

2011 IL App (1st) 100168-U
No. 1-10-0168

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).

FOURTH DIVISION
August 4, 2011

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. 85 C 5092 |
| |) | |
| ROSCOE EVANS, |) | Honorable |
| |) | Clayton J. Crane, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Salone and Sterba concurred in the judgment.

O R D E R

Held: Second-stage dismissal of post-conviction petition affirmed where defendant sought MSR relief which was foreclosed by ruling in *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 1 Defendant Roscoe Evans appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). He contends that the trial court erred in dismissing his "non-

successive" petition by denying him leave to file on the grounds of untimeliness, and in failing to file a written order in the cause.

¶ 2 The record shows, in relevant part, that in 1986, defendant pleaded guilty to the murder of Charles Armstrong Sr. and the attempted murder of Charles Armstrong Jr. in exchange for consecutive, respective sentences of 40 and 10 years' imprisonment. Defendant did not file a motion to vacate his guilty plea or otherwise attempt to perfect a direct appeal from the judgment entered thereon.

¶ 3 On November 1, 1988, defendant filed a *pro se* petition for post-conviction relief alleging, essentially, that he was coerced into pleading guilty by his attorney, and that his case should have been transferred to a different trial judge because the presiding judge knew the victim and had a "profound stand on Black-on-Black crime." The State moved to dismiss defendant's petition, but on May 14, 1992, defendant filed a motion for leave to withdraw his petition which the court granted with prejudice.

¶ 4 On March 31, 2008, defendant filed a second *pro se* petition for post-conviction relief alleging that the trial court violated his right to due process by failing to admonish him that he was subject to a three-year term of mandatory supervised release (MSR) in addition to his sentence, and, as relief, requested a comparable reduction in that sentence. Defendant

further maintained that he was not culpably negligent for the untimely filing of his petition because he had no remedy for that due process violation prior to the supreme court decision in *People v. Whitfield*, 217 Ill. 2d 177 (2005). In support of his petition, defendant attached his own affidavit in which he averred, *inter alia*, that he had not been advised of his three-year MSR term by his attorney, the court, the State, or his earlier post-conviction counsel, that he became aware of it by inquiring of prison officials, and that he subsequently learned from *Whitfield* that a sentence reduction was available as a remedy.

¶ 5 Defendant's petition was not dismissed within 90 days of its filing, and thus was advanced to the second-stage of proceedings. 725 ILCS 5/122-2.1(b) (West 2008). Counsel was appointed to represent defendant, and on July 29, 2009, counsel filed a supplemental petition setting forth a revised *Whitfield* claim, as well as claims that defendant's guilty plea and jury trial waiver were unknowing and involuntary since he had not been properly admonished of his MSR term. Counsel also attached to the petition another affidavit from defendant.

¶ 6 On October 27, 2009, the State filed a motion to dismiss defendant's petition, asserting that defendant was not entitled to relief under *Whitfield*, that he was culpably negligent for the untimely filing of his petition and failed to

allege facts showing the contrary, and that he also failed to satisfy the cause and prejudice test so as to properly obtain leave to file his successive petition. On November 18, 2009, defendant responded that his petition was not successive, that he was not culpably negligent for its untimely filing, and that his guilty plea was subject to the rule announced in *Whitfield*.

¶ 7 On January 6, 2010, a hearing was held on the motion to dismiss. The State initially informed the court that defendant had been paroled, then argued, *inter alia*, that there was no available relief for defendant because his MSR term could not be reduced under "People vs. Poor."¹ Defendant responded that the issue was not moot since MSR was part of his sentence.

¶ 8 In announcing its decision, the court acknowledged that defendant had not been admonished regarding his MSR term, but noted that he had "a period of time to correct that wrong under the statute," and that, in any event, the court could not reduce a MSR term. The court then stated, "The ruling is untimely, therefore I am not giving him leave to file, and I have no remedy in this case."

¶ 9 The certified report of disposition that was mailed to defendant reads, "The motion to dismiss the petition and the successive petition for post-conviction relief is granted. The

¹ The State was likely referring to this court's decision in *People v. Porm*, 365 Ill. App. 3d 791 (2006).

petition and the successive petition for post-conviction relief are denied."

¶ 10 In this appeal from that order, defendant contends that the trial court erred in dismissing his "non-successive" petition by denying him leave to file on the grounds that it was untimely, and in failing to file a written order in the cause. We note, as did the State, that defendant's argument is directed to the procedural errors of the court, and is devoid of reference to the issue of timeliness raised by the State in its motion to dismiss which was found dispositive by the court.

¶ 11 Notwithstanding, review of the dismissal of a post-conviction petition without an evidentiary hearing is *de novo* (*People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998)); and the reviewing court may affirm the dismissal of a petition on any grounds substantiated by the record (*People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010)). With these principles in mind, we address the propriety of the dismissal in this case.

¶ 12 At the second-stage of proceedings, defendant has the burden of providing a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts

in the petition and affidavits are taken as true, but nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 13 Here, the record shows that defendant filed the petition for relief at bar 22 years after judgment was entered on his plea convictions. He substantively alleged the violation of his due process rights under *Whitfield*, 217 Ill. 2d at 195, because he pleaded guilty to specific crimes in exchange for specific sentences, and the court failed to admonish him that he was subject to a MSR term in addition to that sentence. He thus claimed that he was entitled to a reduction in his sentence. He further alleged that his untimely filing of the petition should be excused because he could not have made such an assertion prior to *Whitfield*.

¶ 14 In *People v. Morris*, 236 Ill. 2d 345, 366 (2010), however, the supreme court held that it announced a new rule in *Whitfield* which should only be applied prospectively to cases where the conviction was not finalized prior to the date *Whitfield* was announced. Here, where defendant pleaded guilty in 1986, his conviction became final well before *Whitfield* was filed on December 20, 2005, and, as a result, *Whitfield* is inapplicable to his case.

¶ 15 Furthermore, this court has no authority to withhold a statutorily required MSR term from a sentence. *People v. Porm*, 365 Ill. App. 3d 791, 794 (2006), citing *Whitfield*, 217 Ill. 2d at 200-01. Since defendant has completed his term of imprisonment and only his MSR term remains, his claim for a reduction of sentence pursuant to *Whitfield* is moot. *Porm*, 365 Ill. App. 3d at 795.

¶ 16 We lastly note that defendant has not presented any argument in support of his contention that the trial court erred in failing to enter a written order in this case. Accordingly, this issue is waived. Ill. S. Ct. R. 341(h)(7) (eff. Jul. 1, 2008).

¶ 17 For the reasons stated, we find that the second-stage dismissal of defendant's post-conviction petition was proper, and affirm the decision of the circuit court of Cook County to that effect.

¶ 18 Affirmed.