

No. 1-07-2316

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 13191
)	
HENRY CLARK,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon concurred in the judgment.

ORDER

Held: Where defendant was properly admonished of his three-year period of mandatory supervised release that attached to his sentence, the trial court's judgment was affirmed; where certain pecuniary penalties were reduced and vacated, the trial court's judgment was modified.

¶ 1 Defendant Henry Clark appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2006). On appeal, he contends that when he entered his negotiated plea in 2006, the trial court did not properly admonish him of the three-year period of mandatory supervised

release (MSR) that attached to his sentence. Defendant seeks relief under *People v. Whitfield*, 217 Ill. 2d 177 (2005), which afforded the guilty plea defendant sentencing relief where the trial court made no mention of MSR at his plea hearing.

Defendant also challenges certain pecuniary penalties imposed by the court.

¶ 2 In a Rule 23 Order entered on May 8, 2009, we affirmed the trial court's dismissal. Subsequently, the Illinois Supreme Court entered a supervisory order directing us to vacate that decision and reconsider the decision in light of *People v. Morris*, 236 Ill. 2d 345, 366 (2010). We again affirm the trial court's dismissal.

¶ 3 On March 10, 2006, defendant entered a negotiated plea of guilty to aggravated battery with a firearm. Before accepting defendant's plea, the following colloquy ensued:

"THE COURT: By pleading guilty to this charge, it being a Class X felony, on a Class X felony if you are convicted, you must be sentenced to the penitentiary for a period of not less than six years or more than 30 years. When you get out of the penitentiary, you would have a term of mandatory supervised release of three years to do. You can be fined from \$1 up to \$25,000. Those are the

possible penalties on the Class X felony. Do you understand the possible penalties on this charge?

DEFENDANT: Yes, sir."

¶ 4 The court then admonished defendant pursuant to Supreme Court Rule 402 (eff. July 1, 1997), accepted his written jury waiver, and ascertained his understanding of the rights he was relinquishing by pleading guilty. The court then accepted defendant's guilty plea, and sentenced him in accordance with the plea agreement to seven years' imprisonment. The court also admonished defendant that he had a right to appeal and, in order to perfect that right, he had to file a written motion to vacate his plea. Following that proceeding, defendant did not file a motion to withdraw his guilty plea and vacate the judgment or otherwise attempt to perfect an appeal from it.

¶ 5 On May 8, 2007, however, defendant sought relief under the Act. In his *pro se* petition, defendant alleged that he was not admonished by the trial court of the MSR period, and thus did not receive the benefit of the bargain of his plea agreement. Pursuant to *Whitfield*, 217 Ill. 2d at 177, defendant requested, as relief, that his sentence be reduced by the length of the statutorily required MSR term, *i.e.*, three years. Defendant failed to attach any affidavits to his post-conviction petition.

¶ 6 On May 25, 2007, the trial court summarily dismissed

defendant's petition as frivolous and patently without merit. In doing so, the circuit court found that contrary to defendant's allegation, a careful review of the record showed that the trial court admonished defendant of his MSR obligation. That same day, the trial court entered a separate order which imposed fees and costs upon defendant totaling \$384.20, including \$294 for filing a frivolous post-conviction petition, \$15 for postage, \$50 in State's Attorney's fees, and \$25.20 for the cost of ordering transcripts. In satisfaction of this assessment, the trial court ordered the Illinois Department of Corrections (IDOC) to collect it from defendant's trust fund account.

¶ 7 On June 19, 2007, defendant filed a *pro se* petition for leave to amend his post-conviction petition. He also filed an amended petition for post-conviction relief on that same date restating the MSR argument in his original petition. Defendant attached his own sworn affidavit to the petition, in which he restated the allegations in his post-conviction petitions.

¶ 8 On July 13, 2007, the circuit court denied defendant's request for leave to amend the petition. In doing so, the circuit court found that defendant's request to file an amended petition did not include any reference to his suggested amendments, the petition was conclusory, and it failed to include any facts for the court to use in determining whether defendant's suggested amendments have merit. Moreover, the circuit court

found that the petition defendant was seeking to amend was dismissed on May 25, 2007, and thus there was no petition pending for him to amend.

¶ 9 On August 8, 2007, defendant filed a notice of appeal from the July 13, 2007 order. In the notice of appeal, defendant identified the nature of the order appealed as the dismissal of his post-conviction petition.

¶ 10 As a threshold matter, the State asserts that this court lacks jurisdiction to consider the May 25 orders, which summarily dismissed defendant's post-conviction petition and imposed certain monetary penalties, because defendant's notice of appeal references only the July 13 order, which denied defendant's request for leave to amend the petition. We disagree with the State's position.

¶ 11 A notice of appeal should be liberally construed. *People v. Smith*, 228 Ill. 2d 95, 104 (2008) (and cases cited therein). A defect in form will not defeat jurisdiction where the substance of the notice of appeal, taken as a whole, advises the successful party (here, the State), of the nature of the appeal. *Smith*, 228 Ill. 2d at 105 (cases cited therein).

¶ 12 In the present case, the notice of appeal expressly states the "nature of order appealed: Dismissal of Post-Conviction Petition." Accordingly, the State clearly was advised that defendant sought review of the trial court's May 25 order

dismissing his post-conviction petition. Furthermore, the monetary assessments imposed by the trial court on May 25 were inherently linked to the dismissal of the subject petition and, therefore, are properly considered a part of the appeal. Just as a sentence, which can include monetary penalties, is inherently connected to a criminal conviction in a direct appeal so also the monetary penalties here are inherently connected to the dismissal of a post-conviction petition.

¶ 13 In addition, the reference to July 13, rather than May 25, as the date of the order in the notice of appeal does not constitute a defect but instead correctly notes that July 13 was the date of the final and appealable judgment. In 2007, the court summarily dismissed defendant's *pro se* post-conviction petition on May 25 and less than 30 days later on June 19, defendant filed a *pro se* petition for leave to amend his petition. A notice of appeal is due within 30 days *after* the court rules on a timely-filed postjudgment motion. Ill. S. Ct. R. 606 (eff. March 20, 2009); Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008). Although defendant entitled his *pro se* June 19 motion as a request to amend his dismissed petition, the motion, which contained the same arguments as his petition, in effect, requested the circuit court to reconsider its dismissal of the post-conviction petition, which was attached to the motion. See *People v. Blair*, 215 Ill. 2d 427, 451 (2005) (the "defendant may

file a motion to reconsider" the dismissal of a post-conviction petition); *People v. Harper*, 345 Ill. App. 3d 276, 284 (2003) (the character of a motion is determined by its content and not the title asserted by the petitioner). In light of this record, we have jurisdiction to consider the merits of defendant's appeal.

¶ 14 Our conclusion is not altered by the State's reliance on *Smith*, 228 Ill. 2d at 105, where the notice of appeal referred to the 2004 judgment of conviction upon defendant's plea of guilty rather than the 2006 order that was actually contested on appeal, *i.e.*, the circuit court's subsequent denial of defendant's *pro se* "Motion to Correct Sentence," which challenged the MSR term. Notably, the *Smith* defendant already had challenged his 2004 conviction. *Smith*, 228 Ill. 2d at 99, citing *People v. Smith*, No. 4-05-0104 (2005) (unpublished order under Supreme Court Rule 23) (affirmed the denial of the defendant's motion to withdraw his plea). Accordingly, the defect in *Smith* was more than one of form based on the date of the contested order because the substance of the notice of appeal referred to the judgment of conviction, which had already been considered by the appellate court in 2005, and it did not apprise the State of the true nature of the appeal, which attempted to contest his sentence based on a 2006 circuit court order. Unlike *Smith*, the notice of appeal in this case apprised the State of the judgment

being appealed because it specifically mentioned that defendant intended to appeal from the dismissal of his post-conviction petition.

¶ 15 Turning to the merits of this appeal, defendant relies on *Whitfield*, 217 Ill. 2d at 177, in claiming that he was denied his right to due process when the court failed to admonish him of the MSR term that was added to his sentence. The issue here is controlled by *Morris*, which expressly held that (1) "*Whitfield* announced a new rule" (*Morris*, 236 Ill. 2d at 361) and (2) "the new rule announced in *Whitfield* should only be applied prospectively to cases where the conviction was not finalized prior to December 20, 2005, the date *Whitfield* was announced" (*Morris*, 236 Ill. 2d at 366). Because defendant pled guilty and was admonished in 2006, *Whitfield* applies here.

¶ 16 The *Morris* court also addressed the type of information that must be communicated to ensure that the admonishments provided during a plea hearing comply with the requirement of Supreme Court Rule 402 (eff. July 1, 1997)), and due process post-*Whitfield*. *Morris*, 236 Ill. 2d at 366. According to *Morris*, 236 Ill. 2d at 366, the purpose of admonishments is to "advise the defendant of the actual terms of the bargain he has made with the State." The admonition is sufficient if it substantially complies with Rule 402 and an ordinary person would understand it to convey the required warning. *Morris*, 236 Ill.

2d at 366-67. Following the above language describing what is required of a trial court admonishing a defendant of MSR, the supreme court then discussed what a trial court ideally should do when giving its MSR admonishments. The supreme court encouraged judges to explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea, give the admonition at the time the trial court reviews the provisions of the plea agreement, and reiterate the admonition both at sentencing and in the written judgment. *Morris*, 236 Ill. 2d at 367-68.

¶ 17 The contrast between what the trial court must do and what it should do in giving MSR admonishments is significant. The *Morris* court reinforced the non-binding nature of what the "ideal" admonishment is by supporting it with several quotes from appellate cases that used advisory language similar to its own. *Morris*, 236 Ill. 2d at 367-68, quoting *People v. Daniels*, 388 Ill. App. 3d 952, 956 (2009); *People v. Berrios*, 387 Ill. App. 3d 1061, 1064 (2009); *People v. Mendez*, 387 Ill. App. 3d 311, 321 (2008) (vacated in light of *Morris*); *People v. Marshall*, 381 Ill. App. 3d 724, 736 (2008); and *People v. Jarrett*, 372 Ill. App. 3d 344, 352 (2007). Moreover, while *Whitfield* relief was granted in some of those cases (*Daniels* and *Mendez*), it was denied in others (*Berrios*, *Marshall*, and *Jarrett*), thus emphasizing that it is not reversible error when a trial court fails to make express references to MSR in the pronouncement of sentence or the

mittimus.

¶ 18 We conclude, therefore, that the supreme court in *Morris* was instructing the lower courts that it is *preferable* to expressly include MSR in the pronouncement of sentence and the mittimus but *mandatory* to give admonishments that convey to a defendant that his actual sentence, which he would be accepting with his negotiated plea, includes a term of MSR following his imprisonment.

¶ 19 Here, the admonishment satisfied that test. The court stated that, "if you are convicted, you must be sentenced to the penitentiary for a period of not less than six years or more than 30 years. When you get out of the penitentiary, you would have a term of mandatory supervised release of three years to do." The court then asked defendant if he understood "the possible penalties on this charge," and he replied that he did. We find that the trial court informed defendant of his MSR term in language that made it sufficiently clear that his prison sentence would be followed by MSR, rather than merely including MSR as a potential penalty.

¶ 20 Defendant next contends that the circuit court erred in imposing costs and fees against him for filing a frivolous post-conviction petition because his petition contained the gist of a constitutional claim. For the reasons stated above, defendant's petition was properly dismissed by the circuit court as frivolous

and patently without merit. Therefore, defendant failed to state the gist of a constitutional claim and the fees imposed on him were proper.

¶ 21 Alternatively, defendant maintains that the court erred in imposing fees pursuant to section 22-105 of the Code of Civil Procedure (Code) (735 ILCS 5/22-105 (West 2006)), because the imposition of such fees violates his rights to due process and equal protection where only prisoners are subject to sanctions. The same arguments now advanced by defendant were rejected by our supreme court in *People v. Alcozer*, 241 Ill. 2d 248, 261, 265 (2011). Bound by the supreme court in *Alcozer*, we find section 22-105 to be constitutional.

¶ 22 Next, the parties correctly agree that we must modify three specific fees and costs. First, the fee for filing a frivolous post-conviction petition must be reduced from \$294 to \$90, which is the maximum fee allowed by statute. 705 ILCS 105/27.2a(g)(2) (West 2006); see *People v. Carter*, 377 Ill. App. 3d 91, 97-98 (2007) (recognizing that the \$90 filing fee applies to post-conviction petitions filed 30 days after the entry of the judgment order).

¶ 23 Second, the costs of ordering transcripts must be reduced from \$22.50 to \$8.50 pursuant to section 27.2a(k)(5) of the Clerks of Courts Act (705 ILCS 105/27.2a(k)(5) (West 2006)). This provision directs the court to collect \$2 for the first

page, 50 cents per page for the next 19 pages, then 25 cents per page for any additional page. Here, the transcripts ordered by the court were from the plea hearing on March 10, 2006, which consisted of 14 pages. Accordingly, the total cost the circuit court was permitted to assess for the transcripts was \$8.50.

¶ 24 Third, we vacate the \$50 State's Attorney fee because the State was not involved in the summary dismissal of defendant's post-conviction petition. 55 ILCS 5/4-2002.1(a) (West 2006).

¶ 25 Finally, defendant contends that the circuit court erred in ordering his prisoner trust fund account to be docked for a filing fee, arguing that such account can only be docked for court costs under the language of section 22-105(a) of the Code, which provides in pertinent part that a

"prisoner is responsible for the full payment of filing fees and actual costs.

On filing the action or proceeding the court shall assess and, when funds exist, collect as a partial payment of any court costs required by law a first time payment of 50% of the average monthly balance of the prisoner's trust fund account for the past 6 months. Thereafter 50% of all deposits into the prisoner's individual account *** shall

be withheld until the actual court costs are collected in full." (Emphasis added.) 735 ILCS 5/22-105(a) (West 2006).

¶ 26 We resolved this issue against defendant's position in *People v. Smith*, 383 Ill. App. 3d 1078, 1093-94 (2008). In that case, as here, the defendant argued that the IDOC could not dock her account for the filing fee because section 22-105(a) only permits the collection of "any court costs" from a prisoner's trust account. *Smith*, 383 Ill. App. 3d at 1093-94. In rejecting this argument, we explained that the supreme court agreed with the characterization of a "cost" as including a "filing fee" because a cost compensates for services as distinguished from a "fine" which serves as a punishment for a conviction. *Smith*, 383 Ill. App. 3d at 1094, citing *People v. Jones*, 223 Ill. 2d 569, 581-82 (2006). Accordingly, we found that "the legislature's use of the broad phrase 'any court costs' in delineating a means of collection was meant to include the assessed 'filing fee and actual court costs'." *Smith*, 383 Ill. App. 3d at 1094. We find no reason to depart from the holding in *Smith* and agree that the filing fee here can be docked from defendant's prisoner trust fund account under section 22-105(a).¹

¹ We note that neither party cited *Smith*, despite the fact that it is directly on point and was filed before the briefs in this case, and about six months before the filing of the State's brief and defendant's reply brief.

1-07-2316

¶ 27 In conclusion, we vacate the \$50 State's Attorney fee, modify the \$294 fee for filing a frivolous post-conviction petition to \$90, and modify the \$22.50 assessment for the cost of transcripts to \$8.50. We affirm the judgment of the circuit court in all other respects.

¶ 28 Affirmed as modified.