

No. 1-09-2107

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).

FIFTH DIVISION
January 28, 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.)	99 CR 11623
)	
CHARLES DELANEY,)	The Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein
concur in the judgment.

O R D E R

HELD: Second-stage dismissal of defendant's petition for post-conviction relief affirmed where it was shown that his conviction was finalized before the decision in *Whitfield* was announced.

Defendant Charles Delaney appeals from the second-stage dismissal of his 2008 petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2008)). In this court, he raises a "benefit-of-the-bargain"

claim under *People v. Whitfield*, 217 Ill. 2d 177 (2005), seeking specific performance of his negotiated plea agreement in 2000. He also contends that the tardy filing of his petition was not due to his culpable negligence because he was unaware of the corresponding mandatory supervised release (MSR) term for his Class X offense until 2008, and the State waived the affirmative defense of *Whitfield's* nonretroactivity.

The record shows that on August 14, 2000, defendant entered a negotiated plea of guilty to aggravated battery of a child, a Class X felony (720 ILCS 5/12-4.3(a) (West 2000)), and was sentenced, in accordance therewith, to 13 years in prison. Before accepting his plea, the trial court admonished defendant of the rights he was waiving and the range of possible sentences, but failed to mention the three-year term of MSR following imprisonment. Defendant did not move to withdraw his plea or otherwise attempt to perfect an appeal from the judgment entered thereon.

Eight years later, on July 14, 2008, defendant filed a *pro se* motion to vacate judgment (735 ILCS 5/2-1401 (West 2008)) or, alternatively, for post-conviction relief (725 ILCS 5/122-1 (West 2008)), and a motion for leave to file an amended motion on October 28, 2008. In those motions, defendant alleged that his constitutional right to due process was violated when the trial court failed to advise him that his sentence included three years

of MSR.

On April 28, 2009, appointed counsel filed an amended petition for post-conviction relief requesting that defendant's sentence be reduced by the length of his MSR term, in accordance with *People v. Whitfield*, 217 Ill. 2d 177 (2005), and *Santobello v. New York*, 404 U.S. 257 (1971). Counsel also submitted a form affidavit from defendant stating that he learned about his MSR obligation from a fellow inmate on February 11, 2008, and that he has a learning disability which further delayed the filing of his post-conviction petition.

The State filed a motion to dismiss defendant's petition asserting that it was untimely filed and he is not entitled to the relief sought. Following a hearing, the circuit court granted the State's motion to dismiss defendant's petition as untimely.

In this appeal from that second stage dismissal, defendant contends that he was not culpably negligent "where he filed his post-conviction petition less than seven months after learning of his MSR term and approximately four months after his motion for [plea] transcripts was denied." He also contends that the State waived the affirmative defense of *Whitfield's* nonretroactivity. The State responds that defendant did not establish his lack of culpable negligence in the late filing, and the nonretroactivity argument is not an affirmative defense that can be waived.

To withstand a motion to dismiss and merit an evidentiary hearing under the Act, defendant was required to make a substantial showing that his constitutional rights were violated, taking all well-pled facts as true. *People v. Davis*, 119 Ill. 2d 61, 64 (1987). We review the second-stage dismissal of defendant's post-conviction petition *de novo* (*Whitfield*, 217 Ill. 2d at 527), and we may affirm on any grounds appearing in the record, regardless of the circuit court's reasoning for that decision (*People v. Demitro*, No. 1-09-2104, slip op. at 2 (Ill. App. Dec. 17, 2010)).

Defendant sought relief under *Whitfield*, 217 Ill. 2d at 202, where the supreme court determined that an appropriate remedy for a defendant who was not advised of his MSR obligation before entering his guilty plea, was a reduction of the prison sentence by the MSR term. However, as the State points out, in *People v. Morris*, 236 Ill. 2d 345, 366 (2010), the supreme court held that *Whitfield* should only be applied prospectively to cases where the conviction was not finalized before December 20, 2005, the date *Whitfield* was announced.

The record here shows that defendant pleaded guilty and was sentenced on August 14, 2000. Because defendant did not file any postplea motions or attempt to perfect an appeal from that judgment, his conviction was finalized before *Whitfield* was announced in 2005, and, thus, he is not entitled to retroactive

relief under *Whitfield*. *Morris*, 236 Ill. 2d at 366; *Demitro*, No. 1-09-2104, slip op. at 3. Accordingly, we find that defendant cannot make a substantial showing that his constitutional rights were violated, and his MSR claim was properly denied. *Demitro*, No. 1-09-2104, slip op. at 2-3.

To avoid this result, defendant asserts that *Morris* wrongly decided that *Whitfield* announced a new constitutional rule of law as it merely reiterated the "decades old" requirement that a defendant receive the benefit of the bargain from his plea agreement. We note, however, that the propriety of *Morris* is not before us, and that we are bound by the decisions of the supreme court. *People v. Artis*, 232 Ill. 2d 156, 164 (2009). A supreme court decision may not be waived by a party, but must be applied as a matter of law (*Artis*, 232 Ill. 2d at 164), and we have no authority to overrule it. *Demitro*, No. 1-09-2104, slip op. at 3-4.

Defendant further contends that independent of *Whitfield*, he made a substantial showing that his due process rights were violated under *Santobello v. New York*, 404 U.S. 257 (1971), where it was held that the State's failure to honor its promises as part of a plea agreement may implicate a defendant's right to due process. This contention is unpersuasive because *Whitfield* was explicitly dependent upon, not independent of, *Santobello*. *Demitro*, No. 1-09-2104, slip op. at 4.

In point of fact, the court found in *Whitfield* that the "benefit of the bargain" claim raised by defendant had "its roots in *Santobello*" (*Whitfield*, 217 Ill. 2d at 184-85), then explained in *Morris*, that *Whitfield* relied "squarely on the Supreme Court's decision in *Santobello*" (*Morris*, 236 Ill. 2d at 361). By citing *Santobello*, defendant cannot avoid the effect of its progeny, *Whitfield*, and its limitation to prospective application under *Morris*. *Demitro*, No. 1-09-2104, slip op. at 4.

In so finding, we need not address whether defendant established a lack of culpable negligence for the tardy filing of his post-conviction petition. *Demitro*, No. 1-09-2104, slip op. at 4, citing *McNeil v. Carter*, 318 Ill. App. 3d 939, 944 (2001).

For the reasons stated, we affirm the second-stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

Affirmed.