No. 1-09-3191

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).

THIRD DIVISION
June 15, 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. 06 CR 508
	)	
RAFAEL HERNANDEZ,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

O R D E R

HELD: Where the record showed that the trial court sufficiently admonished defendant during his guilty plea hearing that he would be required to serve a three-year term of mandatory supervised release if sentenced to prison, the summary dismissal of his post-conviction petition was affirmed.

Defendant, Rafael Hernandez, appeals from an order of the circuit court summarily dismissing his *pro se* post-conviction petition as frivolous and patently without merit. On appeal, defendant contends that the court erred in dismissing his petition because it stated a meritorious claim that he was denied his right to due process and fundamental fairness when the trial court failed to advise him at his guilty plea hearing that a three-year term of mandatory supervised release (MSR) would be added to his negotiated sentence. Defendant asserts that this court should reduce his prison term by three years to provide him the benefit of his bargain with the State. We affirm.

In a 20-count indictment, defendant was charged with 10 counts of aggravated criminal sexual assault, 6 counts of aggravated kidnaping, and 2 counts each of criminal sexual assault and kidnaping. At the September 2006 plea hearing, defendant entered a fully negotiated guilty plea to one count of aggravated criminal sexual assault. Defendant acknowledged that he was accepting the State's offer of 12 years' imprisonment. Defendant also acknowledged that he would have to serve 85% of his sentence, which would be 10 years, 2 months and 12 days.

The prosecutor noted that in an unrelated 1999 case, defendant had pleaded guilty to a reduced charge of aggravated discharge of a firearm and was sentenced to 12 years' imprisonment. Defendant

was placed on mandatory supervised release in that case on July 15, 2006.

After advising defendant of the charge in this case, the court admonished him as follows:

> "The charge that I just read to you is a Class X Felony. That means it carries a possible sentence of not less than 6, no more than 30 years in the Department of Corrections; a fine of up to $25,000, or both; 3 years mandatory supervised release, formerly known as parole if you were sentenced to the penitentiary once you got out."

Defendant stated that he understood the penalties and the fact that he would be sentenced to a term of 12 years' imprisonment in exchange for his guilty plea. The trial court entered judgment on the guilty plea and sentenced defendant to the agreed prison term. The court did not mention MSR when it imposed the sentence. Defendant did not move to withdraw his guilty plea, nor did he attempt to perfect an appeal from that judgment.

In September 2009, defendant filed the instant *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2008)) alleging that his due process rights were violated when the trial court failed to admonish him

that his 12-year prison term would be followed by a 3-year term of MSR. Defendant alleged that the MSR term extended his sentence beyond the maximum term imposed by the trial court, resulting in a void sentence. He claimed that his sentence was more onerous than the one he agreed to, and that he did not receive the benefit of his negotiated plea bargain. Defendant asked the court to reduce his prison sentence by 3 years so that his combined terms of imprisonment and MSR would equal the 12-year sentence to which he had agreed.

The circuit court quoted its admonishment from the plea hearing and found that the record contradicted defendant's claim that he was not advised of MSR. Accordingly, the court summarily dismissed defendant's post-conviction petition as frivolous and patently without merit.

On appeal, defendant contends that the circuit court erred when it summarily dismissed his *pro se* post-conviction petition because it stated the gist of a meritorious due process claim that the trial court failed to properly admonish him about the three-year term of MSR. Defendant acknowledges that at the plea hearing, the trial court said he could be sentenced to MSR when advising him of the "possible sentences." Defendant argues, however, that the court never told him he "would" have to serve MSR, or that MSR automatically follows a prison sentence. Defendant asserts that the court failed to comply with our supreme court's holding in

People v. Whitfield, 217 Ill. 2d 177 (2005), because it did not specifically advise him that MSR would be added to *his* sentence, it did not mention MSR when imposing the sentence, and it did not include MSR on his mittimus.

Defendant acknowledges that similar challenges have been rejected by this court in *People v. Davis*, 403 Ill. App. 3d 461 (2010), *People v. Marshall*, 381 Ill. App. 3d 724 (2008) and *People v. Andrews*, 403 Ill. App. 3d 654 (2010). He argues, however, that those cases were wrongly decided and should not be followed by this court. Defendant asserts that this court must follow the action taken by the *Whitfield* court and reduce his prison sentence by three years, or reverse the dismissal of his post-conviction petition and remand his case to the circuit court for second-stage proceedings under the Act.

We review the circuit court's summary dismissal of defendant's post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2006); *Coleman*, 183 Ill. 2d at 378-79. A *pro se* post-conviction petition need only state the gist of a constitutional claim to survive summary dismissal. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Our supreme court has held that a petition can be summarily dismissed as frivolous or patently without merit if it

has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Hodges*, 234 Ill. 2d at 16. A legal theory that is completely contradicted by the record is indisputably meritless. *Hodges*, 234 Ill. 2d at 16.

Our supreme court has held that a defendant's right to due process is violated when he pleads guilty in exchange for a specific sentence and the trial court fails to admonish him, prior to accepting the plea, that a term of MSR will be added to his sentence. *Whitfield*, 217 Ill. 2d at 195. In *Whitfield*, the trial court failed to advise the defendant at any time during the plea hearing that he would be required to serve a three-year term of MSR. *Whitfield*, 217 Ill. 2d at 180. Consequently, the supreme court reduced the defendant's term of imprisonment by three years to account for the due process violation. *Whitfield*, 217 Ill. 2d at 205.

Our supreme court subsequently clarified the *Whitfield* holding in *People v. Morris*, 236 Ill. 2d 345 (2010). In *Morris*, the court explained that the trial court cannot merely mention the term "MSR" without placing it in a relevant context that advises the defendant of the consequences of his guilty plea. *Morris*, 236 Ill. 2d at 366. However, an MSR admonishment need not be perfect nor follow a precise formula; instead, it must "substantially comply" with

precedent and Supreme Court Rule 402 (eff. July 1, 1997). *Morris*, 236 Ill. 2d at 366-67. An admonishment is sufficient if an ordinary person in the defendant's circumstances "would understand it to convey the required warning." *Morris*, 236 Ill. 2d at 366. The supreme court "strongly encourage[d]" the trial courts to explicitly link the MSR term to the defendant's negotiated sentence, to give the MSR admonishment while reviewing the provisions of the plea agreement, to reiterate the admonishment when imposing the sentence, and to include the MSR term on the written mittimus. *Morris*, 236 Ill. 2d at 367-68.

This court has held that where the defendant knows that he is going to be sentenced to prison in exchange for his guilty plea, and he is thereafter admonished by the trial court during the guilty plea hearing that he must serve a term of MSR if sentenced to the penitentiary, the MSR admonishment is sufficient. *Davis*, 403 Ill. App. 3d at 466; *Marshall,* 381 Ill. App. 3d at 736. See also *People v. Dorsey*, 404 Ill. App. 3d 829, 837-38 (2010) (Fourth District); *Andrews*, 403 Ill. App. 3d at 665 (Fourth District). *Contra People v. Burns*, 405 Ill. App. 3d 40 (2010) (Second District). These cases all note that in *Whitfield*, the trial court never mentioned the three-year term of MSR at any point during the plea hearing. *Davis*, 403 Ill. App. 3d at 465-66; *Marshall*, 381 Ill. App. 3d at 735; *Dorsey*, 404 Ill. App. 3d at 834; *Andrews*, 403 Ill. App. 3d at 663. On that basis, this court has held that under *Whitfield*, the

defendant's due process rights are violated only where the trial court fails to make any mention to him, before he pleads guilty, that he must serve a term of MSR in addition to his negotiated sentence. *Davis*, 403 Ill. App. 3d at 466.

Here, we find that the record contradicts defendant's claim and shows that the trial court sufficiently admonished him about the three-year term of MSR prior to accepting his guilty plea. At the beginning of the plea hearing, defendant acknowledged for the trial court that he was accepting the State's offer of 12 years' imprisonment in exchange for his guilty plea. Defendant further acknowledged that he would be required to serve 85% of that sentence, and knew the specific number of years and days that he would spend in prison. We find it significant in this case, that the defendant previously pleaded guilty in an unrelated case in which he was also sentenced to a term of 12 years' imprisonment, and that after serving his time in prison, he began serving a term of MSR. Following this information, the trial court then admonished defendant of the penalties he faced, expressly stating "3 years mandatory supervised release, formerly known as parole if you were sentenced to the penitentiary once you got out." Defendant verified that he understood the penalties and again acknowledged that he would be sentenced to a term of 12 years' imprisonment in exchange for his guilty plea.

The record thus shows that defendant knew he was going to be sentenced to the penitentiary in exchange for his guilty plea, and was thereafter admonished by the trial court during the guilty plea hearing that he must serve a term of MSR if sentenced to the penitentiary. In accordance with our prior holdings, from which we decline to depart, we find that the trial court's MSR admonishment in this case was sufficient. Defendant's post-conviction claim is rebutted by the record, and therefore, the circuit court's summary dismissal of his *pro se* petition was proper.

For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's *pro se* post-conviction petition.

Affirmed.