

1-10-1047

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 4634
	)	
DIANTE WILEY,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Justices Connors and Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the trial court advised the defendant that he would have to serve a term of mandatory supervised release in addition to the sentence negotiated as part of his plea agreement, summary dismissal of the defendant's *pro se* petition for post-conviction relief was proper.

¶ 2 The defendant Diante Wiley, who pleaded guilty to first degree murder and was sentenced to 25 years in prison, appeals from the summary dismissal of his *pro se* petition for post-conviction relief. On appeal, the defendant contends that his petition stated a non-frivolous claim that his due process rights were violated when the trial court did not inform him that he would have to serve three years of mandatory supervised release (MSR) in addition to the sentence negotiated as part of his plea agreement. For the reasons that follow, we affirm.

¶ 3 The defendant was charged with several counts of first degree murder. On February 28, 2006, the parties indicated to the trial court that they had negotiated a guilty plea to one of the counts

in exchange for a sentence of 25 years' imprisonment. The trial court admonished the defendant, in relevant part, as follows:

"The charge of murder carries a penalty of from 20 to 60 years in the Illinois Department of Corrections and up to \$25,000 in fines. It also carries a three year mandatory supervised release period when you are released from the penitentiary. Do you understand the charges, [defendant], and the possible penalties?"

¶ 4 The defendant indicated that he understood and stated that he was pleading guilty. The trial court admonished the defendant further and then heard the factual basis for the plea. The court thereafter imposed sentence, stating, "[Defendant], I will sentence you, as agreed between your lawyer and the State's [A]ttorney, and I would concur with that agreement and I will sentence you to 25 years in the Illinois Department of Corrections."

¶ 5 The defendant did not file a motion to withdraw his guilty plea or a direct appeal. In 2009, the defendant filed a *pro se* petition for post-conviction relief, alleging, in relevant part, that his constitutional rights to due process and equal protection were violated by the addition of a three-year MSR term to the sentence he negotiated as part of his guilty plea. The defendant claimed that he was denied the benefit of his bargain, that he was not informed he would have to serve a term of MSR, and that he did not learn of the MSR term until after he was in prison. As relief, the defendant sought modification of his prison term.

¶ 6 The trial court summarily dismissed the petition. In addition, the trial court assessed costs and fines against the defendant for filing a frivolous petition. The defendant appeals.

¶ 7 In cases not involving the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). The instant case involves the first stage of the process, during which the trial court independently assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based

on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2008).

¶ 8 A *pro se* petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Id.* at 16. A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Id.* at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 9 On appeal, the defendant contends that his petition should not have been summarily dismissed because it presented a non-frivolous constitutional claim that the trial court failed to inform him that his agreed-upon sentence would be followed by a three-year period of MSR. The defendant acknowledges that the trial court mentioned MSR when discussing possible penalties. However, the defendant argues that the court's failure to specifically state that a three-year MSR term would follow the actual sentence imposed violated due process.

¶ 10 In support of his contention, the defendant relies primarily upon *People v. Whitfield*, 217 Ill. 2d 177 (2005), and *People v. Morris*, 236 Ill. 2d 345 (2010). In *Whitfield*, the trial court made no mention of MSR to the defendant when he entered into a negotiated plea. See *Whitfield*, 217 Ill. 2d at 179-80. Our supreme court held that because the defendant was not informed of the required MSR term, he was entitled to the benefit of the bargain by having his prison sentence reduced by the length of the MSR term. *Whitfield*, 217 Ill. 2d at 195, 205.

¶ 11 In *Morris*, our supreme court acknowledged that *Whitfield* had "created some confusion" and that questions remained as to what information a trial court was required to convey to a defendant regarding MSR to ensure that the guilty plea admonishments complied with Supreme Court Rule 402 and due process. *Morris*, 236 Ill. 2d at 366. While the *Morris* court did not explicitly reach the

issue -- it resolved the case by finding that *Whitfield* did not apply retroactively to the *Morris* defendants -- the *Morris* court did provide guidance for trial courts to follow when giving guilty plea admonishments. *Morris*, 236 Ill. 2d at 355, 366-68; *People v. Thomas*, 402 Ill. App. 3d 1129, 1130 (2010).

¶ 12 The *Morris* court instructed that a Rule 402 admonishment is sufficient if an ordinary person in the accused's circumstances would understand it to convey "that a term of MSR will be added to the actual sentence agreed upon in exchange for a guilty plea to the offense charged." *Morris*, 236 Ill. 2d at 366-67; see also *Thomas*, 402 Ill. App. 3d at 1134. In addition, the *Morris* court suggested that ideally, a Rule 402 admonishment expressly linking MSR to the agreed-upon sentence would be: (1) given when the trial court reviewed the plea agreement's provisions; (2) reiterated at sentencing; and (3) included in the written judgment. *Morris*, 236 Ill. 2d at 367.

¶ 13 Despite the *Morris* court's attempt to clarify the holding of *Whitfield*, disagreement exists between the districts of the appellate court regarding whether a trial court satisfies due process, Rule 402, and *Whitfield* when it mentions, in the course of informing a defendant of the minimum and maximum penalties of the crimes charged, that a term of MSR will attach to any prison sentence. *People v. Hunter*, 2011 IL App (1st) 093023, ¶ 16 (discussing cases).

¶ 14 In his reply brief, the defendant urges us to follow *People v. Burns*, 405 Ill. App. 3d 40 (2010). In *Burns*, the Second District held that the trial court's statement regarding MSR was insufficient because it did not link the term of MSR to the actual sentences the defendant would receive under his plea agreement and did not convey unconditionally that MSR would be added to the agreed-upon sentences. *Burns*, 405 Ill. App. 3d at 43. We decline to follow *Burns*, as we find the First District decisions in *People v. Davis*, 403 Ill. App. 3d 461 (2010), and *People v. Hunter*, 2011 IL App (1st) 093023, more persuasive.

¶ 15 In *Davis*, this court held that a constitutional violation occurs only when there is absolutely no mention to a defendant that he must serve a term of MSR in addition to his agreed-upon sentence.

*Davis*, 403 Ill. App. 3d at 466. In *Hunter*, this court concurred, adding that while it would be a "better practice" to admonish a defendant regarding MSR when the specific sentence is announced, due process and Rule 402 would be satisfied by advising a defendant prior to imposing sentence that he would have to serve a term of MSR. *Hunter*, 2011 IL App (1st) 093023, ¶ 19.

¶ 16 Here, the trial court admonished the defendant that he was pleading guilty to first degree murder, that "murder carries a penalty of from 20 to 60 years in the Illinois Department of Corrections and up to \$25,000 in fines," and that a murder charge "also carries a three year mandatory supervised release period when you are released from the penitentiary." In our view, an ordinary person in the defendant's circumstances would have understood the language used by the trial court to convey that a term of MSR would follow his prison sentence. Thus, the trial court complied with *Whitfield* and Rule 402 and satisfied the requirements of due process.

¶ 17 The defendant's post-conviction claim that he was not informed that he would have to serve three years of MSR in addition to the sentence negotiated as part of his plea agreement is positively rebutted by the record. Accordingly, summary dismissal of the defendant's petition was proper. See *Hodges*, 234 Ill. 2d at 16-17. In addition, imposition of fees and costs under section 22-105(b) of the Illinois Code of Civil Procedure (735 ILCS 5/22-105 (West 2006)) was proper. *People v. Alcozer*, 241 Ill. 2d 248, 257-58 (2011) (a post-conviction petition summarily dismissed as frivolous or patently without merit is subject to imposition of fees and costs under section 22-105(b)). We affirm the trial court's orders dismissing the petition and assessing \$105 in costs and fees for filing a frivolous petition.

¶ 18 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.