

**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) 170240-U

NO. 4-17-0240

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

April 2, 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.	)	McLean County
ISRAEL ACEVES,	)	No. 08CF1210
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

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

**ORDER**

¶ 1 *Held:* The appellate court affirmed, granting the Office of the State Appellate Defender’s motion to withdraw as postconviction counsel.

¶ 2 In October 2008, defendant, Israel Aceves, pleaded guilty to one count of aggravated assault and one count of aggravated unlawful use of a weapon. In May 2011, defendant was discharged early from probation. In December 2016, defendant filed a *pro se* postconviction petition, which the trial court denied, allowing defendant’s appointed counsel to withdraw. The court appointed the Office of the State Appellate Defender (OSAD) to represent defendant in this appeal.

¶ 3 On appeal, OSAD moves to withdraw its representation of defendant, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987), contending any appeal in this cause would be frivolous. We grant OSAD’s motion and affirm the trial court’s judgment.

¶ 4 I. BACKGROUND

¶ 5 This matter comes before this court on appeal of a postconviction petition filed as a result of defendant's conviction, through a plea deal, for aggravated assault and aggravated unlawful use of a weapon.

¶ 6 In April 2009, the trial court accepted the terms of the plea agreement reached by the State and defendant and sentenced defendant to 80 days in jail with credit for 40 days served, resulting in no additional jail time, and 30 months' probation. Defendant requested early termination of his probation so he could pursue the option of joining the Army or National Guard, which was granted in May 2011. In December 2016, defendant filed a *pro se* postconviction petition, alleging he was 17 years old at the time of his plea and his trial counsel scared him by telling him if he did not take the plea deal, he would be sentenced to the maximum sentence. He claimed his parents did not speak fluent English, he had no mentors to discuss his options with, and he was actually innocent. The court allowed the petition to advance to second-stage proceedings and appointed counsel. In March 2017, postconviction counsel filed a motion to withdraw, alleging defendant did not have standing to bring an action under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)) because he was no longer incarcerated and had completed his probation. The court granted the motion and dismissed the postconviction petition.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 OSAD has filed a motion to withdraw its representation of defendant and a supporting memorandum of law. The record shows proof of service on defendant. This court granted defendant leave to file a response by January 22, 2019. He has not done so. Based on our

examination of the record, we conclude, as has OSAD, an appeal in this cause would be without arguable merit.

¶ 10 A. Standing

¶ 11 The Act allows a petitioner to collaterally attack his or her conviction on constitutional grounds while “imprisoned in the penitentiary.” 725 ILCS 5/122-1 (West 2016). “The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights.” *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256.

¶ 12 The Act creates a three-stage process for adjudicating a postconviction petition. *Crenshaw*, 2015 IL App (4th) 131035, ¶ 24. At the first stage, the trial court must review the petition within 90 days after the filing and docketing of the petition to determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2016). “In considering a petition pursuant to [section 122-2.1 of the Act], the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding.” 725 ILCS 5/122-2.1(c) (West 2016). “The circuit court’s review at this first stage is independent, as the Act does not permit any further pleadings from the defendant, or any motions, responsive pleadings, or other input from the State.” *People v. Jones*, 211 Ill. 2d 140, 144, 809 N.E.2d 1233, 1236 (2004). However, our supreme court has held a reversal of a first-stage dismissal is not required when the State files a premature motion to dismiss “[w]here the record gives no indication that the trial judge sought input from the State or relied on the motion to dismiss.” *People v. Gaultney*, 174 Ill. 2d 410, 420, 675 N.E.2d 102, 107 (1996).

¶ 13 “If the petition is not dismissed at the first stage, it advances to the second stage. [Citation.] At the second stage, the trial court may appoint counsel, who may amend the petition

to ensure defendant's contentions are adequately presented." *Crenshaw*, 2015 IL App (4th) 131035, ¶ 25. Additionally, at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2016). "No other or further pleadings shall be filed except as the court may order on its own motion or on that of either party." 725 ILCS 5/122-5 (West 2016). "The dismissal of a postconviction petition is warranted at the second stage of the proceedings only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). "If at the second stage a substantial showing of a constitutional violation is established, the petition proceeds to the third stage for an evidentiary hearing." *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007).

¶ 14 The phrase "imprisoned in the penitentiary" has been defined to include "defendants who have been released from incarceration after the timely filing of their petition [citation], released on appeal bond following conviction [citation], released under mandatory supervision [citation], and sentenced to probation [citation]." *People v. West*, 145 Ill. 2d 517, 519, 584 N.E.2d 124, 125 (1991). In *West*, our supreme court found the defendant had served his sentence for voluntary manslaughter and the mandatory supervised release period by the time he filed his postconviction petition. *West*, 145 Ill. 2d at 519. Thus, the defendant did not fall under the term "imprisoned in the penitentiary," and, as such, the defendant's petition was rightfully dismissed for lack of standing. *West*, 145 Ill. 2d at 519; see also *People v. Carrera*, 239 Ill. 2d 241, 258-59, 940 N.E.2d 1111, 1121-22 (2010) (finding the defendant lacked standing for his postconviction petition because he had fully served his sentence.)

¶ 15 Here, defendant had completed his sentence in May 2011. Five years after completing the sentence, he filed a postconviction petition. As our supreme court has repeatedly

stated, a defendant cannot gain relief through the Act after the completion of his or her imprisonment and probation. Therefore, we find defendant lacked standing to file a postconviction petition and grant OSAD's motion to withdraw.

¶ 16 B. Rule 651(c) Certificate

¶ 17 Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013) requires the record filed in the trial court to contain a showing the appointed postconviction counsel "has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." "The filing of a Rule 651(c) certificate gives rise to a presumption that postconviction counsel provided reasonable assistance during second-stage proceedings under the Act." *People v. Jones*, 2011 IL App (1st) 092529, ¶ 23, 955 N.E.2d 1200. The duty "falls on the defendant to overcome that presumption by demonstrating counsel's failure to substantially comply with the duties mandated by Rule 651(c)." *Jones*, 2011 IL App (1st) 092529, ¶ 23. In March 2017, postconviction counsel filed a Rule 651(c) certificate and a motion to withdraw. In the certificate, counsel stated she examined the petition and record, communicated with defendant, and could not amend the original *pro se* petition because defendant's claim was without merit as he lacks standing. As such, we presume postconviction counsel complied with Rule 651(c).

¶ 18 C. Appointment of Counsel

¶ 19 The Act does not permit defendants filing a frivolous or clearly without merit postconviction petition the benefit of counsel during postconviction proceedings; thus, a trial court may dismiss petitions without the assistance of counsel during the first stage if the petition

is “deemed frivolous or patently without merit.” *People v. Greer*, 212 Ill. 2d 192, 208-09, 817 N.E.2d 511, 521-22 (2004). “A petition filed pursuant to the Act has no merit if filed by an individual who is not imprisoned.” *People v. Steward*, 406 Ill. App. 3d 82, 90, 940 N.E.2d 140, 148 (2010). A petition without standing may be properly dismissed at the first stage of proceedings. *People v. Vinokur*, 2011 IL App (1st) 090798, ¶ 14, 955 N.E.2d 664.

¶ 20 Here, defendant was no longer “imprisoned” as defined by the Act. Therefore, the trial court was not required to proceed to the second stage of proceedings or appoint postconviction counsel, as defendant’s claim was “frivolous and patently without merit.” Thus, no error can be found in the appointment of counsel or her performance.

¶ 21 III. CONCLUSION

¶ 22 We grant OSAD’s motion to withdraw and affirm the trial court’s judgment.

¶ 23 Affirmed.