

THIRD DIVISION
February 23, 2011

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).

No. 1-09-2118

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	No. 05 CR 20756
v.)	
)	
PETE CORTEZ,)	The Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.

Justices Neville and Murphy concurred in the judgment.

O R D E R

HELD: Dismissal of section 2-1401 post-judgment petition was proper where circuit court's admonishment about mandatory supervised release substantially complied with Illinois Supreme Court Rule 402(a)(2) (eff. July 1, 1997) and *People v. Whitfield*, 217 Ill. 2d 177 (2005), as required by *People v. Morris*, 236 Ill. 2d 345, 366-67 (2010).

Defendant Pete Cortez appeals from the dismissal of his

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section 2-1401 petition for post-judgment relief, contending that he was not adequately admonished about mandatory supervised release during his guilty plea and sentencing proceedings. Defendant requests reduction of his sentence from 15 years to 12 years, followed by three years of mandatory supervised release, or, alternatively, remandment for second-stage post-conviction proceedings.¹ We affirm.

Pursuant to a negotiated guilty plea on May 31, 2007, defendant was convicted of possession of a controlled substance (900 or more grams of cocaine) with intent to deliver, and was sentenced to a 15-year prison term.

The parties stipulated that there was a factual basis for the guilty plea. The circuit court heard the facts during a pretrial conference that was not on the record.

During the guilty plea proceeding, the circuit court admonished defendant about mandatory supervised release in the middle of other admonishments:

"THE COURT: This is a Class One--excuse
me--Class X enhanced offense, 15 to 60 years
in the Illinois Department of Corrections,

¹ Defendant argues on appeal as if he had filed a post-conviction petition under the Post-Conviction Hearing Act, but he filed a post-judgment petition under the Code of Civil Procedure.

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three years mandatory-supervised release, and a fine of up to \$25,000. Do you understand that?

THE DEFENDANT: Yes."

The court did not re-admonish defendant about mandatory supervised release during the sentencing phase of the plea proceedings and did not refer to mandatory supervised release when it imposed sentence.

Defendant did not file a motion to withdraw the guilty plea or a direct appeal.

In May 2009, defendant filed a *pro se* petition for post-judgment relief (735 ILCS 5/2-1401 (West 2008)), alleging that he agreed to a 15-year sentence, not to mandatory supervised release, and that mandatory supervised release deprived him of the benefit of his bargain. The circuit court dismissed the petition, finding that defendant had failed to set forth a claim or defense that would entitle him to relief under section 2-1401, because the record established that defendant was admonished about mandatory supervised release.

On appeal, defendant contends that the circuit court referred to mandatory supervised release only when discussing the maximum possible penalty for possession of a controlled substance

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with intent to deliver, during the middle of the admonishments, and did not admonish him that mandatory supervised release would apply to the terms of his negotiated plea and be added to his actual prison sentence, did not mention mandatory supervised release at the beginning or end of the plea colloquy, and did not mention mandatory supervised release in the mittimus. Defendant argues that the error was compounded by the failure of the assistant State's Attorney to explain mandatory supervised release to him.

Defendant relies on the standards applicable to post-conviction proceedings rather than post-judgment proceedings and argues that there was an arguable basis in fact and in law for his allegation that he was not adequately admonished about mandatory supervised release. However, post-conviction proceedings and post-judgment proceedings are two "entirely different form[s] of statutory, collateral relief." *People v. Vincent*, 226 Ill. 2d 1, 6 (2007).

A post-conviction petition may be summarily dismissed as frivolous and patently without merit only if it lacks an arguable basis in law or in fact, meaning that it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (1009); see

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also *People v. Mendez*, 402 Ill. App. 3d 95, 98 (2010). The applicable standard of review for the summary dismissal of a post-conviction petition is *de novo*. See *People v. West*, 187 Ill. 2d 418, 426 (1999); *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

To obtain post-judgment relief, the defendant must prove, by a preponderance of the evidence, a claim or defense that would have prevented the original judgment, diligence in discovering the claim or defense, and diligence in presenting the post-judgment petition. *Vincent*, 226 Ill. 2d 1, 7-8. Although section 2-1401 is a civil remedy, it can be used in criminal cases. *Vincent*, 226 Ill. 2d 1, 8.

In *People v. Whitfield*, 217 Ill. 2d 177, 180, 195, 201, 205 (2005), neither the circuit court nor the prosecutor told the defendant during the plea hearing that he would have to serve three years of mandatory supervised release following his negotiated 25-year prison sentence for murder. The Illinois Supreme Court reversed the judgment, vacated the sentence, and remanded to the circuit court with directions to impose a prison sentence of 22 years, to be followed by a three-year term of mandatory supervised release. *Whitfield*, 217 Ill. 2d at 205.

In *People v. Morris*, 236 Ill. 2d 345, 366 (2010), the

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Illinois Supreme Court ruled that *Whitfield* applies prospectively to post-conviction petitioners whose convictions were finalized after December 20, 2005, the date that the *Whitfield* decision was issued. The court in *Morris*, 236 Ill. 2d at 366, also stated that it was clarifying *Whitfield*. The court stated that, pursuant to *Whitfield*, the defendant must be advised that a period of mandatory supervised release will be added to the actual, agreed sentence, in exchange for the guilty plea. *Morris*, 236 Ill. 2d at 367. However, the court also stated that "there is no precise formula in admonishing a defendant" about mandatory supervised release, that the admonishment "need not be perfect" (*Morris*, 236 Ill. 2d at 367), and that it is sufficient if it substantially complies with Supreme Court Rule 402 and case law precedent (*id.*).

Although the districts are divided over what constitutes a *Whitfield* violation after *Morris* (see the discussion in *People v. Dorsey*, No. 4-07-0572, slip op. at 10-17 (Ill. App. Oct. 15, 2010)), the first district has held that a constitutional violation under *Whitfield* occurs only where there is no mention of mandatory supervised release (see *People v. Davis*, 403 Ill. App. 3d 461, 466 (2010)).

Here, *Whitfield* applies to defendant because his May 31,

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2007, conviction occurred after the date that *Whitfield* was issued. However, unlike *Whitfield*, this is not a case where the circuit court was absolutely silent about mandatory supervised release. See *Davis*, 403 Ill. App. 3d at 466. Instead, the court substantially complied with *Whitfield* and Rule 402(a)(2) because it clearly admonished defendant that the offense involved penitentiary time and three years of mandatory supervised release upon his release from the penitentiary. The clear meaning of the admonishments was that defendant would receive a penitentiary sentence to be followed by three years of mandatory supervised release. Under these circumstances, the court's dismissal of the petition was proper, because defendant did not raise a meritorious claim or defense that would have prevented the original judgment.

Nor are we persuaded by defendant's argument under *Santobello v. New York*, 404 U.S. 257, 262-63 (1971). Pursuant to *Santobello*, a defendant who pleads guilty pursuant to a plea agreement has a due process right to enforce the plea bargain. Defendant implies that his sentence should be reduced because he was denied the benefit of his plea bargain under *Santobello* and independent of *Whitfield*. However, *Morris* recognized that *Whitfield* relied on *Santobello*. *Morris*, 236 Ill. 2d at 361; see

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also *People v. Seyferlich*, 398 Ill. App. 3d 989, 993 (2010) (observing that the benefit of the bargain theory in *Whitfield* was "rooted in" *Santobello*). Therefore, *Santobello* is not independent of *Whitfield*, and defendant cannot avoid *Morris* by relying on *Santobello* instead of *Whitfield*. See *People v. Demitro*, No. 1-09-2104, slip op. at 4 (Ill. App. Dec. 17, 2010). We reject defendant's suggestion that the law applicable to his benefit of the bargain argument begins and ends in 1971 with *Santobello*. We have considered, and rejected, all of defendant's arguments on appeal.

The judgment of the circuit court is affirmed.

Affirmed.