted appellate counsel’s motion to withdraw and affirmed the trial court’s judgment.

¶ 2 In December 2010, defendant, David A. McGee, pleaded guilty to one count of aggravated criminal sexual abuse, and the trial court sentenced him to four years in prison. In June 2016, defendant filed a postconviction petition. The State filed a motion to dismiss, arguing defendant lacked standing to file a postconviction petition because he was no longer in custody in the penitentiary. The court dismissed the petition. Defendant filed a second postconviction petition, which the court denied.

¶ 3 On appeal, the Office of the State Appellate Defender (OSAD) moves to withdraw its representation of defendant, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending an appeal in this cause would be without merit. We grant OSAD’s motion and affirm the trial court’s judgment.

¶ 4

## I. BACKGROUND

¶ 5 In October 2010, the State charged defendant by information in case No. 10-CF-113 with one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2010)), alleging he committed an act of sexual penetration with J.K., who was at least 13 years of age but under 17 years of age, in that he placed his penis in her vagina and he was at least 5 years older than her.

¶ 6 Defendant pleaded guilty in December 2010, and the trial court sentenced him to four years in prison with a two-year term of mandatory supervised release (MSR) (formerly known as parole). Defendant was also required to register as a sex offender for life. Defendant did not file a direct appeal.

¶ 7 In June 2016, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). The petition noted he was released from prison and attempted to register as a sex offender on December 10, 2013. As relief, defendant asked for the judgment in case No. 10-CF-113 to be vacated, the charge dismissed, and that he be “fully ‘Exonerated’ and ‘With Prejudice’ of the said Charge or Complaint.”

¶ 8 The State filed a motion to dismiss, arguing defendant lacked standing to file his postconviction petition. The motion noted defendant had served the entirety of his four-year sentence, and although he had been in custody on a separate charge of aggravated criminal sexual assault of a person over the age of 60 in case No. 14-CF-926, he was no longer imprisoned on his earlier conviction and was ineligible to seek relief under the Act. In September 2016, the trial court agreed with the State’s motion and dismissed the petition as patently without merit. The following month, defendant filed a *pro se* answer to the motion to

dismiss, a *pro se* petition for *certiorari*, and a *pro se* motion for leave to file an appeal. We note the motion for leave to appeal simply contended Judge Day could not preside over any part of the appeal process. It does not appear defendant took any further action on these motions. A week after defendant filed these motions, the circuit clerk was directed to advise defendant of the reasons the court dismissed his postconviction petition.

¶ 9 In March 2017, defendant filed a second petition for postconviction relief, claiming the trial court erred in dismissing his previous petition. At an April 2017 hearing on the petition, the court noted defendant pleaded guilty in December 2010 and received a four-year sentence. Defendant agreed his sentence was “done and over with.” He stated he had been released on parole in 2012, violated his parole, and “went back and finished the parole time.” In denying defendant’s request for relief, the court told defendant he was “way too late” in filing a postconviction petition, as he was no longer in custody on the case. This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, OSAD has filed a motion to withdraw as counsel and has included a supporting memorandum. Proof of service has been shown on defendant. This court granted defendant leave to file a response on or before March 26, 2019. We later allowed defendant’s motion for an extension of time to file a response before May 6, 2019. Defendant did not file a response prior to that date. The State did file a brief, and defendant filed a response thereafter. Based on our examination of the record, we conclude, as has OSAD, that an appeal in this cause would be meritless.

¶ 12 OSAD argues defendant lacked standing to file his postconviction petition because he served his prison sentence and was discharged from MSR. The Act provides that a defendant may only seek relief under the Act if he is “imprisoned in the penitentiary” when his

petition is filed. 725 ILCS 5/122-1(a) (West 2016). Our supreme court has found the term “ ‘imprisoned’ for purposes of section 122-1(a) has been held to include petitioners whose liberty, in some way or another, was curtailed to a degree by the state.” *People v. Carrera*, 239 Ill. 2d 241, 246, 940 N.E.2d 1111, 1114 (2010).

¶ 13 In the case *sub judice*, defendant was released from prison in 2012 and completed his two-year MSR term in 2014. He did not file the postconviction petition at issue here until March 2017. Thus, as defendant completed his sentence and MSR term, postconviction relief was unavailable. See *People v. West*, 145 Ill. 2d 517, 519, 584 N.E.2d 124, 125 (1991) (holding postconviction relief was unavailable to the petitioner who had fully served his underlying sentence).

¶ 14 Moreover, defendant was not “imprisoned in the penitentiary” because of his lifetime requirement to register as a sex offender. The Third District has held “lifetime registration as a sex offender is not a constraint on liberty sufficient to bring it within the Act.” *People v. Downin*, 394 Ill. App. 3d 141, 146, 914 N.E.2d 1169, 1174 (2009). Thus, a defendant who has completed his sentence in its entirety lacks standing to file a postconviction petition, despite the registration requirement. *Downin*, 394 Ill. App. 3d at 146-47, 914 N.E.2d at 1174; see also *People v. Begay*, 2018 IL App (1st) 150446, ¶ 57, 117 N.E.3d 264 (finding “sex offender registration status does not qualify as ‘imprisoned’ under the Act”); *People v. Stavenger*, 2015 IL App (2d) 140885, ¶ 12, 36 N.E.3d 1011 (rejecting the “defendant’s contention that he has standing under the Act by virtue of his having to register as a sex offender”).

¶ 15 As defendant was no longer imprisoned in the penitentiary for his conviction in case No. 10-CF-113, and as his sex-offender-registration requirement does not constitute

imprisonment, dismissal of his postconviction petition was appropriate.

¶ 16 Along with the fact that defendant was no longer imprisoned in the penitentiary, a successive postconviction petition may only be filed if leave of court is granted. 725 ILCS 5/122-1(f) (West 2016). To that end, section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2016)) provides, in part, as follows:

“Leave of court may 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. For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process.”

Thus, for a defendant to obtain leave to file a successive postconviction petition, both prongs of the cause-and-prejudice test must be satisfied. *People v. Davis*, 2014 IL 115595, ¶ 14, 6 N.E.3d 709.

¶ 17 In this case, defendant did not acknowledge he was filing a successive postconviction petition and nothing indicates he sought leave of court to file such a petition. See *People v. Smith*, 2014 IL 115946, ¶ 33, 21 N.E.3d 1172 (stating the Act requires a defendant to obtain leave of court). Moreover, he failed to set forth any facts demonstrating cause or prejudice. For these additional reasons, we find the trial court properly dismissed the petition.

As no colorable claim can be made that the court erred in dismissing defendant's petition, we grant OSAD's motion to withdraw.

¶ 18

### III. CONCLUSION

¶ 19 For the reasons stated, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 20 Affirmed.