

2011 IL App (2d) 100900-U
No. 2—10—0900
Order filed August 9, 2011

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 98—CF—2203
)	
BARBARA WALENDZIAK,)	Honorable
)	Blanche Hill Fawell,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: Because defendant had completed her sentence, she was not entitled to file a postconviction petition, which the trial court therefore properly summarily dismissed.

¶ 1 In January 1999, defendant, Barbara Walendziak, pleaded guilty to a single count of retail theft (720 ILCS 5/16A—3(a) (West 1998)), and was sentenced 24 months' probation and 40 hours of public service employment. She was discharged from probation on January 10, 2001. In 2010, she filed a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2010)). She alleged that when she entered her plea she was residing in the United States

legally, but was not a United States citizen. She claimed that her right to the effective assistance of counsel was violated because her trial attorney did not advise her that she would face the risk of deportation as a result of the conviction entered on her plea. See *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010). The trial court summarily dismissed the petition (see 725 ILCS 5/122—2.1(a)(2) (West 2010)) and this appeal followed. Because defendant had completed her sentence by the time she filed her petition, she is not entitled to proceed under the Act. We therefore affirm the summary dismissal of her petition.

¶ 2 The Act provides for summary dismissal of a postconviction petition if the trial court, after examining the petition, concludes that it is “frivolous or is patently without merit.” 725 ILCS 5/122—2.1(a)(2) (West 2010). A petition is frivolous or patently without merit if it “has no arguable basis either in law or in fact.” *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Davis*, 377 Ill. App. 3d 735, 745 (2007).

¶ 3 A proceeding under the Act may be brought by “[a]ny person imprisoned in the penitentiary.” 725 ILCS 5/122—1(a) (West 2010). Actual incarceration is not required and a defendant sentenced to probation may seek relief under the Act. *People v. Carrera*, 239 Ill. 2d 241, 246 (2010). As noted in *Carrera*, however, in *People v. Dale*, 406 Ill. 238 (1950), *overruled in part on other grounds*, *People v. Warr*, 54 Ill. 2d 487 (1973), our supreme court “held that the words ‘imprisoned in the penitentiary’ prevented those who had completed their sentences from using the Act’s remedial machinery solely to purge their criminal records. Rather, only those whose liberty was actually restrained were entitled to the protection afforded by the Act.” *Carrera*, 239 Ill. 2d at 245-46 (citing *Dale*, 406 Ill. at 246).

¶ 4 In *Carrera*, the defendant pleaded guilty to unlawful possession of a controlled substance and was sentenced to 24 months' probation. At the plea hearing the trial court asked, " 'No immigration problems, nothing like that?' " *Id.* Defense counsel responded, " 'No, Judge. It's not an issue.' " *Id.* Later, however, the Immigration and Naturalization Service initiated proceedings to deport the defendant. After successfully completing his term of probation, the defendant filed a postconviction petition in which he claimed that his guilty plea was involuntary "because it was made in reliance upon his counsel's erroneous advice, reiterated in open court, that no immigration consequences would result from the guilty plea." *Id.* at 244. The *Carrera* court held that the petition was properly dismissed. The *Carrera* court reasoned that "[g]iven the fact that defendant had fully served his underlying sentence prior to filing his postconviction petition, defendant's liberty was not curtailed by the state in any way, and he was not a person 'imprisoned in the penitentiary,' as required in order to file a claim for postconviction relief." *Id.* at 253.

¶ 5 Defendant argues that *Carrera* is distinguishable because, according to defendant, "in *Carrera* the defendant was informed of potential immigration consequences but the Plaintiff [*sic*] in the present case was not ***." As seen, however, the defendant in *Carrera* was advised that his immigration status was *not an issue*. In any event, distinctions about precisely what the defendants in this case and in *Carrera* were told about the potential immigration consequences of their pleas are beside the point. Both defendant and her counterpart in *Carrera* raised claims of ineffective assistance of counsel. As the *Carrera* court observed, counsel's failure to properly advise a defendant about the deportation consequences of a guilty plea is not equivalent to a restraint on liberty that would give the defendant standing to seek relief under the Act. *Id.* at 245-46. That the ineffective-assistance-of-counsel claims in this case and in *Carrera* might vary marginally from one

another is simply of no consequence with respect to the application of *Carrera*'s holding that a criminal defendant who has fully served his or her sentence cannot initiate a proceeding for relief under the Act. The salient fact in this case, as in *Carrera*, is that defendant's liberty is no longer subject to any restraint by the State and she therefore may not now petition for relief under the Act.

¶ 6 Because the record definitively establishes that defendant had completed her sentence before she filed her postconviction petition, her petition has no arguable basis in fact or law and it was subject to summary dismissal.

¶ 7 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 8 Affirmed.