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FIFTH DIVISION
February 25, 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. 94 CR 26213
)	
PETER RODRIGUEZ,)	The Honorable
)	John Joseph Hynes,
Defendant-Appellant.)	Judge Presiding.

JUDGE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse 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 under supreme court ruling in *People v. Morris*, 236 Ill. 2d 345 (2010).

Defendant Peter Rodriguez appeals 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). On appeal, he contends that he was not culpably negligent for the untimely filing of his petition, and, substantively, that he made a

substantial showing of a constitutional violation related to his negotiated plea.

Following a jury trial, defendant was convicted of the first degree murder (720 ILCS 5/9-1(a) (West 1992)) and armed robbery (720 ILCS 5/18-2 (West 1992)) of Ronald Hudson. On direct appeal, this court reversed defendant's convictions and remanded the cause for a new trial. *People v. Rodriguez*, No. 1-97-0990 (1999) (unpublished order under Supreme Court Rule 23).

On remand, defendant entered a negotiated plea of guilty to first degree murder and armed robbery and was sentenced to concurrent, respective terms of 35 and 28 years' imprisonment. Judgment was entered on September 26, 2000, and defendant did not file a motion to vacate his guilty plea or attempt to perfect a direct appeal from it.

On February 16, 2007, defendant filed a *pro se* petition for post-conviction relief seeking a reduction in his sentence. He alleged that his constitutional right to due process was violated when he negotiated a plea agreement with the prosecution for a sentence of 35 years' imprisonment, but was never advised that he would also be subject to an additional 3 years of mandatory supervised release (MSR). He claimed that the addition of the MSR term to his sentence, under these circumstances, denied him the benefit of his bargain under the plea agreement, citing *People v. Whitfield*, 217 Ill. 2d 177 (2005).

Defendant also addressed the untimely filing of his petition. He claimed that he was neither admonished nor advised that he would be subject to a MSR term, and only learned that was the case when another inmate brought it to his attention. As a result, he claimed that he was not culpably negligent for the untimely filing of his petition.

The circuit court appointed counsel to represent defendant, and counsel filed an amended post-conviction petition on September 26, 2008. In support of that petition, counsel attached the affidavits of defendant and Joe Rejon, a fellow inmate at Hill Correctional Center in Galesburg, Illinois. These affidavits indicated that sometime during the summer of 2006, Rejon brought up the subject of MSR with defendant and showed him a case on the topic, which, defendant claimed, first alerted him to a possible due process violation in his sentencing. Defendant subsequently obtained a copy of his mittimus in August, and, finding no mention of MSR, he began drafting a petition for post-conviction relief. He also asked a friend to obtain court transcripts of his sentencing which were prepared on December 5, 2006. After several lock-downs and limited access to the prison law library, defendant filed his petition on February 16, 2007.

On October 10, 2008, the State filed a motion to dismiss defendant's petition. The State alleged that defendant failed to meet his burden of proving that he was not culpably negligent for

the untimely filing of his petition, and that defendant's claims were waived because he did not present them to this court on direct appeal.

After a hearing, the court entered a written order on April 3, 2009, granting the State's motion. The court found that defendant had failed to demonstrate that the untimely filing of his petition was due to anything other than his culpable negligence. Defendant now appeals that decision, contending that he was not culpably negligent for the untimely filing of his petition, and that he made a substantial showing of a constitutional violation where he was denied the benefit of his negotiated plea due to the trial court's failure to admonish him of MSR.

The trial court granted the State's motion to dismiss because the petition was untimely filed. The record shows that defendant filed his petition over six years after his guilty plea was entered, which is beyond the statutory time frame provided in the Act. 725 ILCS 5/122-1(c) (West 2008). Although defendant here contends that he established a lack of culpable negligence for his untimely filing, we may affirm the dismissal of defendant's petition on any grounds substantiated by the record (*People v. Demitro*, No. 1-09-2104, slip op. at 2 (Ill. App. Dec. 17, 2010)), and do so here.

At the second stage of proceedings, under the Act, a

petition may only be dismissed where the allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *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 under the Act. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). The dismissal of a petition without an evidentiary hearing is subject to plenary review. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

In this case, defendant substantively alleges that he suffered a violation of his due process rights under *Whitfield*, 217 Ill. 2d at 195. In that case, the supreme court held that where a defendant pleads guilty in exchange for a specific sentence, the trial court violates his due process rights if it fails to admonish him that he is subject to a MSR term in addition to that sentence. *Whitfield*, 217 Ill. 2d at 195. Since he negotiated a sentence of 35 years pursuant to a plea agreement, and was not admonished that he was subject to a MSR term as well, defendant claims that he is entitled to a reduction in his sentence.

The State responds that the supreme court's holding in *Morris*, 236 Ill. 2d at 366, forecloses defendant from any relief under *Whitfield*. In *Morris*, 236 Ill. 2d at 366, the supreme

court held that its holding in *Whitfield* was a new rule 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 on September 26, 2000, and filed no challenges to the judgment entered thereon, his conviction became final well before *Whitfield* was filed on December 20, 2005. Thus, *Whitfield* provides no basis for finding a constitutional violation or the relief requested. *Morris*, 236 Ill. 2d at 366.

Defendant argues, nonetheless, that the non-retroactivity of *Whitfield* under the holding in *Morris* was an affirmative defense which the State waived by not raising in the trial court. However, a party cannot waive a supreme court opinion, which must be applied as a matter of law. *Demitro*, No. 1-09-2104, slip op. at 3-4. The holding in *Morris* clearly bars any available relief, and we have no authority to overrule that holding. *Demitro*, No. 1-09-2104, slip op. at 4, citing *People v. Artis*, 232 Ill. 2d 156, 164 (2009).

Defendant finally argues that he has made a substantial showing of a violation of his due process rights under *Santobello v. New York*, 404 U.S. 257 (1971), independent of his claim under *Whitfield*. In *Santobello*, 404 U.S. at 262, the Supreme Court held that the State violates defendant's due process rights when

it fails to fulfill its promises under a plea agreement. However, in *Morris*, 236 Ill. 2d at 361, the supreme court explained that its decision in *Whitfield* was rooted in *Santobello*; and, accordingly, defendant cannot merely cite *Santobello* and avoid the effect of its progeny, *Whitfield*, and its limitation to prospective application under *Morris*. *Demitro*, No. 1-09-2104, slip op. at 4.

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

Affirmed.