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SECOND DIVISION  
August 9, 2011

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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
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 92 CR 9331
	)	92 CR 9333
	)	
DENNIS MCGRUDER,	)	The Honorable
	)	Marjorie Laws,
Petitioner-Appellant.	)	Judge Presiding.

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JUSTICE HARRIS delivered the judgment of the court.  
Justices Quinn and Connors concurred in the judgment.

**ORDER**

Held: The new rule announced in *People v. Whitfield*, 217 Ill. 2d 177 (2005), requiring the trial court to admonish defendants of the mandatory supervised release requirement when reviewing the terms of their plea agreements, does not apply retroactively to this case. Also, the trial court's imposition of \$90 for filing a frivolous petition was not error.

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¶ 1 Defendant Dennis McGruder appeals from the circuit court's dismissal of his *pro se* petition for relief from judgment under section 2-1401 of the Code of Civil Procedure (Code). 735 ILCS 5/2-1401 (West 2006). McGruder contends that his due process rights were violated by the imposition of a three-year term of mandatory supervised release (MSR) that attached to his sentence without admonishment by the trial court when it sentenced him pursuant to his plea agreement. McGruder also challenges a \$90 filing fee assessed by the trial court for filing a frivolous petition.

¶ 2 On June 17, 2009, this court affirmed McGruder's conviction and sentence. *People v. McGruder*, No. 1-07-2569 (June 17, 2009). On May 25, 2011, the supreme court denied McGruder's petition for leave to appeal, but entered a supervisory order directing this court to vacate its judgment and reconsider in light of *People v. Morris*, 236 Ill. 2d 345 (2010). Accordingly, we vacate our prior judgment and reconsider McGruder's appeal. For the reasons that follow, we affirm the dismissal of his petition and the assessment of the filing fee.

¶ 3 **BACKGROUND**

¶ 4 Defendant was charged with over 100 crimes under five indictments (92 CR 13576, 92 CR 9331, 92 CR 9332, 92 CR 9333, and 92 CR 9334). On September 13, 1993, defendant pled guilty to four counts of aggravated criminal sexual assault and 20 counts of armed robbery. The record indicates that McGruder agreed with all of the terms of his plea agreement as set forth by the trial court. Before accepting McGruder's plea, the trial court asked the following:

“THE COURT: The offense of armed robbery is called a Class X felony. The offense of aggravated criminal sexual assault is called a Class X felony. Class X felonies

are offenses that are punishable upon conviction by imprisonment in the Illinois Department of Corrections, Penitentiary Division, for a determinate or flat number of years of six years up to thirty years, and or a fine of up to \$10,000 or both for each offense. And if you're sent to the Illinois Penitentiary for a Class X offense, you shall be required to serve as part of your sentence upon release of custody upon each offense a period of three years mandatory supervised release. For a Class X offense there is no provision whatsoever for probation. That means if you're convicted you will be required to serve a minimum of six years in the Illinois Department of Corrections for each Class X offense. Do you understand that?

DEFENDANT: Yes.”

¶ 5 The court also admonished defendant pursuant to Supreme Court Rule 402 (Ill. S. Ct. R. 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 accepted McGruder's guilty plea and sentenced him to an aggregate term of 40 years' imprisonment in accordance with the plea agreement. The court also informed him that he had a right to appeal and, in order to perfect that right, he must file a written motion to vacate his plea. McGruder did not file a motion to withdraw his guilty plea and vacate the judgment, nor did he file a direct appeal.

¶ 6 On June 30, 1995, McGruder filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2006). The trial court dismissed the petition on July 10, 1995 and this court affirmed the trial court's judgment. The supreme court denied his petition for leave to appeal on January 11, 1999, but entered a supervisory order directing this

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court to vacate its Rule 23 order and reconsider in light of *People v. Coleman*, 183 Ill. 2d 366 (1998). On March 26, 1999, this court again affirmed the trial court's dismissal of the petition. *People v. McGruder*, No. 1-95-2824 (1999) (unpublished order pursuant to Supreme Court Rule 23). On June 12, 2003, McGruder filed a second *pro se* post-conviction petition which the trial court dismissed as frivolous and patently without merit on July 11, 2003. He did not appeal the dismissal.

¶ 7 On April 27, 2007, McGruder filed a *pro se* Motion to Vacate Void Judgments pursuant to section 2-1401 of the Code, directed toward two indictments (92 CR 9331 and 92 CR 9333). He alleged that his sentence should be reduced to 37 years because the trial court did not admonish him that he would have to serve an additional three-year term of MSR after completion of his sentence. He also alleged that he did not understand the meanings of consecutive versus concurrent sentencing when he pleaded guilty.

¶ 8 On August 1, 2007, the trial court found that McGruder was properly admonished regarding the MSR term. Furthermore, it found that he had raised the consecutive/concurrent sentencing issue in a prior post-conviction petition, and on appeal this court had determined that his claim had no merit and affirmed the dismissal of the post-conviction petition. The trial court denied the petition as frivolous on August 1, 2007, and assessed a \$90 filing fee pursuant to section 27.2(g)(2) of the Clerks of Court Act (705 ILCS 105/27.2(g)(2) (West 2006)). McGruder appeals from that order.

¶ 9

#### ANALYSIS

¶ 10 In his section 2-1401 petition, McGruder contends that the imposition of a three-year

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MSR term violated his due process rights because it was appended to his agreed-upon 40-year sentence without the trial court admonishing him of that fact during sentencing. Section 2-1401 establishes a procedure by which a court may vacate a final judgment after more than 30 days has passed. 735 ILCS 5/2-1401 (West 2006). “Relief under section 2-1401 is predicated upon proof, by a preponderance of evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition.” *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). Section 2-1401 is a statutory procedure that allows for collateral relief from final judgments. *Vincent*, 226 Ill. 2d at 6.

¶ 11 As support for his contention, McGruder cites *People v. Whitfield*, 217 Ill. 2d 177 (2005). In *Whitfield*, the defendant was required by statute to serve a mandatory three-year term of MSR, although the MSR was never discussed during plea negotiations, and the trial court never admonished him of his MSR obligation during the plea hearing. *Whitfield*, 217 Ill. 2d at 180. The supreme court in *Whitfield* reasoned that “a defendant has a due process ‘contract’ right to enforce the terms of a plea agreement, and the unilateral modification of the agreement to include a term of MSR not previously bargained for amounted to a breach of the plea agreement and violated principles of fundamental fairness.” *Whitfield*, 217 Ill. 2d at 189-91. The court found that the defendant’s rights were violated and the appropriate remedy was to modify his sentence from a term of 25 years plus 3 years MSR to a term of 22 years plus 3 years MSR. *Whitfield*, 217 Ill. 2d at 205.

¶ 12 In *People v. Morris*, the supreme court clarified its holding in *Whitfield* that a defendant must be admonished of the actual terms of the bargain he has made with the State. *Morris*, 236

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Ill. 2d at 366. “An admonition that uses the term ‘MSR’ without putting it in some relevant context cannot serve to advise the defendant of the consequences of his guilty plea and cannot aid the defendant in making an informed decision about his case.” *Id.* Therefore, “*Whitfield* requires that defendants be advised 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 367. Such an admonishment “would explicitly link MSR to the sentence to which defendant agreed in exchange for his guilty plea, would be given at the time the trial court reviewed the provisions of the plea agreement, and would be reiterated both at sentencing and in the written judgment.” *Id.*

¶ 13 *Whitfield*, however, announced a new rule since it established a novel remedy not based on supreme court precedent. *Morris*, 236 Ill. 2d at 361. The supreme court in *Morris* determined that the rule is not a watershed rule of criminal procedure requiring retroactive application to claims on collateral review. *Morris*, 236 Ill. 2d at 363-64. Therefore, it held that the new rule announced in *Whitfield* only applies prospectively to cases where the conviction was not finalized prior to *Whitfield*'s announcement date of December 20, 2005. McGruder pled guilty to four counts of aggravated criminal sexual assault and twenty counts of armed robbery on September 13, 1993. The trial court accepted his guilty pleas and sentenced him accordingly. He never filed a motion to withdraw his guilty plea nor did he directly appeal his conviction. Therefore, McGruder's conviction was finalized prior to December 20, 2005, and *Whitfield* does not apply to his case.

¶ 14 Before *Whitfield*, courts held that a defendant's due process rights were not violated by faulty MSR admonishments as long as he entered his guilty plea knowingly and voluntarily. See

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*People v. Wills*, 61 Ill. 2d 105, 110 (1975). Also, courts had determined prior to *Morris* that informing a defendant of the MSR term at some point prior to accepting the plea was sufficient although incorporation of the admonition at sentencing was encouraged. See *People v. Borst*, 372 Ill. App. 3d 331, 334 (2007), and *People v. Jarrett*, 372 Ill. App. 3d 344, 352 (2007).

McGruder does not claim the trial court never informed him of a MSR term, and the record indicates the trial court did state that “if you’re sent to the Illinois Penitentiary for a Class X offense, you shall be required to serve as part of your sentence upon release of custody upon each offense a period of three years mandatory supervised release.” The record indicates McGruder was informed of the MSR requirement before his plea was accepted, and he stated that he understood what the court was telling him. Furthermore, he indicated that he understood and agreed with the terms of his plea agreement, and entered his plea voluntarily. The trial court’s dismissal of his petition was proper.

¶ 15 In a supplemental brief, McGruder argues that the State waived consideration of the retroactivity issue by failing to raise it as an affirmative defense. Generally, waiver is a limitation on the parties and not on this court. *People v. Carter*, 208 Ill. 2d 309, 318-19 (2003).

Furthermore, the retroactive application of the rule in *Whitfield* was addressed in *Morris*. A supreme court opinion is binding on all lower courts and must be applied as a matter of law. *People v. Artis*, 232 Ill. 2d 156, 164 (2009). Therefore, we properly address the issue on appeal. See *People v. Demitro*, 406 Ill. App. 3d 954, 957 (2010).

¶ 16 McGruder also contends that he has stated an independent meritorious claim under *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). *Santobello* held

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that a defendant's due process rights may be violated if the State fails to honor its promises pursuant to a plea agreement. *Santobello*, 404 U.S. at 262, 92 S.Ct. at 499, 30 L.Ed.2d at 433. McGruder argues he's entitled to receive the benefit of the bargain he made in the plea agreement: a 40-year plea bargain. The supreme court in *Whitfield*, however, expressly relied on *Santobello* and stated that its holding was in conformity with precedent that "considered the defendant's bargain with the State in determining the propriety of certain MSR admonishments \*\*\*." *Morris*, 236 Ill. 2d at 360-61. *Santobello*, therefore, does not provide an independent basis to support McGruder's claim. See also *Demitro*, 406 Ill. App. 3d at 957 (*Whitfield* relied "on *Santobello* in the context of MSR, [and] defendant cannot maintain a claim for that remedy without relying on the holding in *Whitfield*.").

¶ 17 Finally, McGruder contends the \$90 filing fee assessed by the trial court should be vacated because his petition was not frivolous, and furthermore the imposition of the filing fee violated his right to equal protection. He first argues that his petition had merit because the ruling in *Whitfield* was not clear, and *Morris* "strongly encouraged" judges to discuss MSR in the context of a defendant's agreed upon sentence. However, as discussed above McGruder was informed of the MSR term attached to his offense. Furthermore, his petition was not based solely on the MSR issue. He also alleged that he did not understand consecutive versus concurrent sentencing, an issue he raised before in a post-conviction petition which this court subsequently determined was without merit. The trial court thus dismissed the petition as frivolous and properly assessed McGruder the \$90 filing fee.

¶ 18 McGruder also contends that imposition of the fee violates his equal protection rights.

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He argues that the statute on which the trial court relied, section 22-105 of the Code of Civil Procedure (735 ILCS 5/22-105 (West 2006)), is unconstitutional because it states that only “prisoners” are subject to costs and fees for filing a frivolous petition. Our supreme court in *People v. Alcozar*, 241 Ill. 2d 248 (2011) addressed this exact issue. In *Alcozar*, the court held that section 22-105 does not violate either due process or equal protection. *Alcozar*, 241 Ill. 2d at 266. It reasoned that the statute “was enacted by the General Assembly ‘to stem the tide of frivolous filings by prisoners who have been convicted and, in most instances, have had their ‘cases’ subjected to additional forms of appellate review.’” *Alcozar*, 241 Ill. 2d at 265. Section 22-105 does not violate equal protection of the law because it applies only to prisoners who file frivolous petitions, “a permissible distinction related to the purpose of the classification to achieve permissible ends.” *Alcozar*, 241 Ill. 2d at 265. The trial court’s imposition of the \$90 filing fee does not violate McGruder’s equal protection rights.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 20 Affirmed.