

**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) 170166-U

NO. 4-17-0166

**FILED**  
April 17, 2019  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Logan County
JOSEPH P. HICKEY,	)	No. 05CF71
Defendant-Appellant.	)	
	)	Honorable
	)	William G. Workman,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.  
Justices DeArmond and Turner concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court reversed and remanded for second-stage postconviction proceedings, concluding (1) defendant had standing to file a postconviction petition and (2) the postconviction petition was not dismissed within 90 days of its filing.

¶ 2 Defendant, Joseph P. Hickey, appeals from the summary dismissal of his *pro se* postconviction petition. On appeal, defendant argues this court should (1) reverse the trial court’s judgment summarily dismissing his postconviction petition because the court erroneously concluded he lacked standing to file a petition and (2) remand the case for second-stage postconviction proceedings because the court did not dismiss his postconviction petition within 90 days of its filing. We agree and reverse and remand for second-stage postconviction proceedings.

¶ 3

## I. BACKGROUND

¶ 4 In April 2009, defendant pleaded guilty in Logan County case No. 05-CF-71 to harassment of a witness (720 ILCS 5/32-4a(a)(2) (West 2004)) and was sentenced to three years' imprisonment followed by two years' mandatory supervised release (MSR). Defendant's sentence was ordered to be served concurrently with his sentences in Logan County case Nos. 05-CF-107 and 05-CF-113. In case No. 05-CF-107, defendant was sentenced to 10 years' imprisonment. In case No. 05-CF-113, defendant was sentenced to 15 years' imprisonment. Defendant's sentence in case No. 05-CF-113 was ordered to be served consecutively to his sentence in case No. 05-CF-107. Defendant did not appeal from his conviction and sentence in case No. 05-CF-71.

¶ 5 In October 2014, defendant filed a *pro se* motion for leave to file a successive postconviction petition in case Nos. 05-CF-71, 05-CF-107, and 05-CF-113. Attached to the motion was a pleading titled "Second Subsequent Petition for Post Conviction Relief Under Claim of Actual Innocence Among Others."

¶ 6 In February 2017, the trial court issued a written ruling. The court explained the postconviction petition was a successive petition for case Nos. 05-CF-107 and 05-CF-113 and then denied leave to file the successive petition in those two cases. The court explained the postconviction petition was an original petition for case No. 05-CF-71 and then summarily dismissed the petition because "statutory post[ ]conviction relief is unavailable where, as here, the underlying sentence has already been served."

¶ 7 This appeal followed.

¶ 8

## II. ANALYSIS

¶ 9 On appeal, defendant argues this court should (1) reverse the trial court's judgment summarily dismissing his postconviction petition because the court erroneously concluded he lacked standing to file a petition and (2) remand the case for second-stage postconviction proceedings because the court did not dismiss his postconviction petition within 90 days of its filing. The State agrees.

¶ 10 Section 122-1(a) of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1(a) (West 2014)) provides: "Any person imprisoned in the penitentiary may institute a proceeding under this Article." "A defendant is 'imprisoned in the penitentiary' for the purposes of the Act when his liberty is actually constrained by the State." *People v. Vinokur*, 2011 IL App (1st) 090798, ¶ 6, 955 N.E.2d 664. "[A] defendant [has] standing under the Act so long as he is challenging a conviction from which he continues to serve some form of sentence, such that his liberty would be directly affected by invalidating his conviction." *People v. Stavenger*, 2015 IL App (2d) 140885, ¶ 9, 36 N.E.3d 1011. A term of MSR is part of a defendant's sentence. *People v. Correa*, 108 Ill 2d 541, 546, 485 N.E.2d 307, 309 (1985).

¶ 11 While defendant had completed his three-year term of imprisonment by the time he filed his postconviction petition, he had not completed his two-year term of MSR. Instead, defendant had remained imprisoned serving sentences in case Nos. 05-CF-107 and 05-CF-113, which prevented him from serving his term of MSR in this case. See *Round v. Lamb*, 2017 IL 122271, ¶ 20, 90 N.E.3d 432 ("[I]t would be illogical to hold that a prisoner can simultaneously be serving a prison term and be on supervised release."). Because defendant had not completed his sentence, he had standing to file a postconviction petition. We therefore reverse the trial court's judgment summarily dismissing his postconviction petition and remand the case for

second-stage postconviction proceedings. See 725 ILCS 5/122-2.1 (West 2014) (providing any petition not dismissed within 90 days of its filing as frivolous or patently without merit must be docketed for second-stage proceedings).

¶ 12 In reaching this decision, we note the Illinois Department of Corrections' website indicates defendant was released from prison on January 18, 2019. See <https://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx>. (last visited April 5, 2019). Defendant's release does not, however, render his postconviction petition moot. See *People v. Coe*, 2018 IL App (4th) 170359, ¶¶ 46-50, 118 N.E.3d 1256 (discussing the issue of mootness as it relates to a postconviction petition and a defendant's release from custody).

¶ 13 III. CONCLUSION

¶ 14 We reverse the trial court's judgment and remand for second-stage postconviction proceedings.

¶ 15 Reversed and remanded.